COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

File Copy

Coral Gables, Florida
January 6-7, 2000

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JANUARY 6-7, 2000

1. Opening Remarks of the Chair

   A. Welcoming new members

   B. Report on the Judicial Conference session

   C. Follow-up action on Civil Rule 26(b)(2)

2. **ACTION** — Approval of Minutes

3. Report of the Administrative Office

   A. Legislative Report

   B. Administrative Report

4. Report of the Federal Judicial Center

5. Report of the Advisory Committee on Appellate Rules

   A. **ACTION** — Proposed amendments to Rules 1, 4, 5, 15, 24, 26, 27, 28, 31, 32, 41, and 44 and revision of Form 6 for approval to be published for comment in August

   B. Minutes and other informational items

6. Report of the Advisory Committee on Bankruptcy Rules

7. Report of the Advisory Committee on Civil Rules

8. Report of the Advisory Committee on Criminal Rules

   A. **ACTION** — Comprehensive revision of Rules 1 through 31 for approval to be published for comment in August

   B. Minutes and other informational items

9. Report of the Advisory Committee on Evidence Rules

10. Status Report of Subcommittee on Attorney Conduct Rules

11. Disclosure of Financial Interests

    A. Alternative Models

    B. Federal Judicial Center's surveys

12. Status Report of Local Rules Project

13. Report of Technology Subcommittee

14. Long Range Planning

15. Updated Bibliography

16. Next Meetings: June 7-8 in Washington, D.C.; January 4-5, 2001 (tentative)

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December 9, 1999
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WASHINGTON, D.C. 20544

December 7, 1999

MEMORANDUM TO THE MEMBERS OF THE JUDICIAL CONFERENCE

SUBJECT: Mail Ballot

This is to advise you that by mail ballot concluded December 3, 1999, the Judicial Conference, by vote of 22 to 5, endorsed a proposed amendment to Civil Rule 26(b)(2) to eliminate the discretion of a court to alter by local rule presumptive national limits on the numbers of depositions and interrogatories.

Leonidas Ralph Mecham

cc: Honorable Anthony J. Scirica
Honorable Paul V. Niemeyer

bc: Mr. Peter McCabe
Mr. John Rabiej

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

November 23, 1999

MEMORANDUM TO THE MEMBERS OF THE JUDICIAL CONFERENCE

SUBJECT: Amendments to Civil Rule 26(b)(2) **(IMMEDIATE ACTION)**

An ambiguity has arisen with regard to action taken by the Judicial Conference at its September 15, 1999 session on Rule 26(b)(2) of the Federal Rules of Civil Procedure. A mail ballot is attached on which you may vote to resolve the ambiguity.

At its August 1999 meeting, the Executive Committee identified for discussion at the September 1999 session proposed amendments submitted by the Committee on Rules of Practice and Procedure to Civil Rule 26(b)(2). When the consent and discussion calendars were transmitted to the Conference, Rule 26(b)(2) was included on the discussion calendar, where the rule was described (along with proposed amendments to Civil Rule 34) as "deal[ing] with cost shifting." Proposed Rule 26(b)(2), however, included not only cost-shifting language, but also an elimination of the discretion of a court to alter by local rule presumptive national limits on the numbers of depositions and interrogatories. (The amendments would not affect a judge's authority to alter the limits by order in individual cases.) Conference members will recall that the debate at the Conference dealt exclusively with the cost-shifting aspect of the amendments, and it was rejected.

The question arises about the fate of the portion of the amendments dealing with the elimination of a court's discretion to alter presumptive national limits on depositions and interrogatories. This portion of Rule 26(b)(2) was included in the rules package submitted to the Conference, but there was no reference to the provision on the consent calendar, and no effort was made to obtain its approval on the Conference floor. Thus, there is no record of the Conference having affirmatively approved this amendment to proposed Rule 26(b)(2), although the Conference did vote to approve limitations on the duration of depositions under the amendments to Rule 30(d)(2). While the ambiguity poses a *procedural* problem, there is no evidence that any Conference member objected to the *substance* of the proposal.

Your views are therefore sought on the recommended Rule 26(b)(2) language to eliminate a court's discretion to alter presumptive national limits on depositions and interrogatories, a copy of which is attached. Assuming the mail ballot is favorable, the proposal will be included in the

rules-package submission to the Supreme Court that incorporates all the rules actions taken by the Conference in September.

Leonidas Ralph Mecham
Secretary

Attachments

Item 2

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 14-15, 1999
Newton, Massachusetts

Draft Minutes

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held at the Boston College Law School in Newton, Massachusetts on Monday and Tuesday, June 14-15, 1999. The following members were present:

Judge Anthony J. Scirica, Chair
Judge Frank W. Bullock, Jr.
Charles J. Cooper, Esquire
Professor Geoffrey C. Hazard, Jr.
Judge Phyllis A. Kravitch
Gene W. Lafitte, Esquire
Patrick F. McCartan, Esquire
Judge James A. Parker
Sol Schreiber, Esquire
Judge A. Wallace Tashima
Chief Justice E. Norman Veasey
Judge William R. Wilson, Jr.

Judge Morey L. Sear was unable to attend. The Department of Justice was represented at the meeting by Deputy Attorney General Eric H. Holder, Jr. and Associate Attorney General Raymond C. Fisher, both of whom attended the Monday portion of the meeting. Neal K. Katyal, Advisor to the Deputy Attorney General, also participated on behalf of the Department. Judge Robert E. Keeton, former chairman of the committee, and Francis H. Fox, former member of the Advisory Committee on Civil Rules, also attended the meeting.

Providing support to the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the United States Courts; Mark D. Shapiro, deputy chief of that office; and Nancy G. Miller, the Administrative Office's judicial fellow.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Will L. Garwood, Chair
Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Adrian G. Duplantier, Chair
Professor Alan N. Resnick, Reporter

Advisory Committee on Civil Rules —
Judge Paul V. Niemeyer, Chair
Judge David F. Levi
Professor Edward H. Cooper, Reporter
Professor Richard A. Marcus, Special Reporter
Advisory Committee on Criminal Rules —
Judge W. Eugene Davis, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules —
Judge Fern M. Smith, Chair
Professor Daniel J. Capra, Reporter

Also participating in the meeting were: Joseph F. Spaniol, Jr. and Bryan A. Garner, consultants to the committee; Professor Mary P. Squiers, Director of the Local Rules Project; Patricia S. Channon, senior attorney from the Bankruptcy Judges Division of the Administrative Office; and Joe S. Cecil and Carol L. Krafka of the Research Division of the Federal Judicial Center.

INTRODUCTORY REMARKS

Judge Scirica reported that he and Judge Davis had appeared before the Judicial Conference in March 1999 to present the committee's proposed amendments to the criminal rules. He stated that most of the rules had been approved as part of the Conference's consent calendar. But the comprehensive new Rule 32.2, governing criminal forfeiture, had been placed on the Conference's discussion calendar. He added that the members of the Conference had been presented with a letter opposing the rule from the National Association of Criminal Defense Lawyers and a written response from Judge Davis.

Judge Scirica said that he described for the Conference the lengthy and meticulous process that the Advisory Committee on Criminal Rules followed in drafting the new rule, in soliciting comments and input, and in making appropriate revisions in light of the comments received from the public and the Standing Committee. He noted that several members of the Conference stated expressly that they had been very impressed by the careful nature of the work of the committees.

Judge Scirica reported that Judge Davis addressed the Conference on the merits of the proposed criminal forfeiture rule and was asked several penetrating questions. Some members, he said, expressed concern over the rule's explicit reference to the practice in some circuits of allowing courts to issue money judgments in lieu of the forfeiture of specific property connected to an offense. In the end, however, the Conference approved the new rule without change.

Judge Scirica also reported that the Federal Judicial Center was in the process of conducting a study for the Standing Committee to document the procedures used by individual district and circuit courts to obtain financial information from parties for purposes of judge recusal. He noted that Judge Bullock had agreed to serve as the committee's liaison to the Center in connection with the study.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on January 7-8, 1999.

REPORT OF THE ADMINISTRATIVE OFFICE

Legislative Report

Mr. Rabiej reported that 20 bills had been introduced in the 106th Congress that would have an impact on the federal rules or the rulemaking process. He proceeded to describe four of the most significant bills.

He said that H.R. 771 would undo the 1993 amendments to FED. R. CIV. P. 30(b) and require, in essence, that depositions be taken down by a stenographer. He noted that the 1993 amendments had been designed expressly to save litigation costs by providing the parties with discretion to select the recording means that best suited their individual needs.

He reported that H.R. 755, the "Year 2000 Readiness and Responsibility Act," which had just passed the House of Representatives, would, among other things, federalize all "Y2K" class actions. He said that Judge Stapleton, chairman of the Judicial Conference's Federal-State Jurisdiction Committee, had written to the Congress expressing opposition to the class action provision of the bill on federalism grounds. He added, though, that Judge Stapleton had included in his letter a caveat that the judiciary's opposition to the Y2K legislation should not be construed as opposition to the extension of minimal diversity to every mass tort.

Mr. Rabiej reported that S. 353, the "Class Action Fairness Act of 1999," contained a provision that would undo the 1993 amendments to FED. R. CIV. P. 11, thereby making the imposition of sanctions mandatory for violations of the rule. He noted that several witnesses had testified against a return to the wasteful satellite litigation generated by the pre-1993 rule. He added that the Judicial Conference would continue to oppose repeal of the 1993 amendments, which focus on deterrence, rather than compensation, and provide courts with appropriate discretion to impose sanctions on a case-by-case basis.

Finally, Mr. Rabiej reported that comprehensive bankruptcy legislation had just passed the House of Representatives. H.R. 833, the "Bankruptcy Reform Act of 1999," he noted, contained several objectionable rules-related provisions. The Director of the Administrative Office had written to the Congress seeking deletion or modification of these provisions. But, he noted, except for adding a provision dealing with rules in bankruptcy appeals, the House passed the legislation without correcting the objectionable rules-related provisions.

Administrative Actions

Mr. Rabiej reported that the volume of staff work needed to support the rules committees had increased enormously in the last few years. This, he said, was due in large measure to: (1) increased legislative activity; and (2) the initiation of special projects and studies on such topics as mass torts, class actions, attorney conduct, discovery, and technology. He noted that the increased workload of preparing, printing, and distributing materials and of staffing committee and subcommittee meetings had placed considerable stress on the staff. He added, though, that technological improvements had provided some relief and that agenda books could now be sent to the members by electronic mail.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil presented a brief update on the Federal Judicial Center's recent publications, educational programs, and research projects. (Agenda Item 4) He referred in particular to the ongoing project to survey the means used by courts to identify financial information about parties in order to avoid potential conflicts of interest for judges.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Garwood presented the report of the advisory committee, as set forth in his memorandum and attachments of May 13, 1999. (Agenda Item 5)

He reported that the advisory committee had no action items to present for approval or publication. Nevertheless, the committee was continuing to consider and approve necessary amendments to the appellate rules, and it would seek authority to publish a package of proposed changes at the January 2000 meeting of the Standing Committee.

Judge Garwood pointed out that the advisory committee had considered the proposed draft amendment to FED. R. CIV. P. 5(b) that would authorize service by electronic means. He noted that the committee had some reservations regarding certain specific provisions of the proposal, but it endorsed the approach taken by the Advisory Committee on Civil Rules. The advisory committee, moreover, believed that it was essential to provide the pilot electronic case files courts with legal authority to permit service by electronic means.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Duplantier and Professor Resnick presented the report of the advisory committee, as set forth in Judge Duplantier's memorandum and attachments of May 7, 1999. (Agenda Item 7)

Judge Duplantier reported that the advisory committee had decided not to proceed with the "litigation package" of proposed amendments that it had published for comment in August 1998. But, he said, parts of the package had been returned to the advisory committee's litigation subcommittee for further study, including proposals addressing the use of affidavits at trial and the scheduling of witnesses for hearings.

Judge Duplantier stated that the advisory committee was seeking final approval from the Standing Committee for amendments to five rules and authority to publish amendments to six rules. The advisory committee would also propose amendments to two other rules regarding electronic service, if the Standing Committee decided to publish the proposed amendment to FED. R. CIV. P. 5(b).

Action Items

FED. R. BANKR. P. 1017

Professor Resnick stated that the proposed amendment to Rule 1017(e) would permit the court to grant a request by the United States trustee for an extension of time to file a motion to dismiss a chapter 7 case under 11 U.S.C. § 707(b), even if the court actually rules on the request for an extension after the 60-day time limit specified in the rule for filing the request has expired. He added that the rule, as presently written, has been interpreted to require the court to issue its ruling before the end of the 60-day period.

FED. R. BANKR. P. 2002

Professor Resnick explained that the proposed amendment to Rule 2002(a)(6) was designed by the advisory committee as a cost-cutting measure and would take account of inflation. The current rule requires the clerk of court to send a notice of hearing to all creditors on any application for compensation or reimbursement of expenses that exceeds $500. The proposed amendment would raise the threshold amount — which has not been adjusted since 1987 — to $1,000. The clerk, however, would still have to send notices of applications of $1,000 or less, but only to the trustee, United States trustee, and creditors' committee.

FED. R. BANKR. P. 4003

Professor Resnick noted that the proposed amendment to Rule 4003(b) was similar to that proposed in Rule 1017. It would permit the court to grant a timely-filed request for an extension of time to object to a list of claimed exemptions, whether or not the court actually rules on the request for an extension within the 30-day period specified in the rule.

FED. R. BANKR. P. 4004

Professor Resnick stated that Rule 4004(c)(1) requires the court to issue a discharge by a certain time unless one or more specified events have occurred. The proposed amendment would add an additional exception to the rule. It would provide that a discharge not be granted if a motion is pending for an extension of time to file a motion to dismiss the case for substantial abuse under 11 U.S.C. § 707(b).

FED. R. BANKR. P. 5003

Professor Resnick reported that new subdivision 5003(e) was designed to facilitate the routing of notices to federal and state governmental units. He noted that debtors, especially consumer debtors, frequently provide incomplete or incorrect addresses for governmental creditors. As a result, the appropriate governmental unit may receive a notice too late for it to act in a bankruptcy proceeding.

Professor Resnick stated that the advisory committee had been working with the Department of Justice to devise a reasonable way to improve and expedite the processing of notices to government creditors. As a result, the proposed new Rule 5003(e) would require each clerk's office to maintain, and annually update, a register of federal and state governmental agencies. The clerk would not be required to include in the register more than one mailing address for each agency.

He noted that the amendment would specify that the mailing address set forth in the register is conclusively presumed to be a correct address. The debtor's failure to use that address, however, would not invalidate a notice if the agency in fact received it. In essence, then, using the address in the register would provide a "safe harbor" for debtors and would encourage use of the register.

Professor Resnick noted that a representative of state governments had urged the advisory committee to go further and require debtors use the register address. The committee, however, rejected that approach because it would be too harsh for consumer debtors. He pointed out, in addition, that the comprehensive bankruptcy legislation that had recently passed the House of Representatives contained a stronger notice requirement. It would require debtors to use the register address and require the clerks of court to update the registry quarterly, rather than annually. Judge Duplantier stated that if the legislation were to become law, the Judicial Conference would be advised promptly that the pending rule amendment would be mooted.

The committee approved the amendments to Rules 1017, 2002, 4003, 4004, and 5003 without objection.

Rules for Publication

FED. R. BANKR. P. 1007

Professor Resnick said that Rule 1007 instructs debtors as to what they must include in the list of creditors and schedules. The proposed new subdivision 1007(e) would add a requirement that if the debtor knows that a person on the list or schedules is an infant or incompetent person, the debtor must also include on the list or schedules the name, address, and legal relationship of any person on whom service should be made. The amendment would enable the person or organization that mails the notices in the case to send them to the appropriate guardian or other representative of an infant or incompetent person.

FED. R. BANKR. P. 2002

Professor Resnick stated that Rule 7001 currently requires a party to file an adversary proceeding in order to obtain an injunction. Effective December 1, 1999, however, the rule will be amended to specify that an adversary proceeding need not be filed if an injunction is provided for in a plan (i.e., an injunction enjoining conduct other than that enjoined by operation of the Bankruptcy Code itself). He explained that it is relatively common practice today for chapter 11 plans to include injunction provisions.

Professor Resnick reported that the Department of Justice originally had opposed the amendment to Rule 7001, expressing concern that affected parties would not normally become aware of an injunction in a plan unless they are served with process as part of an adversary proceeding. He noted that some government agencies had also complained that injunctions — some of which might be against the public interest — could be buried in lengthy, complex plans. He added, though, that the Department later withdrew its objection to the Rule 7001 amendment on the understanding that the advisory committee would work with it to devise appropriate solutions to the notice problem.

Professor Resnick explained that the proposed new Rule 2002(c)(3) — and companion amendments to Rules 3016, 3017, and 3020 — were designed to ensure that parties who are entitled to notice of a hearing on confirmation of a plan are provided with clear notice of any injunction included in a plan enjoining conduct not otherwise enjoined by operation of the Bankruptcy Code. The notice, for example, would have to be set forth in conspicuous language, such as bold, italic, or highlighted text.

Professor Resnick pointed out that the proposed amendments to Rule 2002(g) deal with a different problem. He explained that the clerk's office typically receives information on the addresses of creditors from three sources: (1) lists provided by the debtor; (2) proofs of claim; and (3) separate requests from creditors designating an address. He said that the proposed amendments would establish priorities or rankings to determine which address governs.

He said that the proposed new paragraph 2002(g)(3) was part of the package dealing with notice to infants and incompetent persons. (See Rule 1007 above.) It would provide that if the debtor lists the name of a guardian or legal representative in the notice, all notices would have to mailed to that guardian or representative.

FED. R. BANKR. P. 3016

Professor Resnick pointed out that the proposed new subdivision 3016(c) was a companion to the amendment to Rule 2002(c)(3) above — designed to assure that entities whose conduct would be enjoined under a plan are given adequate notice of the proposed injunction. The amendment would require that the plan and the disclosure statement describe all acts to be enjoined in specific and conspicuous language and identify all entities that would be subject to the injunction. Thus, Rules 2002(c)(3) and 3016 together would require specific and conspicuous language regarding the injunction to be included in the notice, the plan, and the disclosure statement.

FED. R. BANKR. P. 3017

Professor Resnick stated that the proposed new subdivision 3017(f) is also part of the injunction package. He noted that some chapter 11 plans contain injunctions against entities that are not parties in the case. The proposed amendment would require the court to consider providing appropriate notice to non-parties who are to be enjoined under a plan.

FED. R. BANKR. P. 3020

Professor Resnick pointed out that the proposed amendments to Rule 3020(c) are also part of the injunction package. They would require that the order of confirmation describe in reasonable detail all acts to be enjoined, be specific in its terms regarding the injunction, and identify all entities subject to the injunction. He added that notice of entry of the order of confirmation would have to be provided to all entities subject to an injunction provided for in a plan.

Professor Resnick stated that the Department of Justice was pleased with the package of amendments dealing with injunctions, and it had worked closely with the advisory committee in preparing them.

FED. R. BANKR. P. 9020

Professor Resnick reported that the advisory committee would delete the current, complex provision on contempt in Rule 9020 and replace it with a single sentence that would simply state that Rule 9014 applies to a motion for an order of contempt. Rule 9020, thus, would provide that a party seeking a contempt order proceed by way of a contested matter, rather than an adversary proceeding.

Professor Resnick explained that the current rule had been drafted soon after the bankruptcy courts had been restructured under the 1984 bankruptcy reform legislation. The 1984 legislation, in effect, deleted the explicit statutory contempt power granted to bankruptcy judges by legislation in 1978. He noted that, as a result of the 1984 legislation, it was unclear whether bankruptcy judges retained contempt power. Accordingly, the advisory committee drafted a rule, which took effect in 1987, specifying that a bankruptcy judge may issue an order of contempt, but the order may only take effect after 10 days. During the 10-day period, the party named in the contempt order may seek de novo review by a district judge.

Professor Resnick explained that a number of court of appeals decisions have been issued since Rule 9020 took effect in 1987, holding that bankruptcy judges do in fact have contempt power — either under 11 U.S.C. § 105 or as a matter of inherent judicial power. Thus, it was the opinion of the advisory committee that Rule 9020 is too restrictive and is no longer needed. He added that the committee note makes it clear that the advisory committee does not take a position on whether bankruptcy judges have contempt power or not. Issues relating to the contempt power of bankruptcy judges are substantive. The rule simply provides the appropriate procedure, i.e., through the filing of a contested matter under Rule 9014.

The committee approved the amendments to Rules 1007, 2002, 3016, 3017, 3020, and 9020 for publication without objection.

Resolution of Appreciation for Professor Resnick

Judges Scirica and Duplantier reported that Professor Resnick had just announced his intention to relinquish the post of reporter to the Advisory Committee on Bankruptcy Rules after 12 years of distinguished service. He asserted that it would be difficult to imagine anyone doing a better job than Professor Resnick and added that his personal experience in working with him had been immensely gratifying.

The committee unanimously approved the following resolution honoring Professor Resnick:

> Whereas, Alan N. Resnick, Benjamin Weintraub Distinguished Professor of Bankruptcy Law at Hofstra University, has served as Reporter to the Advisory Committee on Bankruptcy Rules for more than eleven years, beginning in late 1987, the Committee on Rules of Practice and Procedure wishes to recognize Professor Resnick for extraordinary service of the highest quality, marked in particular by
>
> - the complete revision of the Federal Rules of Bankruptcy Procedure to accommodate the creation by Congress of a national system of United States trustees to supervise the administration of bankruptcy estates and with statutory authority to raise and be heard on any issue in a case:

- the complete revision of the Official Bankruptcy Forms in conjunction with the revision of the rules;

- the drafting and rapid distribution to the courts following further amendments to the Bankruptcy Code of suggested interim rules for local adoption to provide procedural guidance during the period required to prescribe permanent national rules implementing the statutory changes;

- the drafting of rules to facilitate the use of technology in the giving of notice to parties in bankruptcy cases and initiating the drafting of rules to permit electronic filing of documents in all types of proceedings in federal courts;

- the providing of wise counsel on bankruptcy matters to the committee's working groups on mass torts and on attorney conduct; and

- the concise and lucid presentation to the committee of proposed amendments to the Federal Rules of Bankruptcy Procedure approved by the advisory committee.

And whereas Professor Resnick has requested that he be permitted to relinquish the post of Reporter, a request that the committee has reluctantly granted,

Be it RESOLVED that the committee hereby expresses its gratitude to Professor Resnick for his exemplary drafting of rules and related explanatory materials, for his patient answers to questions from committee members, and for his unfailing collegiality.

Professor Resnick expressed his appreciation for the resolution and the kind words of the chairman. He added that it had been his distinct honor to have served under four remarkable chairs — Judges Lloyd D. George, Edward Leavy, Paul Mannes, and Adrian G. Duplantier — and was grateful to the advisory committee for the intellectual stimulation and respect that they had provided to him over the past 12 years.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Niemeyer presented the report of the advisory committee, as set forth in his memorandum and attachments of May 11, 1999. (Agenda Item 6)

Action Items

Judge Niemeyer reported that the advisory committee was seeking approval of three separate packages of amendments to the civil rules, dealing respectively with: (1) service on federal officers and employees sued in their individual capacity; (2) admiralty rules; and (3) discovery rules.

1. Service Package

FED. R. CIV. P. 4 AND 12

Judge Niemeyer reported that the proposed amendments to Rules 4 and 12 had been initiated at the suggestion of the Department of Justice and adopted by the advisory committee without opposition. He added that the thrust of the amendments was to entitle federal officers and employees who are sued in their individual capacity to the same rights that they would have if sued in an official capacity.

Professor Cooper explained that federal officers and employees are sued in their individual capacity for actions that have some connection to their functions as officers or employees of the United States. He noted that it is common for the United States, through the Department of Justice, to assume the burden of defending them and to move to have the government substituted as the defendant. He said that there was some uncertainty in the case law whether the United States must be served with process, as well as the individual defendant, when an officer or employee is sued for acts in connection with employment.

The amendments to Rule 4 would require service on the United States when a federal employee is sued in an individual capacity for acts occurring in connection with the performance of duties on behalf of the United States. Rule 12 would be amended to provide the same 60-day answer period in an individual-capacity action that the United States enjoys when an officer is sued in an official capacity.

Professor Cooper said that little public comment had been generated by the proposed amendments. The comments received were favorable to the amendments, and several suggested certain drafting improvements, As a result, the advisory committee made improvements in language after publication. For example, as revised, the amendments now use the term "officer or employee" consistently. Language was also added to make sure that no one reads the rule to mean that when the same individual is sued both in an individual capacity and an official capacity, both the individual and the United States must be served twice — once under subparagraph (a) and once under subparagraph (b).

The committee approved the amendments to Rules 4 and 12 without objection.

2. Admiralty Package

Judge Niemeyer reported that the proposed changes in the admiralty rules had been developed over a long period of time with the assistance of a special subcommittee chaired by Mark O. Kasanin, Esquire. He noted that the subcommittee had coordinated its work very closely with the Department of Justice and the Rules Committee of the Maritime Law Association.

Professor Cooper reported that the proposed changes in the Supplemental Rules for Certain Admiralty and Maritime Claims were designed to meet two goals. First, they reflected the increasing importance of civil forfeiture proceedings, which generally use admiralty procedure. The amendments adjust the admiralty rules, for the first time, to make certain necessary procedural distinctions between traditional maritime proceedings and civil forfeiture proceedings. Second, the changes would take account of the 1993 reorganization of FED. R. CIV. P. 4. In addition, the rules have been reorganized and restyled for purposes of clarity.

Professor Cooper stated that it was not necessary to describe the proposed amendments in substantial detail because the advisory committee had presented them to the Standing Committee in January 1998, when it sought authority to publish them for public comment. He noted that there had been little comment or testimony on the proposals and that minor drafting changes had been made by the advisory committee in light of the public comments.

SUPPLEMENTAL ADMIRALTY RULE B

Professor Cooper reported that the advisory committee had made a post-publication adjustment in the language of Rule B(1)(d) — and a companion amendment to Rule (C)(3)(b) — to substitute the passive voice for the active. As published, the amendment had provided that the clerk of court must deliver a summons or other process to the marshal for service if the property in question is a vessel or tangible property aboard a vessel. One of the public comments asserted that delivery of the papers to the clerk for forwarding to the person making service would occasion delay in cases when time is usually of the essence. It was pointed out, for example, that it was the practice in the Eastern District of New York for the clerk to deliver the process to the attorney for the plaintiff, who in turn arranges delivery to the person who will make service. Accordingly, the advisory committee changed the rule to provide broadly that process "must be delivered" to the person making service, without designating who is to effect the delivery. Professor Cooper added that the Maritime Law Association and the Department of Justice agreed with the change, which was made at three places in the amended rules.

Professor Cooper pointed out that FED. R. CIV. P. 4 had been reorganized in 1993. As part of the reorganization, former Rule 4(e) — which is incorporated in the current Admiralty Rule B(1) — has been replaced by Rule 4(n)(2), which permits use of state law to seize a defendant's assets only if personal jurisdiction over the defendant cannot be obtained in the district where the action is brought. The advisory committee, however, decided not to

incorporate Rule 4(n)(2) in the revised Admiralty Rule B because maritime attachment and garnishment are available whenever the defendant is not found within the district, including some circumstances in which personal jurisdiction can also be asserted.

Professor Cooper noted that Rule (B)(1)(e) expressly incorporates FED. R. CIV. P. 64 to make sure that elimination of the reference to state quasi-in-rem jurisdiction in former Rule 4(e) is not read as defeating the continued use of state security devices. Thus, subparagraph (e) reminds attorneys that it is consistent with the admiralty rules to invoke FED. R. CIV. P. 64, which allows the use of security provisions in the manner provided by state law. Professor Cooper said that a concluding sentence would be added to the committee note to Rule E(8) providing that: "if a state law allows a special, limited, or restrictive appearance as an incident to the remedy adopted from state law, the state practice applies through Rule 64 'in the manner provided by' state law."

SUPPLEMENTAL ADMIRALTY RULE C

Professor Cooper explained that the amendments to Rule C were designed in large measure to take into account meaningful distinctions between traditional admiralty and maritime proceedings and civil forfeiture proceedings. In paragraph (2)(c), for example, the complaint in an admiralty or maritime proceeding must state that the property is located within the district or will be within the district while the action is pending. On the other hand, paragraph (2)(d) reflects the variety of civil forfeiture statutes that now allow a court to exercise authority over property outside the district.

Professor Cooper noted that subdivision (6) explicitly provides for different procedures for forfeiture proceedings and admiralty seizure proceedings. In a maritime proceeding, for example, fewer people are entitled to appear and only 10 days are provided to file a verified statement of right or interest. In civil forfeiture proceedings, a person who asserts an interest or right against the property has 20 days to file a statement.

SUPPLEMENTAL ADMIRALTY RULE E

Professor Cooper stated that Rule E(3) provides that maritime attachment and garnishment may be served only within the district. But in forfeiture cases, in rem process may be served outside the district if so authorized by statute. He noted that subdivision E(10) is new and makes clear the authority of the court to preserve and prevent removal of attached or arrested property that remains in the possession of the owner or other person under Rule E(4)(b).

FED. R. CIV. P. 14

Professor Cooper pointed out that the only changes in Rule 14 were to replace the term "the claimant" with "a person who asserts a right under Supplemental Rule C(6)(b)(i)."

The committee approved the amendments to Supplemental Admiralty Rules B, C, and E and FED. R. CIV. P. 14 without objection.

3. Discovery Package

Judge Niemeyer reported that the advisory committee had studied discovery in a comprehensive manner over the past three years. The focus of its efforts was not to curb discovery "abuse" per se, but rather to examine broadly the whole architecture of discovery and to ask whether it can be made more efficient and less expensive — while still preserving the fundamental principle of providing full disclosure of relevant information to the litigants. Yet, he added, full disclosure — especially in the age of information technology — may not require the production of each and every document, regardless of the cost of producing it and the likelihood of its actual use in a case. What needs to be produced, he said, is "all the information that matters."

Judge Niemeyer pointed out that the package of proposed amendments to the civil rules was modest and well balanced. It was designed to make discovery cost less and work better. He said that the advisory committee and its discovery subcommittee would continue to study whether additional changes in the rules should be proposed in the future. He noted, for example, that he believed personally that the committee could explore a number of possibilities for establishing a very inexpensive, streamlined process that would result in prompt resolution of uncomplicated cases.

Judge Niemeyer stated that the impetus for considering changes in the discovery rules had come from several sources. He noted, for example, that the American College of Trial Lawyers and other bar groups had urged that the scope of discovery be narrowed. But, he said, the biggest impetus for change had come from the impact of the Civil Justice Reform Act of 1990 on the district courts. The Act urged each court to experiment locally with various procedural devices in an effort to reduce litigation costs and delay. The 1993 amendments to the Federal Rules of Civil Procedure, enacted in part to facilitate the local experiments sanctioned by the Act, allowed courts to "opt out" of certain provisions of the national rules — most notably the provisions on mandatory disclosure. He added that the combined effect of the Act and the 1993 rules amendments was a "balkanization" of federal pretrial procedure and the proliferation of local rules and procedures.

Judge Niemeyer reported that the advisory committee was firmly committed to returning to a uniform set of national procedural rules. He noted that the bar had been nearly unanimous in urging the committee to limit "opt outs" and local variations. He added, however, that opposition to the rules amendments would likely come from district judges, who are used to their own, carefully developed — and often very effective — local procedures.

Judge Niemeyer described the lengthy and careful process that the advisory committee had followed in developing the proposed amendments to the discovery rules. He noted that the committee had asked the RAND Corporation to take a fresh look at the enormous data base that it had developed under the Civil Justice Reform Act and to examine particularly the cost of discovery, the satisfaction of attorneys with discovery, and the extent to which discovery is actually used in federal civil cases. In addition, at the committee's request, the Federal Judicial Center polled a scientific cross-section of lawyers and received more than 1,200 responses regarding discovery practice and opinions.

He reported that the advisory committee had received numerous papers from academics on discovery topics. It had conducted two conferences involving judges, lawyers, and law professors, and several of the papers presented at its Boston conference were published in the Boston College Law Review. In addition, the committee sought out and heard the views of practitioners from practically every sector of the legal profession, federal and state judges, law professors, and former rules committee chairs and reporters. He added that he had never witnessed any legislative action or committee action that had involved as much participation, research, input, and support.

Judge Niemeyer reported that the research and input, among other things, had revealed that —

- Discovery accounts for about half of all litigation costs.
- Discovery is actually used in a relatively small percentage of federal civil cases. In 40% of the cases, for example, there is no discovery at all, and in another 25% of the cases, there is only minimal discovery.
- Discovery, however, is used extensively in an important minority of cases. It may cause serious problems in those cases and account for as much as 90% of the litigation costs.
- Both plaintiffs' lawyers and defense lawyers agree by very large margins that discovery costs in general are too high (although they tend to emphasize different factors as the principal reasons for the high costs).
- The bar overwhelmingly supports national uniformity in the rules.
- The bar also overwhelming supports early judicial involvement in discovery, early discovery cut-off dates, and firm trial dates.

Judge Niemeyer stated that the advisory committee had conducted its efforts through a discovery subcommittee chaired by Judge Levi, with the assistance of Professor Marcus as special reporter. He reported that the advisory committee had asked the subcommittee to

consider all reasonable proposals for improvement in the discovery process. The subcommittee, he said, had developed and presented the advisory committee with more than 40 possible recommendations for change. The advisory committee, over the course of several meetings, then debated each of the recommendations. It decided to proceed only with those proposals that commanded the support of a strong majority of the committee members. No measure was approved by a close vote.

Judge Niemeyer stated that the advisory committee then published the package of proposed amendments, conducted three public hearings, heard from more than 70 witnesses, and received more than 300 written comments. The committee concluded that the comments, while very informative and helpful, generally addressed the same policy issues and concerns that had been considered thoroughly before publication. Accordingly, the changes made by the committee following publication consisted of language and organizational improvements, rather than substantive changes. The committee, however, amended proposed Rule 30(f)(1) in light of the public comments to delete the requirement that the deponent consent to extending a deposition beyond one day.

Judge Niemeyer reported that three issues in the package had caused the greatest debate during the public comment period and the committee's deliberations: (1) mandatory initial disclosures under Rule 26(a)(1); (2) the scope of discovery under Rule 26(b)(1); and (3) cost bearing under Rule 26(b)(2).

1. Mandatory Initial Disclosures. Judge Niemeyer pointed out that the 1993 rule amendments, which had introduced mandatory initial disclosures, were very controversial. They had generated three dissents on the Supreme Court and came close to being rejected by the Congress. He noted that lawyers had complained strenuously that the revised Rule 26(a)(1) invades the attorney-client relationship by requiring the production of hostile documents and turning over to opposing parties documents that have not been asked for.

Nevertheless, he said, mandatory disclosure has worked well in the districts that have adopted it, and it has been used substantially even in many of the districts that have officially opted out of the national disclosure rule. The empirical data show general satisfaction with disclosure, but they are not conclusive on whether it reduces costs.

Judge Niemeyer explained that the advisory committee was committed to the principle of a single, uniform national rule, without local "opt outs." It therefore had three options: (a) to reject mandatory disclosure altogether; (b) to extend the existing mandatory disclosure regime to all districts; or (c) to mandate disclosure, but in a modified, less controversial form. He stated that the advisory committee decided upon the third course — requiring parties to disclose only that information that the disclosing party may use to support its own claims or defenses.

Judge Niemeyer pointed out that most of the criticisms that the advisory committee had received about disclosure were that it would not work in certain kinds of cases. In response, the

rule was amended to exclude certain categories of cases from the disclosure requirement. It also allows the attorneys to opt out of disclosure in individual cases. And the rule provides district judges with considerable discretion to dispense with disclosure in individual cases.

2. Scope of Discovery. Judge Niemeyer noted that the committee's proposed amendment to Rule 26(b)(1) would not narrow the scope of discovery. Rather, it would divide discovery into two distinct phases: (1) attorney-managed discovery, generally conducted without court involvement and embracing matters relevant to the claim or defense of any party; and (2) court-managed discovery, embracing — with court approval — any matter relevant to the subject matter involved in the action.

He said that opponents of the change had argued that the proposed amendment would cause substantial litigation regarding the scope of discovery. He agreed that some litigation would in fact occur initially, but the law would soon become clear.

3. Cost bearing. Judge Niemeyer stated that much of the opposition to the proposed amendment to Rule 26(b)(2) had been expressed in terms that it would favor rich litigants at the expense of poor ones. He explained that the present rules give a judge implicit authority to allow a party to obtain discovery that may be burdensome or duplicative, on the condition that the requesting party pay for it. The amended rule, he said, would make that authority explicit, and it would tell judges clearly that they have the tools they need to manage and regulate discovery.

FED. R. CIV. P. 5

Judge Niemeyer explained that the advisory committee had originally proposed — when it sought authority from the Standing Committee to publish the proposed discovery amendments — that Rule 5(d) be amended to provide that discovery and disclosure materials "need not" be filed with the court until they are used in a proceeding. The Standing Committee, however, voted to change "need not" to "must not." Judge Niemeyer said that the rule had attracted very little public comment, and the advisory committee on reflection agreed with the Standing Committee that "must not" is preferable language to "need not."

One of the members argued that discovery material not filed with the court should nevertheless be considered part of the court record. He recommended adding a sentence to that effect in the committee note in order to protect the press and the public. He explained, for example, that these materials, having the status of court records, would be privileged. Therefore, one who published them would be protected in the event of a defamation action. Another member agreed and added that if the materials were court records, they would also be available for public examination. He said that it was important to clarify the status of unfiled discovery materials, and the status should be specified in the rule itself, rather than the committee note.

Judge Niemeyer responded that the advisory committee had not studied this issue. Rather, its principal purpose in amending Rule 5 was to alleviate the storage burdens and costs

imposed on clerks' offices. Judge Levi added that the advisory committee also considered the amendment necessary to bring the national rule on filing into conformity with most of the present local rules and practices on the subject.

Professor Marcus pointed out that he had conducted considerable research on whether unfiled materials are "court records" and had concluded that it is a very complicated matter that cannot be addressed properly by simply adding a sentence to the committee note. Several other participants agreed with his analysis.

Professor Hazard recommended that the advisory committee undertake a study of whether discovery and disclosure materials are, or should be, part of the court record. **Mr. Lafitte moved to have the advisory committee study the issue and report back at the January 2000 meeting of the Standing Committee. The committee approved the motion by consensus without a formal vote.**

The committee approved the amendment to Rule 5 without objection.

FED. R. CIV. P. 26(a)

Judge Levi said that the Rules Enabling Act contemplates a set of national, uniform procedural rules to accompany national substantive law. He noted that the Judicial Conference, in its 1997 final report to Congress on the Civil Justice Reform Act, had asked the rules committees specifically to consider whether the advantages of national uniformity outweigh the advantages of allowing courts to develop their own local alternative procedures in such areas as initial disclosure and the development of discovery plans.

Judge Levi reported that well over half the district courts have some form of disclosure in place. Research conducted for the committee by the Federal Judicial Center, moreover, disclosed that some sort of disclosure had occurred in three-fifths of the federal cases surveyed. The Center study also showed that most of the 1,200 attorneys interviewed who had used disclosure liked it and said that it helps to reduce disputes, enhance settlements, and expedite cases. Judge Levi said that the Center study had confirmed that cases where disclosure occurs are concluded more quickly than cases without disclosure, and the RAND study came close to saying that attorney hours are reduced when there is disclosure. He added that the Federal Judicial Center had also found that a majority of the lawyers believe that the lack of procedural uniformity among districts causes problems for attorneys.

Judge Levi reported that the discovery subcommittee had been working on discovery for three years, had conducted several conferences with the bar, and had consulted with six major bar organizations. It had heard from both plaintiffs' attorneys and defense attorneys that national procedural uniformity was very important to them. Members of the bar, he said, report that it is difficult to keep up with changes in local rules, and the practical effect of the local rules is to create a preference for local counsel. Judge Levi added that although many of the rules are

posted on the Internet, they are not easy to find. Electronic postings, moreover, do not include standing orders and local interpretations of the local rules.

Judge Levi emphasized that national uniformity was a major matter. He noted that it had been a common theme voiced by the lawyers at the subcommittee's Boston College conference. In fact, he said, it was a fundamental premise of the federal rules and the Rules Enabling Act. Discovery and disclosure, he emphasized, are an important part of the pretrial process and should not be handled by different sets of rules determined by geography. Discovery and disclosure can affect notice pleading, motions to dismiss, and motions for summary judgment, and they may in certain instances affect the outcome of cases.

Judge Levi said that the subcommittee, in seeking national uniformity, had three options before it. The first was to retain the present disclosure requirements of Rule 26(a)(1), but to eliminate the authority of courts to opt out of the requirements. The second option was to eliminate disclosure entirely from the national rule, effectively preventing any court from using it. He noted that this approach would be very controversial because many courts now require disclosure and have achieved substantial benefits from it. The third choice — which the subcommittee adopted — was to retain disclosure as a national requirement, but to remove the "heartburn" from it by removing the present requirement that attorneys disclose information harmful to their clients without a formal discovery request.

Under the subcommittee's proposal, which the advisory committee eventually approved, parties would only have to disclose matters that support their own claims. Complex, or "high end," cases will be effectively removed from the rule by action of counsel, and eight categories of "low end" cases are explicitly exempted from the rule. The lawyers, moreover, may mutually opt out of the present disclosure requirements, and the court has discretion to dispense with disclosure in any case.

Judge Levi said that the proposal was moderate and based on fundamental fairness. He noted that it was similar to FED. R. CRIM. P. 16 in criminal cases, under which the government turns over documents that it intends to use at trial. Moreover, he said, it was similar to FED. R. CIV. P. 26(a)(3), which deals with documents and witnesses that parties intend to use at trial. He added that the bar, with some notable exceptions, supports the proposal. He noted that the Litigation Section of the American Bar Association, which had been adamantly opposed to Rule 26(a)(1) in 1993, supported the present proposal. In addition, endorsements had been received from the American College of Trial Lawyers and the Federal Magistrate Judges Association.

Judge Levi reported that many letters had been received from judges during the public comment period opposing any national rule that would impose mandatory disclosure in their districts or prescribe a form of disclosure different from that currently provided in their own local rules. The judges in the Eastern District of Virginia, in particular, expressed concern that the amendments would slow down the "rocket docket" used in that court. In response, the advisory committee added a sentence to Rule 26(f) after publication authorizing a court by local rule to

shorten the prescribed period between the Rule 26(f) attorney conference and the court's Rule 16(b) scheduling conference or order.

Judge Levi noted that 10 different federal judges had worked in the advisory committee on the discovery package over the past three years, and all 10 agree that the proposed Rule 26(a)(1) would both achieve national uniformity and benefit civil litigation. He emphasized that the rule provides judges with considerable discretion, but within the context of an overall national rule.

Mr. Schreiber argued against weakening the present mandatory disclosure requirements. He said that hostile information is the key to all discovery and that parties should be required to disclose pertinent information hostile to their clients' interests. He added that the language of the proposed amendment — requiring disclosure of matters "that the disclosing party may use to support its claims" — was meaningless. He said that a party could simply argue at the initial stages of the case that it simply has not yet made up its mind as to whether it will use any particular material in the case.

Mr. Schreiber moved to substitute the word "will" for the word "may." Thus, the amendment would require a party to disclose matters that it "will use to support its claims." Judge Tashima recommended an amendment to the motion to substitute the words "supports its claims or defenses." Judge Tashima said that the term "supports it claims or defenses" will lead to less gamesmanship among attorneys than "may use to support its claims or defenses" **Mr. Schreiber accepted the amendment to his motion.**

Judge Levi responded that the advisory committee had considered both formulations at considerable length. He noted that the agenda binder included a memorandum in which Professors Cooper and Marcus — who had different personal preferences regarding the appropriate terminology — describe the respective advantages and disadvantages of "may use to support" vis a vis "supporting." At Judge Levi's request, each of them presented his respective views orally to the committee.

Judge Levi stated that the advisory committee ultimately concluded that "may use to support" would be easier for lawyers to apply. It also has the advantage of generally tracking the language of Rule 26(a)(3), dealing with pretrial disclosures. In any event, he said, the court has authority to impose appropriate sanctions to prevent gamesmanship on the part of attorneys

The members discussed the merits of the two alternatives, how they compared to similar language in other parts of the Federal Rules of Civil Procedure (including Rule 11), and how lawyers and judges might apply them in practical situations.

The committee rejected Mr. Schreiber's motion by a vote of 8 to 3

Judge Tashima moved to amend Rule 26(a)(1) to allow a court by local rule either: (1) to opt out completely from its mandatory disclosure requirement; or (2) to narrow the categories of disclosure materials.

Some of the members expressed opposition to the motion on the grounds that it would undercut the goal of national uniformity. One member added that if the local bar does not need or want disclosure, the parties will mutually stipulate out of it.

The committee rejected Judge Tashima's motion by a vote of 11 to 1.

Judge Tashima moved to delete from the fifth paragraph of the committee note the sentence reading, "Clients can be bewildered by the conflicting obligations they face when sued in different districts." Professor Cooper agreed that the sentence was not essential. **The committee decided without objection to eliminate the sentence.**

Judge Wilson moved to repeal the 1993 amendments entirely and return to the pre-1993 procedures. He said that the single most important procedural requirement is to encourage judges to resolve disputes decisively and quickly. He added that if a judge is readily accessible to decide disputes, the disputes will arise less frequently and cases will be resolved promptly. He said that judges should also establish early cut-off dates for discovery and set early and firm trial dates.

Judge Levi responded that the 1993 rules authorized mandatory disclosure, and its repeal would deprive courts of the benefits derived from disclosure, as demonstrated by attorney surveys and other empirical data. He said that the present Rule 26(a)(1) proposal was very modest and was necessary to provide the district courts with continuing authority to require disclosure.

Associate Attorney General Fisher stated that the Department of Justice very much favors a uniform set of national procedural rules, although different parts of the Department may have different views as to specific parts of the proposed rules amendments. He said that the central concept of judge-managed discovery will work if the judges actually make it work by being readily accessible to resolve discovery problems.

Mr. Fisher added that Department attorneys, based on their experience, had identified several other categories of cases that should be exempted from the initial disclosure requirements of Rule 26(a)(1). As examples, he listed forfeiture cases, mandamus cases, FOIA cases, constitutional challenges to statutes, *Bivens* cases, and social security cases. He noted that the advisory committee was not inclined to expand the list at this point, but had promised to consider these suggestions promptly. One of the members responded that the list of exemptions was too long already and that it is generally not sound policy to encourage different procedural rules for different categories of cases. Mr. Fisher responded that the Department supported Rule 26(a)(1), as amended.

The committee rejected Judge Wilson's motion by a vote of 8 to 4.

The committee then approved the proposed amendments to Rule 26(a) by a vote of 11 to 1.

FED. R. CIV. P. 26(b)(1)

Judge Levi stated that the proposed amendment to Rule 26(b)(1) will not change the scope of discovery. He said that it will not keep litigants from obtaining appropriate discovery in any case. Parties will still be entitled — on request and without court approval — to a very broad range of information, *i.e.*, "any matter . . . relevant to the claim or defense of any party." The change occasioned by the amendment is to assign a portion of the discovery to the courts to manage, as judges for cause may make available "any matter relevant to the subject matter involved in an action."

Judge Levi said that the language of the amended rule is clearer than that of the present rule, which provides insufficient guidelines for limiting overbroad discovery. The district judges and magistrate judges who had reviewed the amendment believe that it will work well. In fact, he said, not a single judge had written or testified against the amendment. He noted that the proposal was supported by the American College of Trial Lawyers, the Litigation Section of the American Bar Association, and the Federal Magistrate Judges Association.

Judge Levi pointed out that the Department of Justice under the Carter Administration had urged the advisory committee to narrow the scope of discovery by removing the "subject matter" criterion. He read from a letter from Attorney General Griffin Bell to Judge Roszel Thomsen, chairman of the Standing Committee, in which the Attorney General reported that he "was particularly pleased with the . . . proposed change in Rule 26 which would narrow the scope of discovery to the 'issues raised.' It has been my experience as a judge, practicing lawyer and now as Attorney General that the scope of discovery is far too broad and that excessive discovery has significantly contributed to the delays, complexity, and high cost of civil litigation in the federal courts."

Judge Levi said, however, that the Department of Justice had submitted a memorandum to the committee opposing the proposed amendment, stating that it would have a deleterious effect on the Department's litigation and on civil cases generally.

Mr. Fisher pointed out that the Department of Justice sues on behalf of the public interest, and its career litigators have sincere objections to the proposed amendment, as do the American Trial Lawyers Association and civil rights and environmental organizations. In short, he said, Department lawyers are satisfied with the existing standards and believe that they work very well. The burden, presently, is placed on the defendant to come forward to limit discovery when it is seen as inappropriate or excessive. For the most part, judges do not intervene in the discovery process, and, as a consequence, a broad range of discovery is routinely provided today.

The Department believes, however, that the amended rule will shift the burden to plaintiffs and require them to seek judicial intervention to obtain information that they now receive regularly. He added that government attorneys fear that most judges simply will not have the time or inclination to become involved in discovery matters. They fear, moreover, that judges, individually and collectively, will construe the revised language of Rule 26(b)(1) narrowly and deny discovery on the merits. The net result, thus, will be a narrowing of the scope of discovery.

Mr. Fisher said that the amendment will cause particular problems in civil rights and environmental cases, and the public interests of the United States will not be served. He noted that defendants in these cases often resist producing essential records and information. He said that the Department lawyers, and plaintiffs' lawyers generally, believe that they will face even greater resistance under the amended rule.

Mr. Fisher concluded that the problems that the advisory committee attempted to address through the proposed amendment are important and difficult ones. He expressed the Department's appreciation for the committee's careful and thoughtful work. But, he added, the amendment simply was not needed. He suggested that the principal argument advanced in support of the change is that judges do not take appropriate steps under the current rule to limit the excessive discovery that occurs in some cases. But, he said, the current rule clearly gives judges sufficient authority to take an active role and limit inappropriate discovery requests.

He noted that the Department of Justice believed that there would be a good deal of costly litigation over the meaning of the amendment, at least for a while. There may well be inconsistent interpretations of the new rule, and, as a result, the scope of discovery will effectively be narrowed for some plaintiffs. In short, he said, the proposed amendment attempts to deal with a small group of troublesome cases, but will result in serious negative consequences. He suggested that, rather than recreating the whole landscape of Rule 26(b), the advisory committee should consider removing those troublesome cases from the general operation of the rule and regulating them with special rules.

Judge Niemeyer thanked Mr. Fisher and said that his points were very well taken. But, he said, the advisory committee had considered the same points at great length both before and during the public comment period. He noted that some members of the advisory committee agreed generally with Mr. Fisher's arguments, but a strong majority of the committee supported the proposed amendment. He noted that the advisory committee included in its report to the Standing Committee an April 14, 1999 "dissenting opinion" prepared by Professor Thomas D. Rowe, Jr., a member of the advisory committee.

Judge Levi added that the current law makes almost everything relevant to the claims or defenses in civil rights and environmental cases. The amendment, he said, would not limit the broad array of information that plaintiffs presently receive through discovery. They will, for example, still be entitled under the amended rule to information about the treatment of other employees, a pattern of discrimination, or a continuing violation, as well as information

extending beyond the statute of limitations. These types of information are all considered relevant to the claims and defenses under current law.

Judge Levi noted that the advisory committee disagreed that the proposed amendment would lead to costly motion practice. He emphasized that discovery disputes are usually decided on an expedited basis. In many courts they are resolved without the filing of written motions, and often by telephone. He added that discovery works well in most cases and will continue to work well under the proposed amendment. But there is a group of cases where it is very contentious and very expensive. He said that the courts need to take an active role in managing these cases, and the amended rule gives judges clear authority and direction to manage them.

Judge Niemeyer said that the discovery rules are designed generally for lawyers and litigants who do not abuse the process. They assume compliance and good faith for the most part. The existing rules, as well as the proposed amendments, expect judges to supervise discovery in those cases where there are problems. Thus, if a defendant "stonewalls" on discovery production in a case, plaintiffs' counsel or the Department of Justice, will have to litigate on the scope of discovery in any event — either under the present rule or the amended rule.

One of the members strongly opposed the proposed amendment to Rule 26(b)(1), calling it — along with the proposed cost-bearing amendment to Rule 26(b)(2) — the most radical change in the civil rules in 60 years. He said that every employment law group and civil rights organization was opposed to the change, because it would limit discovery and strongly tilt the playing field against them. Another member, however, responded that he could not think of a single piece of information obtainable under the current rule that would not be discovered under the new rule. Other members added that they supported the amendment because it would cause lawyers to focus their discovery efforts more effectively and require them to be more specific and responsible in what they request.

Mr. Schreiber questioned why the advisory committee had used the term "for good cause shown," instead of "on motion" or "for reasonable cause." He moved to delete "for good cause shown" and substitute the words "on motion." Thus, judges would have complete discretion to order broader discovery, without being bound to the "good cause" standard.

Judge Levi replied that the committee note states specifically that the good-cause standard is meant to be flexible. One of the members added that the rule had to prescribe a standard beyond that of mere discretion. Another member reminded the committee that "good cause" had been the standard required for the production of discovery documents before 1970.

Mr. Schreiber later withdrew his motion.

The committee approved the amendment to Rule 26(b)(1) by a vote of 10 to 2.

FED. R. CIV. P. 26(b)(2)

Judge Niemeyer noted that the proposed amendment to Rule 26(b)(2), governing cost bearing, had been published as an amendment to Rule 34. The advisory committee relocated it in Rule 26 after publication, but without any change in content. He said that its placement in Rule 26 would emphasize that it applies to all categories of discovery. He added that the proposed amendment would not change the law as it exists, but would make an existing judicial tool explicit. It would give district judges and magistrate judges clear authority to require a party seeking information not otherwise discoverable under Rule 26(b)(2)(i), (ii), or (iii) to pay part or all of the reasonable expenses incurred in its production.

Mr. Fisher stated that the Department of Justice was concerned that the proposed amendment might be applied by the courts to require requesting parties to pay for "court-managed" discovery, vis a vis "attorney-managed" discovery. He recommended inclusion of a clear statement that discovery of "any matter relevant to the subject matter involved in the action" would be provided without charge to the requesting party, in the same manner as discovery of "any matter . . . relevant to the claim or defense of any party." In other words, the cost-bearing provision explicitly would be applicable to both.

Judge Niemeyer responded that the proposed amendment did in fact apply equally to both and said that he would be pleased to work on improving the language. Mr. Fisher suggested including in the committee note to Rule 26(b)(1) language from page 74 of the agenda book declaring that the scope-expansion and cost-bearing provisions are not intended to operate in tandem and that ordinarily a request to expand the scope of discovery will not justify a cost-bearing order. Judge Niemeyer agreed to draft appropriate language to that effect, and his language was later incorporated in the revised committee note.

Judge Scirica stated that several public comments had suggested that the amendment would have the effect of distinguishing between plaintiffs who have resources and those who do not. Judge Niemeyer replied that the amendment would not change the current results. Plaintiffs will continue to receive, without charge, every document that relates to their claim or defense or that relates to the subject matter of the action. Cost-bearing will only be applied to discovery requests that are burdensome, duplicative, or unreasonable. Judge Levi added that a judge, in considering cost bearing, is required explicitly to take account of the parties' resources under Rule 26(b)(2). Accordingly, parties with limited resources may actually be treated better than well-healed parties under the amended rule. Moreover, a party who can afford to pay for marginal discovery, and is willing to pay for it, may not in fact receive it because the judge has discretion to deny the request entirely.

One of the members said that the amendment would cause havoc, especially in employment discrimination cases. He predicted that defendants would bring a motion for cost-bearing in every case in an effort to save money for their clients. One of the members responded that the prediction assumed that judges would act foolishly. He said that routinely-made motions will be routinely denied.

Judge Levi added that the cost-bearing amendment, by definition, deals only with material that is marginal to the case and is burdensome, duplicative, or unreasonable. Some members questioned why that type of material should be produced at all. Others responded that the amendment provides judges with a useful management tool and would permit a judge to determine how much a lawyer wants particular material and whether the lawyer is willing to pay for it. Others suggested that the amendment would allow judges to order discovery on condition that the requesting party pay only part of the cost of producing it. They said that it was not clear whether judges may apportion costs under the current rule.

One member asked why local rule authority had been removed from the provision of Rule 26(b)(2) dealing with the number of depositions and interrogatories and the length of depositions, but retained with regard to the number of requests for admissions. Professor Cooper responded that there were several local rules on the subject, and the advisory committee was reluctant to eliminate local rule authority to limit requests for admission without further study of local practices.

Another member pointed out that the committee note to Rule 26 referred to standing orders, as well as local rules, in some places, but not in others. He suggested that the note be reviewed in this respect for consistency of terminology.

The committee approved the proposed amendment to Rule 26(b)(2) by a vote of 11 to 1.

FED. R. CIV. P. 26(d) and (f)

Judge Niemeyer reported that the proposed amendments to Rule 26(f) would require the parties to confer at least 21 days, rather than 14 days, before the court's Rule 16 scheduling conference or scheduling order. He noted that the advisory committee had made a change in the amendments after publication to accommodate the expedited pretrial procedures used in the Eastern District of Virginia. The change would allow a court by local rule to require that the conference be held less than 21 days before the scheduling conference or order.

Judge Niemeyer pointed out that the amendments would no longer require the attorneys to meet face-to-face, but would allow a court by local rule or order to require that the attorneys attend the conference in person. Several members questioned the wisdom of allowing courts to issue local rules on this subject, especially since the authority of courts to opt out of national requirements was being eliminated in other parts of Rule 26. One added that the requirement for face-to-face meetings should be made in individual cases, rather than by local rule.

Judges Niemeyer and Levi agreed that local rules should be discouraged generally, but they noted that the advisory committee believed that differences in geography and local culture made it appropriate to allow courts to have local variations in this specific instance. They added that several commentators had informed the committee that face-to-face meetings between the

attorneys, as required by the 1993 amendments to Rule 26(f), had been instrumental in expediting cases and reducing costs.

One of the members stated that a court should not be allowed by local rule to require out-of-town counsel to appear in person. Professor Cooper replied that the committee note addressed the issue and provided that, "a local rule might wisely mandate face-to-face meetings only when the parties or lawyers are in sufficient proximity to one another."

Judge Kravitch moved to eliminate from the proposed amendments the authority of a court to require face-to-face meetings of counsel by local rule and replace it with language that would authorize a court to require that meetings be held face-to-face, but only by a judge's case-specific order. Her motion was approved by a vote of 8 to 2.

The committee approved the amendments to Rules 26(d) and (f) by a vote of 12 to 0.

FED. R. CIV. P. 30

Judge Niemeyer reported that the proposed amendment to Rule 30(d)(2) would establish a presumptive limit on depositions of one day of seven hours. But a longer period could be authorized by court order or stipulation of the parties. The amendment, he said, was designed to respond to an area cited by commentators — particularly plaintiffs' lawyers — as one of recurring abuse and excess cost. He noted that research by the Federal Judicial Center had demonstrated that depositions are often the single most expensive item of discovery.

Judge Niemeyer stated that the rule provides a norm to guide the bench and bar in measuring depositions. He said that the advisory committee had heard many comments at the public hearings that the new rule would be effective. He added that the most common response from lawyers was that they have little trouble in reaching accommodations with opposing counsel on making arrangements for depositions. The amendment, he said, tells lawyers what the norm is for a deposition, and they will plan their depositions accordingly. One member added that he had been strongly opposed to the amendment when it had been published, but the consistent testimony from lawyers at the hearings had convinced him that the rule would work well in practice.

Judge Tashima moved to exclude expert witnesses from the operation of the rule. He noted that many expert witness depositions simply cannot be completed within seven hours. He added that the Department of Justice supported his position in this regard, but the Department would go further and also exclude Rule 30(b)(6) witnesses and named parties.

One of the members spoke against the proposed amendment in general, saying that it simply was not necessary. He said that it is easier to demonstrate to a judge that abuse has occurred in a deposition than to convince the judge that additional time is needed for a deposition. Judge Niemeyer replied that many members of the advisory committee had been of

the same view, but were convinced by the hearings that the amendment to the rule would be beneficial.

Professor Marcus said that the advisory committee had included additional language in the committee note to guide lawyers and judges as to when it would be desirable to extend the time for the deposition. Mr. Katyal added that the Department of Justice appreciated the additional language in the committee note, but still believed that there was no need to apply the presumptive time limit to depositions of expert witnesses. He said that government attorneys feared that relying on the consent of a party or the court's management to waive the 7-hour limit would not be sufficient.

The committee rejected Judge Tashima's motion by a vote of 7 to 3.

One member said that it was essential that the deponent be required to read pertinent documents in advance in order to avoid wasting time and generating requests for extensions of time. He noted that language to that effect had been included in the committee note, but he would prefer to have a clear requirement included in the rule. He also suggested that the note provide additional direction to the bar regarding time limits for depositions in multiple-party cases. Judge Niemeyer responded that the discovery subcommittee would continue to study these matters, but it is simply not possible to address all potential problems in the rule or the note.

Judge Niemeyer reported that the advisory committee had amended Rule 30(f)(1), without publication, to eliminate the need to file a deposition with the court. The change merely conforms the rule to the published amendment to Rule 5(d), which provides that depositions not be filed with the court.

The committee approved the proposed amendments to Rule 30 by a vote of 10 to 1.

FED. R. CIV. P. 34

Judge Niemeyer reported that the advisory committee had added to Rule 34 a cross-reference to Rule 26(b)(2)(i), (ii), and (iii). He noted that, as published, the cost-bearing provision had been included as part of Rule 34(b), but the committee relocated it to Rule 26(b)(2) after publication. Because cost-bearing concerns often arise in connection with discovery under Rule 34, a reference was needed in Rule 34 to call attention to the availability of cost-bearing in connection with motions to compel Rule 34 discovery and Rule 26(c) protective orders in connection with document discovery.

Some members of the committee questioned the need for the cross-reference in Rule 34. Other members pointed out, however, that although the reference is not essential, it serves as a helpful flag to lawyers.

The committee approved the proposed amendment to Rule 34 without objection.

FED. R. CIV. P. 37

Judge Niemeyer reported that the proposed amendment to Rule 37(c)(1) closes a gap in the current rule and provides that the sanction of exclusion, forbidding the use of materials not properly disclosed, applies to a failure to supplement a formal discovery response.

The committee approved the proposed amendment to Rule 37 without objection.

The committee approved the package of amendments to the discovery rules by a vote of 10 to 0.

Rules for Publication

Electronic Service

FED. R. CIV. P. 5, 6, and 77 and FED. R. BANKR. P. 9006 and 9022

Judge Niemeyer reported that the Advisory Committee on Civil Rules had been asked to take the lead in drafting uniform amendments to the federal rules to authorize service by electronic means. The advisory committee, he said, had worked closely with the Standing Committee's Technology Subcommittee (which includes representatives from each of the advisory committees), and it had generally followed the advice of that subcommittee. He noted that the proposed amendments before the Standing Committee had been circulated to the other advisory committees for comment. Although many of the suggestions from the other committees had been incorporated in the draft, the advisory committees were not in complete agreement on all parts of the draft.

Professor Cooper pointed out that all the participants agreed that the time for electronic service had arrived, but they also agreed that it was premature to consider making its use mandatory — either by national rule or by local rule. Accordingly, the proposed amendments authorize electronic service with the consent of the party being served. He added that they authorize electronic service only for documents under Rules 5(a) and 77(d), and not for the service of initiating documents and process in a case, such as under FED. R. CIV. P. 4

Professor Cooper said that, as amended, Rule 5(b) specifies that service is complete upon "transmission." He noted that the Advisory Committee on Civil Rules had requested specific comment from the other advisory committees on this point. In response, the Advisory Committee on Appellate Rules asked what should happen if service is transmitted electronically, but the electronic system notifies the sender that the message has not in fact been delivered. As a result, language was added to the committee note specifying that: "As with other modes of service, . . . actual notice that the transmission was not received defeats the presumption of receipt that arises from the provision that service is complete upon transmission."

Professor Cooper pointed out that new subparagraph 5(b)(2)(D) provides that, if authorized by local rule, a party may make service through the court's transmission facilities. He explained that this provision contemplates eventual enhancements in the courts' electronic systems to allow a party to file a paper with the court and have it served simultaneously on all the required parties. Professor Cooper also pointed out that this is the only reference to local rule authority in the proposed amendments. In addition, a minor amendment would be made to FED. R. CIV. P. 77(d) to conform to the changes proposed in Rule 5(b).

Judge Niemeyer reported that electronic service raises the question of whether the party being served should be allowed additional time to respond, in the same way that FED. R. CIV. P. 6(e) currently provides an additional three days to respond when a party is served by mail. He said that differing views had been expressed on this subject. Accordingly, the Advisory Committee on Civil Rules had prepared a draft rule plus three alternatives for presentation to the Standing Committee. The draft rule would allow an extra three days for all service other than personal service. Alternative 1 would make no change in Rule 6(e), therefore providing no additional time when service is made electronically. Alternative 2 would eliminate Rule 6(e) and the three-day provision entirely. Alternative 3 would amend Rule 6(e) to allow an additional three days if service is made by mail "or by a means permitted only with the consent of the party served." Professor Resnick said that this formulation, which covers electronic service, could conveniently be incorporated by the Federal Rules of Bankruptcy Procedure.

Judge Niemeyer reported that 6 members of the Advisory Committee on Civil Rules had voted against allowing additional time for service by electronic means — or for any other types of proposed consensual service, such as commercial carrier. Professor Cooper added that the reasoning for this approach is that the rule specifically requires consent, and people will only consent to a type of service in which they have confidence. Accordingly, there is no need to provide them with additional time. He added that the Advisory Committee on Appellate Rules had expressed concern that if additional time were given, it would deter people from using electronic service.

Judge Niemeyer said that 4 members of the advisory committee had voted to allow three days additional time. He noted that those who favored allowing additional time urged that consent will be more likely to be given if it brings with it the reward of additional time. He added that the committee would describe the alternatives and solicit comment from the public on the advisability of applying the three-day rule to electronic service.

Judge Scirica emphasized the importance of publishing a uniform set of amendments if feasible. Professor Cooper agreed, but pointed out some practical differences between civil and appellate practice. Judge Garwood added that the Federal Rules of Appellate Procedure — unlike the Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure — presently authorize service by commercial carrier, and that no consent is required from the party being served by commercial carrier. He noted that FED. R. APP. P. 25 and 26 give the party being served an extra three days unless the paper in question is delivered on the date of service specified in the paper.

Judge Garwood said that the time periods should generally be the same in all the federal rules. He would, however, distinguish the issue of the authority to use commercial carriers from the issue of whether an additional three days is provided for a response.

Professor Resnick said that the bankruptcy rules did not have to be amended to authorize electronic service in adversary proceedings because FED. R. CIV. P. 5 is applicable to those proceedings. He added that the Advisory Committee on Bankruptcy Rules believed that an additional three days should be allowed for electronic service, and for all other types of service except personal delivery. Therefore, it had prepared companion amendments to FED. R. BANKR. P. 9006, to extend the three-day "mail rule" to all service under FED. R. CIV. P. 5(b)(2)(C) and (D), and to FED. R. BANKR. P. 9022, to conform to the proposed amendment to FED. R. CIV. P. 77(d). He urged that the proposed amendments to the bankruptcy rules be published together with the proposed amendments to the civil rules.

The committee voted without objection to authorize publication of the proposed amendments to FED. R. CIV. P. 5(b) and 77(d) and to FED. R. BANKR. P. 9006 and 9022. As part of the package, an alternate amendment to FED. R. CIV. P. 6(e) would also be published for comment.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Davis presented the report of the advisory committee, as set forth in his memorandum and attachments of May 12, 1999. (Agenda Item 8)

He reported that the advisory committee had no action items to present. He noted that the committee was deeply involved in the project to restyle the body of criminal rules. The Style Subcommittee of the Standing Committee had prepared a draft of the entire criminal rules, and the advisory committee was close to completing its revision of the first 22 rules.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith presented the report of the advisory committee, as set forth in her memorandum and attachments of May 1, 1999. (Agenda Item 9)

Judge Smith reported that the advisory committee was seeking approval of amendments to seven rules. She noted that she had provided the Standing Committee with a detailed explanation of the proposed amendments at the January 1999 meeting. The advisory committee, she said, had conducted two hearings on the amendments and had received 173 written comments from the public.

FED. R. EVID. 103

Judge Smith said that the proposed amendment to Rule 103 would resolve a dispute in the case law over whether it is necessary for a party to renew an objection or an offer proof at trial after the court has made an advance ruling on the admissibility of the proffered evidence. She noted that the amendment had been considered by the Standing Committee on several occasions and that improvements in its language had been made. She added that the current proposal had received very favorable support during the public comment period.

Judge Smith pointed out that the proposed amendment, as published, had contained an additional sentence codifying and extending to all cases the principles of *Luce v. United States,* 469 U.S. 38 (1984). In that case, the Supreme Court held that a criminal defendant must testify at trial in order to preserve the right to appeal an advance ruling admitting impeachment evidence. The public comments on the addition, she said, had been negative, and several commentators had expressed concern over the potential and unpredictable consequences of applying *Luce* to civil cases.

Judge Smith said that the advisory committee had decided to eliminate the additional sentence in light of the public comments. But, she added, some members were concerned that elimination of the sentence might be interpreted as an implicit attempt to overrule *Luce.* Ultimately, the advisory committee decided to eliminate the sentence but to include explicit language in the committee note stating that nothing in the amendment is intended to affect the rule set forth in *Luce.*

The committee approved the proposed amendment to Rule 103 without objection.

FED. R. EVID. 404

Judge Smith reported that Rule 404(a)(1) would be amended to provide that when an accused attacks the character of an alleged victim, the accused's character also becomes subject to attack for the "same trait." She pointed out that the amendment, as published, had been broader in scope, allowing the accused to be attacked by evidence of a "pertinent trait of character." She added that the advisory committee had narrowed the amendment in light of negative public comments and comments from some members of the Standing Committee.

The committee approved the proposed amendment to Rule 404 without objection.

FED. R. EVID. 701

Mr. Holder reported that the litigating divisions of the Department of Justice, the United States attorneys, and other components of the Department had thoroughly reviewed the proposed amendment to FED. R. EVID. 701 and had concluded that it would have a serious and deleterious impact on the Department's civil and criminal litigation. He said that he was grateful that the

advisory committee had carefully considered his letter of January 5, 1999, to Judge Smith and had made changes in the amended rule and the accompanying committee note to accommodate the Department's concerns. But, he said, the revised amendments regrettably did not alleviate the core concerns of the Department's lawyers.

Mr. Holder explained that no bright line is presently drawn in Rule 701 between lay testimony and expert testimony. Witnesses are often put on the stand by counsel to testify as to facts, but their testimony inevitably includes opinions based on their occupation or personal experience.

He noted, for example, that the Department of Justice puts witnesses on the stand who testify as to drug transactions, food adulteration, or environmental cleanups. Many of these witnesses would not be considered "experts," in the common or legal use of the term, but their testimony is often based on specialized knowledge. The testimony cannot meaningfully be presented to the court or jury without the witnesses giving their opinions, which are based on specialized knowledge arising from their occupation or life experience.

Mr. Holder said that forcing these people to be considered "experts" under Rule 702 would lead to a number of unfortunate results. Under FED. R. CRIM. P. 16, for example, they would have to file a written summary of their testimony. In civil cases, FED. R. CIV. P. 26(a)(2) may require them to file expert reports. Also by brightening the line between lay and expert testimony, the amendment, he said, would subject the evidentiary rulings of trial judges to greater appellate review. This result would run counter to the thrust of the Supreme Court's decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993), and *Kumho Tire Co. V. Carmichael,* 119 S. Ct. 1167 (1999), which confirmed the discretion of trial courts to weigh the reliability of testimony.

Finally, Mr. Holder said that the net effect of the amendment to Rule 701 would be to require the Department under FED. R. CRIM. P. 16 to disclose in advance of trial the identity of fact witnesses whom it intends to call if part of their testimony entails giving their opinion as to matters they have observed. Such disclosure might in a few cases pose a danger to the life or safety of prospective witnesses.

In conclusion, Mr. Holder urged the committee to reject the rule entirely. Alternatively, he recommended that it be deferred for further consideration by the civil and criminal advisory committees.

Judge Smith said that the Department, basically, objects to brightening the line between Rule 701 lay testimony and Rule 702 expert testimony. But, she said, although the line cannot be brightened completely, it can be clarified. There will always be some doubt, and judges will continue to have to exercise judicial discretion. She added that in light of the Supreme Court's decisions in *Daubert* and *Kumho,* it was necessary to provide judges and lawyers with some guidelines in this area.

Judge Smith said that there was a widespread belief among the bar that the lack of guidelines has led to increasing attempts by attorneys to evade the reliability requirements of Rule 702 by proffering experts in the guise of law witnesses under Rule 701. She added that the proposed amendment to Rule 701 was not intended in any way to change the status of lay opinion or opinion that is based on people's everyday life experiences. Rather, the advisory committee wanted to clarify for the bench and bar how the judicial gatekeeping function should operate. She explained that, as helpful as the *Kumho* decision had been, there still needed to be guidelines set forth in the rules to aid the bench and bar.

Judge Smith pointed out that Mr. Holder's letter of June 9 to the Standing Committee, in discussing FED. R. CIV. P. 26(b)(1), had expressed "grave substantive concerns, shared by the Department, about the Advisory Committee's proposal to modify the most essential element of the federal civil system — the complementary hallmarks of the Federal Rules of Civil Procedure: notice pleading and full discovery of relevant information." She said that full disclosure of information requires that a party give notice to the other party of any specialized knowledge on the part of a witness it intends to call. Only in this way can the court's gatekeeping function be handled properly, with appropriate input from both sides. She said that the basic needs of fairness outweigh the inconvenience of having to disclose more witnesses in some kinds of cases.

Judge Smith reported that the advisory committee had made changes in Rule 701 to ameliorate the concerns of the Department of Justice. She said that the words "within the scope of Rule 702" had been added to the rule after publication to show that witnesses need not be qualified as experts unless they are clearly found to be expert witnesses under Rule 702. She said that the committee had also added several examples to the committee note of the types of lay opinion witnesses who do not need to be qualified as experts. Professor Capra explained that the committee had incorporated the examples from the pertinent case law to help clarify the application of Rules 701 and 702 in light of the concerns of the Department and to assist attorneys in determining in advance how to avoid potential violations of FED. R. CRIM. P. 16.

Mr. Katyal said that the Department's principal concern with the amendment was not that its lawyers would be unable to introduce necessary testimony in court, but that testimony currently admitted under Rule 701 would now be classified as Rule 702 expert testimony. This would require compliance with FED. R. CRIM. P. 16, including pretrial disclosure of the names of witnesses. He noted that the Attorney General has had a long-standing policy on this matter and had written to the chief justice in the past firmly opposing proposed amendments to Rule 16 that would have required pretrial disclosure of government witnesses.

Mr. Katyal said that the United States attorneys and the Criminal Division of the Department of Justice believe strongly that the proposed amendment will threaten the safety of government witnesses and add to litigation costs. He added that *Kumho* did not require the proposed amendment, and that the bright line fashioned by the proposed amendment would actually undercut *Kumho*.

Several judges responded that, based on their experience, the potential problems pointed out by the Department of Justice were overstated. One judge, for example, said that the Department's views must always be taken very seriously, but the danger to witnesses cited by the Department was simply not realistic. He suggested that the proposed amendment was both modest and reasonable and added that the Department's concern over the safety of witnesses could be handled in appropriate cases by issuance of a protective order. Professor Capra noted that FED. R. CRIM. P. 16 does not require the government to disclose the identity of a witness. It only requires disclosure of statements.

Judge Scirica said that if the proposed rule were adopted, a United States attorney would in an appropriate case petition the court *ex parte* to protect any witness against whom there was a potential threat. Mr. Katyal responded that the Department had in fact discussed this suggested course of action with the United States attorneys, but they countered that the amended rule might not authorize that type of action. And, in any event, the district court might deny their request. Judge Smith added that the witnesses covered by the rule were, usually, law enforcement witnesses, rather than potentially endangered lay witnesses.

Judge Scirica asked Judges Davis and Niemeyer to comment on Mr. Holder's alternate recommendation that the proposed amendment to Rule 701 be deferred to obtain the views of the criminal and civil advisory committees. Judge Davis responded that the Advisory Committee on Criminal Rules would have no problem with the proposed amendment. He noted that his committee had consistently called for greater pretrial disclosure under FED. R. CRIM. P. 16 than the Department of Justice has been willing to provide. Judge Niemeyer commented that the Advisory Committee on Civil Rules had not considered the proposed amendment, but that he personally believed that it would be helpful in clarifying the distinction between lay witnesses and expert witnesses.

Mr. Katyal suggested that the committee note be amended to specify that the rule is not intended to require the disclosure of the identify of witnesses if the United States attorney personally avers to the court that the safety of a witness is at stake, or there are facts that tend to reveal that the safety of a witness may be at stake. Professor Capra responded that the additional language would be inappropriate because Rule 702 is an evidence rule, not a disclosure or discovery rule.

The committee approved the proposed amendment to Rule 701 by a vote of 9 to 1.

FED. R. EVID. 702

Judge Smith reported that the advisory committee had made minor changes in the rule following publication: (1) to delete the word "reliable" from Subpart 1 of the proposed amendment; (2) to amend the committee note in several places to add references to the Supreme Court's decision in *Kumho*, which was rendered after publication; (3) to revise the note to emphasize that the amendment does not limit the right to a jury trial or encourage additional

challenges to the testimony of expert witnesses; and (4) to add language to the note to clarify that no single factor is necessarily dispositive of the reliability inquiry mandated by Rule 702.

The committee approved the proposed amendment to Rule 702 by a vote of 9 to 0.

FED. R. EVID. 703

Judge Smith reported that the advisory committee had made a few minor, stylistic changes following publication.

The committee approved the proposed amendment to Rule 703 by a vote of 10 to 0.

FED. R. EVID. 803 AND 902

Professor Capra pointed out that the proposed amendments to Rules 803(6) and 902(11) and (12) were part of a single package, allowing certain records of regularly conducted activity to be admitted without the need for calling a foundation witness. He pointed out that two new subdivisions would be added to Rule 902 to provide procedures for the self-authentication of foreign and domestic business records. Professor Capra said that the advisory committee had made minor stylistic changes following publication and had added a phrase to specify that the manner of authentication should comply with any Act of Congress or federal rule.

The committee approved the proposed amendments to Rules 803 and 902 without objection.

REPORT OF THE ATTORNEY CONDUCT RULES SUBCOMMITTEE

Judge Scirica reported that Professor Coquillette and the subcommittee had accomplished a great deal since the last committee meeting. He noted that the subcommittee had held a meeting in Washington in May 1999 that included members of other Judicial Conference committees and a number of people interested and knowledgeable in attorney conduct matters. He said that recent federal legislation had made government attorneys subject to state ethical regulations, and that Chief Justice Veasey and Professor Hazard had been active in working with the Department of Justice in trying to fashion an acceptable rule to govern the subject matter of Rule 4.2 of the A.B.A. Code of Conduct, *i.e.,* contact by government attorneys with represented parties.

Chief Justice Veasey reported that additional progress had been made in the negotiations on this matter among the chief justices, the Department of Justice, and the American Bar Association. He added that two competing bills were pending in the Senate. One, sponsored by Senator Hatch, would preempt state bars from regulating federal prosecutors. The other, sponsored by Senator Leahy, would single out for Judicial Conference action the issue of government attorneys contacting represented parties. He reported that the Conference of Chief

Justices had written to Senators Hatch and Leahy informing them that work was proceeding on trying to reach a compromise. He added that Professor Hazard had been very active and very helpful in the negotiations.

Professor Coquillette said that the subcommittee was planning to hold one additional meeting, in Philadelphia in September.

He reported that there are literally hundreds of local federal court rules purporting to govern attorney conduct. Some of them, he said, just adopt the conduct rules of the state in which the federal court sits. Other local rules adopt the A.B.A. Code, and some adopt the A.B.A. canons. Many courts, moreover, appear to ignore their own rules in practice.

Professor Coquillette said that there appeared to be a consensus that attorney conduct obligations should, as a general rule, be governed by the laws of the states. If there are to be any special rules for federal attorneys, they should be limited to a very small core when clear federal interests are at stake. He noted that Professor Cooper was working on a draft "dynamic conformity" rule that would make state conduct rules applicable in the federal courts, but leave open a narrow door for such matters as Rule 4.2 conduct. He said that the draft would be circulated for comment to the subcommittee and the advisory committee reporters. He added that there was a possibility that a proposed resolution of the matter might be brought before the Standing Committee at the January 2000 meeting.

LOCAL RULES PROJECT

Professor Squiers explained in brief the manner in which she had conducted the original local rules project. She explained that in her original study she had gathered the rules of every court and had placed them in five categories: (1) those that were appropriate local rules; (2) those that were so effective that they should be publicized as model rules for the other courts to consider; (3) those that should be incorporated into the national rules; (4) those that were duplicative of the federal rules; and (5) those that were inconsistent with federal law or the national rules. She added that the courts were provided with the results of this work and asked to take appropriate action. Compliance, she said, was voluntary.

Professor Squiers pointed out that the federal rules had been amended in 1995 to require that local rules be renumbered, and most courts had redrafted their rules to meet that requirement. In addition, she said, the Civil Justice Reform Act had led to the adoption of many new local rules, and that some additional local rules changes had been made to take account of the expiration of the Act.

Professor Squiers reported that she planned to follow the same general approach in the new study of local rules, and she invited the members to provide input and guidance. She pointed, for example, to suggestions that she had received that the judicial councils of the circuits

should be involved early in the project since they have the authority to oversee and abrogate local rules.

Some of the members pointed out that some of the judicial councils appeared to be very active in reviewing and acting on local rules, while other councils appeared to be largely inactive in this area. Judge Scirica said that it might be useful for the committee eventually to suggest a model process for the judicial councils to follow in reviewing local rules.

REPORT OF THE STYLE SUBCOMMITTEE

Judge Parker reported that the style subcommittee's efforts had been directed to assisting the Advisory Committee on Criminal Rules in restyling the body of criminal rules. He noted that the style subcommittee had completed a preliminary draft of all the criminal rules, and that the advisory committee would take action on FED. R. CRIM. P. 1-22 at its June 1999 meeting.

NEXT COMMITTEE MEETING

Judge Scirica reported that the next committee meeting had been scheduled for January 6 and 7, 2000.

Respectfully submitted,

Peter G. McCabe,
Secretary

Item 3A

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

November 30, 1999

MEMORANDUM TO STANDING RULES COMMITTEE

SUBJECT: *Legislative Report*

We are monitoring nearly 30 bills that affect the Federal Rules of Practice and Procedure, which were introduced during the first session of the 106th Congress. A chart showing the status of the rules-related bills is attached.

On September 13, 1999, the House passed the "Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 1999" (H.R. 2112). The bill contains two parts. The first part addresses the *Lexecon* issue and undoes the Supreme Court holding, which prohibits an MDL transferee judge from handling a case for trial purposes. The second part invests a federal court with jurisdiction over claims arising from a single-event accident involving injuries to at least 25 persons. A national choice-of-law provision is included. Both parts of the bill have been separately approved in principle by the Judicial Conference. The Senate passed H.R. 2112 on November 16, 1999, but excluded the single-event multiple-party provisions. No conference between the Senate and House has been scheduled.

On September 23, 1999, the House passed the "Interstate Class Action Jurisdiction Act of 1999" (H.R. 1875) by a vote of 222-207. The bill extends minimal diversity to all class actions, with the exception of entirely intra-state class actions. Proponents of the bill argue that class actions involving claimants from many different states or all states are more appropriately handled by a federal court, rather than by a state court where local prejudices may affect the outcome. It was widely reported that the Administration would oppose and veto the bill if submitted in the form passed by the House. In the Senate, a similar but more far-ranging bill — "Class Action Fairness Act of 1999" (S. 353) — had been introduced by Senator Grassley on February 3, 1999. A hearing before the Senate Judiciary Subcommittee was held on May 4, 1999. The Senate has taken no further action on the bill.

After consulting with Judge Scirica, Judge Niemeyer had recommended to the Judicial Conference's Executive Committee that the judiciary delay taking a formal position opposing H.R. 1875 and urge Congress meanwhile to work with the judiciary on alternative approaches. (Although the Judicial Conference has a general position opposing diversity jurisdiction, the

Conference has determined that extending minimal diversity in certain mass tort cases might be appropriate.) Judge Niemeyer noted that passage of H.R. 1875 in the first session was unlikely and an outright rejection of the bill might prejudice cooperative efforts between the two branches in developing a legislative solution to class-action and mass-tort problems. The Committee on Federal/State Jurisdiction, however, strongly opposed the bill and recommended that the Conference promptly advise Congress of its opposition to the bill as drafted. The committee was convinced that opposition would not prejudice future cooperation, and it noted the availability of the judiciary to work with Congress in exploring alternative approaches to the problem. The Executive Committee decided to transmit to Congress its opposition to the bill and in a letter transmitted to Congress by the Director on behalf of the Conference, the judiciary's opposition was based on workload and federalism concerns.

Senator Hatch introduced the "Federal Prosecutor Ethics Act" (S. 250) on January 19, 1999, and Senator Leahy introduced the "Professional Standards for Government Attorneys Act of 1999" (S. 855) on April 21, 1999. Under both bills, the conduct of government attorneys would be subject to state law and rules. But the Attorney General would be authorized under Senator Hatch's bill to prescribe regulations that exempt government attorneys from state coverage to the extent that the state law or rule is inconsistent with federal law or interferes with the effectuation of federal law or policy, including the investigation of violations of federal law. Senator Leahy's bill would require the Judicial Conference to report within 1 year its recommendations with respect to a federal rule governing communications with represented parties.

In August and September, an effort was underway by Senators Leahy's and Hatch's staffs to draft and attach a modified version of S. 855 (Senator Leahy's original bill) to a pending judiciary's appropriations bill. The modified version would require the Judicial Conference to report within 1 year its recommendations on a national rule governing communications with represented parties by government attorneys and within 2 years its recommendations on rules governing other aspects of government-attorney behavior. The modified version was not attached to the appropriations bill and later attempts to append it to other bills were considered, but ultimately did not prevail because of the press of time. It is expected that these attempts will be renewed early in the next congressional session.

On February 24, 1999, Representative Gekas introduced the "Bankruptcy Reform Act of 1999" (H.R. 833). On March 16, 1999, Senator Grassley introduced the "Bankruptcy Reform Act of 1999" (S. 625). The bills are similar to legislation introduced and commented on in the last Congress. A letter from the Director was sent to the House and Senate Judiciary Committees on March 23, 1999, which among other things reiterated the judiciary's opposition to several rules-related provisions. Nonetheless, on May 5, 1999, the House passed the bill retaining these objectionable provisions. And on November 19, 1999, the Senate agreed to vote on a cloture motion on January 25, 2000, limiting further debate on the bill. Both bills make comprehensive changes to the bankruptcy system, but they differ in many important respects.

from each other. Late amendments to the Senate bill further widened the differences between the two bills. Either bill or a compromise version would require extensive changes to the Federal Rules of Bankruptcy Procedure.

The House has taken no further action on H.R. 771, an untitled bill, after the House Judiciary Subcommittee approved it on March 11, 1999. The bill undoes the 1993 amendments to Civil Rule 30(b) and requires that all depositions be recorded by stenographic or stenomask means. No similar bill has been introduced in the Senate. We have advised key Senate staffers of our opposition to the bill and will follow up if the Senate directs its attention to it.

Several other rules-related bills are being monitored. Senator Kohl reintroduced the "Sunshine in Litigation Act of 1999" (S. 957) on May 4, 1999. The bill would require a court to make particularized findings of fact prior to issuing a protective order. Representative Andrews introduced the "Parent-Child Privilege Act of 1999" (H.R. 522) on February 3, 1999, which would create a new Evidence Rule 502. Senator Grassley introduced an untitled bill (S. 721) that authorizes individual judges to permit the televising of court proceedings, and a similar bill was introduced on March 25, 1999, in the House by Representative Chabot (H.R. 1281). A cameras-in-the-court provision was attached to the judiciary's courts improvement bill (H.R. 1752), which was reported favorably on September 9, 1999, by the House Judiciary Committee for consideration by the full House. On October 6, 1999, Senator Durbin introduced "The Right to Use Technology in the Hunt for Truth Act" (S. 1700), which would add a new Criminal Rule 33.1. Under the new rule, a court can order post-conviction forensic DNA testing if the technology was not available when the defendant was convicted. No hearing on any of these bills has been held.

John K. Rabiej

Attachment

LEGISLATION AFFECTING
THE FEDERAL RULES OF PRACTICE AND PROCEDURE
106th Congress

SENATE BILLS

S. 32 No title

- Introduced by: Thurmond
- Date Introduced: 1/19/99
- Status: Referred to the Committee on Judiciary
- Provisions affecting rules
  - **Criminal Rule 31(a)** is amended by striking "unanimous" and inserting "by five-sixths of the jury."

S. 96 Y2K Act (See H.R. 775) Pub. L. No 106-37.

- Introduced by: McCain
- Date Introduced: January 19, 1999
- Status: Referred to Committee on Commerce; Hearings held on February 9, 1999; Committee reported bill favorably on March 3, 1999; Letter from Director opposing class action and special pleading requirements sent on March 24, 1999; Cloture vote not obtained 5/18/99; Text inserted in H. R. 775 as passed Senate (CR S6998) on 6/15/99
- Provisions affecting rules: federalizing Y2K class actions and heightened pleading requirements

S. 248 Judicial Improvement Act of 1999

- Introduced by: Hatch (5 co-sponsors)
- Date Introduced: 1/19/99
- Status: Referred to the Committee on Judiciary; 3/24/99 Referred to Subcommittee on Oversight and Courts
- Provisions affecting rules
  - Sec. 4. Would amend Section 1292(b) of title 28, and allow for interlocutory appeals of court orders relating to class actions;
  - Sec. 5. Creates original federal jurisdiction based upon minimal diversity in certain single accident cases; and
  - Sec. 10. Clarifies sunset of civil justice expense and delay reduction plans.

S. 250 Federal Prosecutor Ethics Act

- Introduced by: Hatch (3 co-sponsors)
- Date Introduced: 1/19/99
- Status: Referred to the Committee on Judiciary
- Provisions affecting rules
  - Sec. 2 authorizes Attorney General to establish special ethical standards governing federal prosecutors in certain situations. Those standards would override state standards.

S.353 Class Action Fairness Act of 1999

- Introduced by: Grassley (3 co-sponsors)
- Date Introduced: February 3, 1999
- Status: Referred to the Committee on Judiciary 5/4/99 Subcommittee on Oversight and Courts; hearings held on May 4, 1999
- Provisions affecting rules:
  - Sec. 2. Provides for notification of the Attorney General & state attorney generals;
  - Sec. 2. Limits on attorney fees
  - Sec. 3. Minimal diversity requirements;
  - Sec. 4. Allows for removal of class actions to federal court; and
  - Sec. 5. Removes judicial discretion from **Civil Rule 11(c)** in all cases.

S.461 Year 2000 Fairness and Responsibility Act (See S. 96 and H.R. 775) (Pub. L. No. 106-37)

- Introduced by: Hatch (2 co-sponsors)
- Date Introduced: February 24, 1999
- Status: Referred to Committee on the Judiciary; hearings held on March 3, 1999; Letter from Director opposing class action and special pleading requirements sent on March 24, 1999; Judiciary Committee reported favorably on March 25, 1999
  - Sec. 103 establishes special ("fraud-like") pleading requirements
  - Sec. 404 established minimal diversity for Y2K class actions

S. 625 *Bankruptcy Reform Act of 1999*

- Introduced by: Grassley (5 co-sponsors)
- Date Introduced: March 16, 1999
- Status: Referred to the Committee on Judiciary; Letter sent by Director to Hatch 3/23/99; Ordered to be reported with amendments favorably Apr 27, 1999; Committee on Judiciary reported to Senate with amendments. (Report No. 106-49 May 11, 1999.) Placed on Senate Legislative Calendar; 11/19/99 Unanimous consent agreement in Senate to vote on cloture motion on Jan. 25 (CR S15061)
- Provisions affecting rules:
  - Section 702 requires clerks of court to maintain a register of all governmental units to ensure that the appropriate government office receives adequate notice of bankruptcy filings.
  - Sections 102, 319, and 425 would authorize or mandate the initiation of the rulemaking process with respect to separate proposals for rule changes.

S. 721 No title (See *H.R. 1281*)

- Introduced by: Grassley (6 co-sponsors)
- Date Introduced: March 25, 1999
- Status:
- Provisions affecting rules:
  - Section 1 states that the presiding judge of any appellate court or district court may, in his or her discretion, permit the photographing, electronic recording, broadcasting, or televising to the public of court proceedings over which that judge presides; safeguards are provided to obscure the identity of nonparty witnesses; the Judicial Conference is authorized to promulgate advisory guidelines
  - Section 3 provides a 3-year sunset of section 1.

S. 755 No title

- Introduced by: Hatch (14 co-sponsors)
- Date Introduced: March 25, 1999
- Status: April 12 read the second time, placed on the calendar
- Provisions affecting rules: Delays effective date of the "McDade" provision on Rule 4.2 contacts with represented parties

S. 758 Fairness in Asbestos Compensation Act of 1999

- Introduced by: Ashcroft (13 co-sponsors)
- Date Introduced: March 25, 1999
- Status: Referred to the Committee on Judiciary; 10/5/99 hearing held by sub. Administration Oversight and the Courts.
- Provisions affecting rules:
  - Section 208 gives exclusive jurisdiction, regardless of the amount in controversy or citizenship of parties, to federal courts;
  - Section 301 requires the board of the Asbestos Resolution Corporation to establish procedures for ADR;
  - Section 307(j) creates an penalty for an inadequate offer; and
  - Section 402 bars class actions in asbestos cases without the consent of each defendant, and governs removal.

S. 855 Professional Standards for Government Attorneys Act of 1999

- Introduced by: Leahy (7 co-sponsors)
- Date Introduced: April 21, 1999
- Status: Referred to the Committee on Judiciary.
- Provisions affecting rules:
  - Requires the Judicial Conference to submit to the Chief Justice a report that includes recommendations with respect to amending the Federal Rules of Civil and Criminal Procedure to provide for such a uniform national rules governing conduct of government attorneys. Directs the Judicial Conference, in developing

recommendations, to consider: (1) the needs and circumstances of multi-forum and multi-jurisdictional litigation; (2) the special needs and interests of the United States in investigating and prosecuting violations of Federal criminal and civil law; and (3) practices that are approved under Federal statutory or case law or that are otherwise consistent with traditional Federal law enforcement techniques.

S. 899 21st Century Justice Act of 1999

- Introduced by: Hatch (7 co-sponsors)
- Date Introduced: April 28, 1999
- Status: Referred to the Committee on Judiciary. May 18, 1999 partially incorporated into S. 254
- Provisions affecting rules:
  - Sections 5103-08 provide victims of crime with allocution rights; **Criminal Rule 11** is amended
  - Section 5224 amends **Evidence Rule 404** to permit consideration of evidence showing disposition of defendant
  - Section 6515 amends **Criminal Rule 43(c)** to permit videoconferencing of several types of proceedings n criminal cases, including sentencing
  - Section 6703 amends **Criminal Rule 46** governing criterion for forfeiture of a bail bond
  - Section 7101 amends **Criminal Rule 24** to equalize the number of peremptory challenges
  - Section 7102 amends **Criminal Rule 23** to permit a jury of 6 in a criminal case
  - Section 7105 amends the **Rules Enabling Act** and would restructure the composition of the rules committees to include more prosecution-oriented members
  - Section 7321 sets up ethical standards governing attorney conduct
  - Section 7477 permits disclosure of grand jury information to government attorneys not involved in the original prosecution

S. 934 Crime Victims Assistance Act

- Introduced by: Leahy (5 co-sponsors)
- Date Introduced: April 30, 1999
- Status: Referred to the Committee on Judiciary.
- Provisions affecting rules:
  - Section 121 would amend **Criminal Rule 11** to require the Government to make a reasonable effort to notify the victim of a crime of violence of the time and date of any hearing on entering a plea of guilty or nolo contendere, and the victim's right to attend that hearing. If the victim attends the proceeding, the court shall afford the victim an opportunity to be heard on the plea.
  - Section 122 would amend **Criminal Rule 32** detailing the contents of the Victim Impact Statement; give the victim an opportunity to submit a written or oral statement, or an audio or videotaped statement; require the Government to make a reasonable effort to notify the victim of a crime of violence of the time and date of any sentencing hearing and the victim's right to attend that hearing. If the victim

attends the proceeding, the court shall afford the victim an opportunity to be heard.

- Section 123 would amend **Criminal Rule 32.1** require the Government to make a reasonable effort to notify the victim of a crime of violence of the time and date of any hearing to revoke or modify sentence and the victim's right to attend that hearing. If the victim attends the proceeding, the court shall afford the victim an opportunity to be heard.
- Section 131 would amend **Evidence Rule 615** to allow the victim of a crime of violence to be present unless the court finds the testimony of that person will be material affected by hearing the testimony of other witnesses or there are too many victims. [Note: It appears the amendments are based on the old version of Evidence Rule 615 (i.e do not account for the 2/98 amendment)]

S. 957 Sunshine in Litigation Act of 1999

- Introduced by: Kohl (No co-sponsors)
- Date Introduced: May 4, 1999
- Status: Referred to the Committee on Judiciary.
- Provisions affecting rules:
  - section 1 would amend chapter 111 of title 28, U.S.C. to require a court to make particularized findings of fact prior to entering a protective order; the proponent of the protective order has the burden of proof; stipulated protective orders would be unenforceable

S. 1360 Secret Service Protection Privilege Act of 1999

- Introduced by: Leahy (0 co-sponsors)
- Date Introduced: July 13, 1999
- Status: Referred to the Committee on Judiciary.
- Provisions affecting rules:
  - Section 3 amends title 18 to establish a secret service privilege (EV501)

S. 1437 Thomas Jefferson Researcher's Privilege Act of 1999

- Introduced by: Moynihan (0 co-sponsors)
- Date Introduced: July 26, 1999
- Status: Referred to the Committee on Judiciary.
- Provisions affecting rules:
  - Section 3 would amend CV45 to allow a court to quash a subpoena requiring disclosure of information relating to study or research of academic, commercial, scientific, or technical issues
  - Section 4 adds EV502 which would create a privilege for information relating to study or research of academic, commercial, scientific, or technical issues

S. 1700 "Hunt for the Truth Act"

- Introduced by: Durbin (0 co-sponsors)
- Date Introduced: October 6, 1999
- Status: Referred to the Committee on Judiciary.
- Provisions affecting rules:
  - Section 2 would add new criminal Rule 33.1 allowing a judge upon motion of the defendant to order post-conviction forensic DNA testing if the technology for that type of testing was not available when the defendant was convicted.

HOUSE BILLS

H.R . 461 Prisoners Frivolous Lawsuit Prevention Act of 1999

- Introduced by: Gallegly (27 co-sponsors)
- Date Introduced: February 2, 1999
- Status: Referred to the Committee on Judiciary; 2/25/ 99 Referred to the Subcommittee on Courts and Intellectual Property.
- Provisions affecting rules:
  - Sec. 2 would amend **Civil Rule 11** creating special sanction rules for prisoner litigation.

H.R . 522 Parent-Child Privilege Act of 1999

- Introduced by: Andrews (No co-sponsors)
- Date Introduced: February 3, 1999
- Status: Referred to the Committee on Judiciary; 2/25/99 Referred to the Subcommittee on Courts and Intellectual Property.
- Provisions affecting rules:
  - Sec. 2 would create new **Evidence Rule 502** providing for a parent/child privilege.

H.R. 771 No title

- Introduced by: Coble (15 co-sponsors)
- Date Introduced: February 23, 1999
- Status: Referred to the Committee on Judiciary; 3/11/99 Forwarded by Subcommittee to Full Committee; Letter from Judge Niemeyer to Hyde 3/22/99
- Provisions affecting rules:

- Amends **Civil Rule 30** to require that depositions be recorded by stenographic or stenomask means unless the court upon motion orders, or the parties stipulate in writing, to the contrary.

H.R. 775 Year 2000 Readiness and Responsibility Act; Small Business Year 2000 Readiness Act (See S. 96 and S. 461) Public Law: 106-37 (07/20/99)

- Introduced by: Honorable W. Eugene Davis (62 co-sponsors)
- Date Introduced: February 23, 1999; ordered report 5/4/99
- Status: Referred to the Committee on Judiciary; Letter from Director opposing class action and special pleading requirements sent on March 24, 1999; hearing 4/13; Passed by House of Representatives on May 12, 1999; Signed by President on 7/20/99
- Provisions affecting rules:
  - Section 103 establishes special ("fraud-like") pleading requirements
  - Section 404 establishes federal jurisdiction of Y2K class actions over $1 million

H.R. 833 Bankruptcy Reform Act of 1999

- Introduced by: Gekas (105 co-sponsors)
- Date Introduced: February 24, 1999
- Status: Referred to the Committee on Judiciary; Forwarded by Subcommittee to Full Committee in the Nature of a Substitute by the Yeas and Nays: 5 - 3; letter sent by Director to Hyde on 3/23/99; Passed(313 - 108) 05/05/99; Read twice in the Senate 5/12/99;
- Provisions affecting rules:
  - Section 802 requires clerks of court to maintain a register of all governmental units to ensure that the appropriate government office receives adequate notice of bankruptcy filings.
  - Sections 102, 403, 607, and 816(e) would authorize or mandate the initiation of the rulemaking process with respect to separate proposals for rule changes.

H.R. 967 Multiparty, Multiforum Jurisdiction Act of 1999 (See H.R. 2112)

- Introduced by: Sensenbrenner (1 co-sponsor)
- Date Introduced: March 3,1999
- Status: Referred to the Committee on Judiciary; Mar 16, 1999: Referred to the Subcommittee on Courts and Intellectual Property.
- Provisions affecting rules:
  - Minimal diversity for class actions arising from single-event mass tort

H.R. 1281 No title (See S. 721)

- Introduced by: Grassley (43 co-sponsors)
- Date Introduced: March 25, 1999
- Status: 3/25/98 Referred to the House Committee on the Judiciary; referred to the Subcommittee on Courts and Intellectual Property 4/7/99;
- Provisions affecting rules:
  - Section 1 states the presiding judge of any appellate court or district court may, in his or her discretion, permit the photographing, electronic recording,

broadcasting, or televising to the public of court proceedings over which that judge presides; safe guards are provided to obscure the identity of nonparty witnesses; the Judicial Conference is authorized to promulgate advisory guidelines

- Section 3 provides a 3-year sunset of section 1.

H.R. 1658 Civil Asset Forfeiture Reform Act

- Introduced by: Hyde (59 co-sponsors)
- Date Introduced: May 4, 1999
- Status: 5/4/99 Referred to the House Committee on the Judiciary; Measure passed House on June 24, 1999, received in the Senate June 28, 1999

H.R. 1752 Federal Courts Improvement Act of 1999

- Introduced by: Coble (1 co-sponsors)
- Date Introduced: May, 11, 1999
- Status:09/09/99 Reported to House from the Committee on the Judiciary with amendment
- Provisions affecting rules
  - Sec. 208 Provides for the sunset of provisions requiring a civil justice expense and delay reduction plan.
  - Sec. 210 would allow the presiding judge of any appellate court or district court may, in his or her discretion, permit the photographing, electronic recording, broadcasting, or televising to the public of court proceedings over which that judge presides; safe guards are provided to obscure the identity of nonparty witnesses; the Judicial Conference is authorized to promulgate advisory guidelines

H.R. 1852 Multidistrict Trial Jurisdiction Act of 1999 (See H.R. 2112)

- Introduced by: Sensenbrenner (2 co-sponsors)
- Date Introduced: May 18, 1999
- Status: 5/19/99 Referred to the Subcommittee on Courts and Intellectual Property. 5/20/99 Subcommittee Consideration and Mark-up Session Held; 5/20/99 Forwarded by Subcommittee to Full Committee by Voice Vote; .
  - Addresses Lexecon issue.
-

H.R. 1875 Interstate Class Action Jurisdiction Act of 1999

- Introduced by: Goodlatte (37 co-sponsor)
- Date Introduced: May 19, 1999
- Status: Referred to the Committee on Judiciary; Hearings Held on July 21, 1999, Mark-up held July 27, 1999 and August 3, 1999; Ordered to be Reported (Amended) by the Yeas and Nays: 15 - 12.; letter from Executive Committee generally stating Judiciary's opposition more detailed letter to follow; 09/23/99 Measure passed House, amended, (222-207) . 11/19/99 Referred to Senate Committee on the Judiciary
- Provisions affecting rules: None directly; general class action considerations; extends minimal diversity to all class actions

H.R. 2112 Multidistrict; Multiparty, Multiforum Trial Jurisdiction Act of 1999 (See H.R. 1852)

- Introduced by: Sensenbrenner (2 co-sponsors)
- Date Introduced: June 9, 1999
- Status: 9/13/99 Measure passed House; 9/14/99 referred to the Senate Committee on Judiciary; 10/27/99 Measure passed and modified by Senate to exclude "single-event" mass tort choice of law provisions; 11/16/99 Conference scheduled in House
- Provisions affecting rules
    - Addresses Lexecon issue and choice of law issues for single-event mass torts.

JOINT RESOLUTIONS

S. J. RES. 3; *A joint resolution proposing an amendment to the Constitution of the United States to protect the rights of crime victims.*

- Introduced by: Kyl (33 Co-sponsors) Date Introduced: 1/19/99
- Status: Referred to the Committee on Judiciary; 3/23/99 Referred to Subcommittee on Constitution, Federalism, Property; 3/24/99 Committee on Judiciary, Hearings held; 9/30/99 passed House; 10/4/99 placed on Senate Legislative Calendar.
- Provisions affecting rules
    - Calls for a Constitutional amendment enumerating victim's rights.

chart showing the status of all rules changes has been updated. It will be distributed at the meeting.

The office continues to research our historical records for information regarding any past relevant committee action on every new proposed amendment submitted to an advisory committee. The microfiche collection of rules-related documents was searched for prior committee action on each rule under consideration by the advisory committees at their respective fall meetings. Pertinent documents were forwarded to the appropriate reporter for consideration.

Record Keeping

Under the *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure* all rules-related records must "be maintained at the Administrative Office of the United States Courts for a minimum of two years and . . . [t]hereafter the records may be transferred to a government record center. . . ."

All rules-related documents from 1935 through 1992 have been entered on microfiche and indexed. The documents for 1993 have been catalogued and boxed to be shipped to the national record center. The process for documents from 1994 will be completed shortly after the January 2000 meeting. The microfiche collection continues to prove useful to us and the public in researching prior committee positions.

Manual Tracking

Our manual system of tracking comments continues to work well. For the last public comment period, the office received, acknowledged, forwarded and followed-up on approximately 500 comments and many suggestions. Each comment was numbered consecutively, which enabled committee members to determine instantly whether they had received all of them. We will continue to distribute the comments electronically using Adobe PDF. We found that process allowed us to distribute the comments much faster and more cheaply.

State Bar Points-of-Contact

In August 1994, the president of each state bar association was requested to designate a point-of-contact for the rules committee to solicit and coordinate that state bar's comments on the proposed amendments. The Standing Committee outreach to the organized bar has resulted in 43 state bars designating a point-of-contact.

The points-of-contact list was again updated this year in time to include the new names in *The Request for Comment* pamphlet on proposed amendments published in August 1999. Several state bars updated their designated point-of-contact. The process will be repeated every year to ensure that we have an accurate and up-to-date list. Hopefully, the points-of-contact will continue to facilitate submission of comments from these organizations.

Mailing List

The Administrative Office has purchased another automated mailing list system. It will replace several existing systems and will be fully operational early in the new year. It should substantially reduce the time involved in maintaining and expanding the mailing list. A contractor will be hired to maintain all mailing lists for the Administrative Office. We plan to add attorneys and law professors at a 2:1 ratio to a temporary list every six months until the list contains 2,500 names.

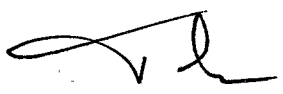
Miscellaneous

In September 1999, with the exception of Civil Rules 26(b)(2) & 34 cost-bearing provisions, the Judicial Conference approved the proposed amendments to the Federal Rules of Evidence and Bankruptcy and Civil Procedure recommended by the Standing Committee at its June 1999 meeting. The formatting and proofreading of the proposed rule amendments were extensive. The Supreme Court recently changed their word processing program, which has required us to convert all our submissions from WordPerfect to Microsoft Word. The conversion process is tedious and time-consuming. In December, the proposals were forwarded to the Supreme Court.

On August 15, 1999, the *Preliminary Draft of the Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure* was published for comment. A brochure summarizing the proposed amendments was also prepared and published.

In November 1999, the courts were advised that the amendments to the Federal Rules of Bankruptcy, Civil, and Criminal Procedure approved by the Supreme Court on April 26, 1999, would take effect on December 1, 1999.

In December 1999, the pamphlets printed by the Government Printing Office for the House Judiciary Committee containing the recently effective amendments to the Federal Rules of Appellate, Civil, and Criminal Procedure and the Rules of Evidence were distributed to the court family. Links to those documents will be included on our website. The House Judiciary Committee does not print any pamphlets for the bankruptcy rules, and our effort to convince Congressman Henry Hyde, chair of the House Judiciary Committee, of the need for such a pamphlet has so far been unsuccessful.



John K. Rabiej

Attachments

AGENDA DOCKETING

ADVISORY COMMITTEE ON CIVIL RULES

Proposal	Source, Date, and Doc #	Status
[Financial disclosure statement]	Request by committee on Codes of Conduct 9/23/98	11/98 — Cmte considered 3/99 — Agenda Subcomte rec. Hold until more information available (2) 4/99 — Cmte considered; FJC study initiated **PENDING FURTHER ACTION**
[Copyright Rules of Practice] — Update	Inquiry from West Publishing	4/95 — To be reviewed with additional information at upcoming meetings 11/95 — Considered by cmte 10/96 — Considered by cmte 10/97 — Deferred until spring '98 meeting 3/98 — Deferred until fall '98 meeting 11/98 — Request for publication 1/99 — Stg. Cmte. approves publication for fall **PENDING FURTHER ACTION**
[Admiralty Rule B, C, and E] — Amend to conform to Rule C governing attachment in support of an in personam action	Agenda book for the 11/95 meeting	4/95 — Delayed for further consideration 11/95 — Draft presented to cmte 4/96 — Considered by cmte 10/96 — Considered by cmte, assigned to subc 5/97— Considered by cmte 10/97 — Request for publication and accelerated review by ST Cmte 1/98 — Stg. Com. approves publication at regularly scheduled time 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions **PENDING FURTHER ACTION**
[Admiralty Rule-New]— Authorize immediate posting of preemptive bond to prevent vessel seizure	Mag. Judge Roberts 9/30/96 (96-CV-D) #1450	12/24/96— Referred to Admiralty and Agenda Subc 3/99 — Agenda Subc rec. Hold until more information available (2) **PENDING FURTHER ACTION**
[Inconsistent Statute] — 46 U.S.C. § 786 inconsistent with admiralty	Michael Cohen 1/14/97 (97-CV-A) #2182	2/97 — Referred to reporter and chair Supreme Court decision moots issue **COMPLETED**
[Non-applicable Statute]— 46 U.S.C. § 767 Death on the High Seas Act not applicable to any navigable waters in the Panama Canal Zone	Michael Marks Cohen 9/17/97 (97-CV-O)	10/97 — Referred to reporter, chair, and Agenda Subc 3/99 — Agenda Subcomte rec. Remove from agenda (5) **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[Admiralty Rule C(4) — Amend to satisfy constitutional concerns regarding default in actions *in rem*	Gregory B. Walters, Cir. Exec., for Jud. Council of Ninth Cir. 12/4/97 (97-CV-V)	1/98 — Referred to reporter, chair, and Agenda Subc 3/99 — Agenda Subc rec. Hold until more information available (2) **PENDING FURTHER ACTION**
[CV4(c)(1)] — Accelerating 120-day service provision	Joseph W. Skupniewitz	4/94 — Deferred as premature **DEFERRED INDEFINITELY**
[CV4(d)] — To clarify the rule	John J. McCarthy 11/21/97 (97-CV-R)	12/97 — Referred to reporter, chair, and Agenda Subc 3/99 — Agenda Subcomte rec. Accumulate for periodic revision (1) **PENDING FURTHER ACTION**
[CV4(d)(2)] — Waive service of process for actions against the United States	Charles K. Babb 4/22/94	10/94 — Considered and denied 4/95 — Reconsidered but no change in disposition **COMPLETED**
[CV4(e) & (f)] — Foreign defendant may be served pursuant to the laws of the state in which the district court sits	Owen F. Silvions 6/10/94	10/94 — Rules deemed as otherwise provided for and unnecessary 4/95 — Reconsidered and denied **COMPLETED**
[CV4(i)] — Service on government in Bivens suits	DOJ 10/96 (96-CV-B; #1559)	10/96 — Referred to Reporter, Chair, and Agenda Subc 5/97 — Discussed in reporter's memo. 3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions **PENDING FURTHER ACTION**
[CV4(m)] — Extension of time to serve pleading after initial 120 days expires	Judge Edward Becker	4/95 — Considered by cmte **DEFERRED INDEFINITELY**
[CV4]— Inconsistent service of process provision in admiralty statute	Mark Kasanin	10/93 — Considered by cmte 4/94 — Considered by cmte 10/94 — Recommend statutory change 6/96 — Coast Guard Authorization Act of 1996 repeals the nonconforming statutory provision **COMPLETED**
[CV4] — To provide sanction against the willful evasion of service	Judge Joan Humphrey Lefkow 8/12/97 (97-CV-K)	10/97 — Referred to Reporter, Chair, and Agenda Subc 3/99 — Agenda Subc rec. Accumulate for periodic revision (1) **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV5] — Electronic filing		10/93 — Considered by cmte 9/94 — Published for comment 10/94 — Considered 4/95 — Cmte approves amendments with revisions 6/95 — Approved by ST Cmte /95 — Approved by Jud Conf 4/96 — Approved by Sup Ct 12/96 — Effective **COMPLETED**
[CV5] — Service by electronic means or by commercial carrier; fax noticing produces substantial cost savings while increasing efficiency and productivity	Michael Kunz, clerk E.D. Pa. and John Frank 7/29/96; 9/10/97 (97-CV-N)	4/95 — Declined to act 10/96 — Reconsidered, submitted to Technology Subcommittee 5/97 — Discussed in reporter's memo. 9/97 — Information sent to reporter, chair, and Agenda Subc 11/98 — Referred to Tech. Subcommittee 3/99 — Agenda Subc rec. Refer to other comte (3) 4/99 — Cmte requests publication 6/99 — Stg. Comte approves publication **PENDING FURTHER ACTION**
[CV5(b)] — Facsimile service of notice to counsel	William S. Brownell, District Clerks Advisory Group 10/20/97 (97-CV-Q)	11/97 — Referred to reporter, chair, and Agenda Subc 3/98 — Referred to Technology Subcommittee 3/99 — Agenda Subc rec. Refer to other comte (3) **PENDING FURTHER ACTION**
[CV5(d)] — Whether local rules against filing of discovery documents should be abrogated or amended to conform to actual practice	Gregory B. Walters, Cir. Exec., for District Local Rules Review Cmte of Jud. Council of Ninth Cir. 12/4/97 (97-CV-V)	1/98 — Referred to reporter, chair, and Agenda Subc 3/98 — Cmte. approved draft 6/98 — Stg Cmte approves with revision 8/98 — Published for comment 4/99 — Cmte approves amendments 6/99 — Stg. Comte approves **PENDING FURTHER ACTION**
[CV6] — Modifying mailbox rule	J. Michael Schaefer, Esq. 12/28/98 (99-CV-A)	3/99 — Referred to reporter, chair, and Agenda Subc 3/99 — Agenda Subc rec. Remove from agenda (5) **PENDING FURTHER ACTION**
[CV6(b)] — Enlargement of Time; deletion of reference to abrogated rule (technical amendment)	Prof. Edward Cooper 10/27/97; Rukesh A. Korde 4/22/99 (99-CV-C)	10/97 — Referred to cmte 3/98 — Cmte approved draft with recommendation to forward directly to the Jud Conf w/o publication 6/98 — Stg Cmte approves 9/98 — Jud. Conf. Approves and transmits to Sup. Ct. 4/99 — Supreme Court aproves **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV6(e)] — Time to act after service	ST Cmte 6/94	10/94 — Cmte declined to act **COMPLETED**
[CV8, CV12] — Amendment of the general pleading requirements	Elliott B. Spector, Esq. 7/22/94	10/93 — Delayed for further consideration 10/94 — Delayed for further consideration 4/95 — Declined to act **DEFERRED INDEFINITELY**
[CV9(b)] — General Particularized pleading	Elliott B. Spector	5/93 — Considered by cmte 10/93 — Considered by cmte 10/94 — Considered by cmte 4/95 — Declined to act **DEFERRED INDEFINITELY**
[CV9(h)] — Ambiguity regarding terms affecting admiralty and maritime claims	Mark Kasanin 4/94	10/94 — Considered by cmte 4/95 — Approved draft 7/95 — Approved for publication 9/95 — Published 4/96 — Forwarded to the ST Cmte for submission to Jud Conf 6/96 — Approved by ST Cmte 9/96 — Approved by Jud Conf 4/97 — Approved by Supreme Court 12/97 — Effective **COMPLETED**
[CV11] — Mandatory sanction for frivolous filing by a prisoner	H.R. 1492 introduced by Cong Gallegly 4/97	5/97 — Considered by cmte 3/99 — Agenda Subc rec. Remove from agenda (5) **PENDING FURTHER ACTION**
[CV11] — Sanction for improper advertising	Carl Shipley 4/97 (97-CV-G)	5/97 — Referred to reporter, chair, and Agenda Subc 3/99 — Agenda Subc rec. Remove from agenda (5) **PENDING FURTHER ACTION**
[CV11] — Should not be used as a discovery device or to test the legal sufficiency or efficiency of allegations in pleadings	Nicholas Kadar, M.D. 3/98 (98-CV-B)	4/98 — Referred to reporter, chair, and Agenda Subc 3/99 — Agenda Subc rec. Await preliminary review by reporter (6) 8/99 — Reporter recommends removal from the agenda **PENDING FURTHER ACTION**
[CV12] — Dispositive motions to be filed and ruled upon prior to commencement of the trial	Steven D. Jacobs, Esq. 8/23/94	10/94 — Delayed for further consideration 5/97 — Reporter recommends rejection 11/98 — rejected by cmte **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV12] — To conform to *Prison Litigation Act of 1996*	John J. McCarthy 11/21/97 (97-CV-R)	12./97 — Referred to reporter, chair, and Agenda Subc 3/99 — Agenda Subc rec. Ready for full committee consideration (4) **PENDING FURTHER ACTION**
[CV12(a)(3)] —Conforming amendment to Rule 4(i)		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions 6/99 — Stg Comte approves **PENDING FURTHER ACTION**
[CV12(b)] — Expansion of conversion of motion to dismiss to summary judgment	Daniel Joseph 5/97 (97-CV-H) #2941	5/97 — Referred to reporter, chair, and Agenda Subc 3/99 — Agenda Subc rec. Remove from agenda (5) **PENDING FURTHER ACTION**
[CV14(a) & (c)] — Conforming amendment to admiralty changes		6/98 — Stg Comt approves 8/98 — Published for comment 4/99 — Cmte approves amendments 6/99 — Stg Comte approves **PENDING FURTHER ACTION**
[CV15(a)] — Amendment may not add new parties or raise events occurring after responsive pleading	Judge John Martin 10/20/94 & Judge Judith Guthrie 10/27/94	4/95 — Delayed for further consideration 11/95 — Considered by cmte and deferred **DEFERRED INDEFINITELY**
[CV 15(c)(3)(B)] —Clarifying extent of knowledge required in identifying a party	Charles E. Frayer, Law student 9/27/98 (98-CV-E)	9/98 — Referred to chair, reporter, and Agenda Subc 3/99 — Agenda Subc rec. accumulate for periodic revision (1) **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV23] — Amend class action rule to accommodate demands of mass tort litigation and other problems	Jud Conf on Ad Hoc Communication for Asbestos Litigation 3/91; William Leighton ltr 7/29/94; H.R. 660 introduced by Canady on CV 23 (f)	5/93 — Considered by cmte 6/93 — Submitted for approval for publication; withdrawn 10/93, 4/94, 10/94, 2/95, 4/95, 11/95; studied at meetings. 4/96 — Forwarded to ST Cmte for submission to Jud Conf 6/96 — Approved for publication by ST Cmte 8/96 — Published for comment 10/96 — Discussed by cmte 5/97 — Approved and forwarded changes to (c)(1), and (f); rejected (b)(3)(A) and (B); and deferred other proposals until next meeting 4/97 — Stotler letter to Congressman Canady 6/97 — Changes to 23(f) were approved by ST Cmte; changes to 23(c)(1) were recommitted to advisory cmte 10/97 — Considered by cmte 3/98 — Considered by cmte deferred pending mass torts working group deliberations 3/99 — Agenda Subc rec. Refer to other comte (3) **PENDING FURTHER ACTION**
[CV23] — Standards and guidelines for litigating and settling consumer class actions	Patricia Sturdevant, for National Association for Consumer Advocates 12/10/97 (97-CV-T)	12/97 — Referred to reporter, chair, and Agenda Subc 3/99 — Agenda Subc rec. Refer to other comte (3) **PENDING FURTHER ACTION**
[CV23(e)] — Amend to include specific factors court should consider when approving settlement for monetary damages under 23(b)(3)	Beverly C. Moore, Jr., for Class Action Reports, Inc. 11/25/97 (97-CV-S)	12/ 97 — Referred to reporter, chair, and Agenda Subc 3/99 — Agenda Subc rec. Refer to other comte (3) **PENDING FURTHER ACTION**
[CV23(e)] — Require all "side-settlements", including attorney's fee components, to be disclosed and approved by the district court	Brian Wolfman, for Public Citizen Litigation Group 11/23/99 (99-CV-H)	12/99 Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV23(f)] — interlocutory appeal	part of class action project	4/98 — Sup Ct approves 12/98 — Effective **COMPLETED**
[CV26] — Interviewing former employees of a party	John Goetz	4/94 — Declined to act **DEFERRED INDEFINITELY**

Proposal	Source, Date, and Doc #	Status
[CV26] —Initial disclosure and scope of discovery	Thomas F. Harkins, Jr., Esq. 11/30/94 and American College of Trial Lawyers; Allan Parmelee (97-CV-C) #2768; Joanne Faulkner 3/97 (97-CV-D) #2769	4/95 — Delayed for further consideration 11/95 — Considered by cmte . 4/96 — Proposal submitted by American College of Trial Lawyers 10/96 — Considered by cmte; subc appointed 1/97 — Subc held mini-conference in San Francisco 4/97 — Doc. #2768 and 2769 referred to Discovery Subc 9/97 — Discovery Reform Symposium held at Boston College Law School 10/97 — Alternatives considered by cmte 3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions 6/99 — Stg Comte approves **PENDING FURTHER ACTION**
[CV26(c)] — Factors to be considered regarding a motion to modify or dissolve a protective order	Report of the Federal Courts Study Committee, Professors Marcus and Miller, and Senator Herb Kohl 8/11/94; Judge John Feikens (96-CV-F); S. 225 reintroduced by Sen Kohl	5/93 — Considered by cmte 10/93 — Published for comment 4/94 — Considered by cmte 10/94 — Considered by cmte 1/95— Submitted to Jud Conf 3/95 — Remanded for further consideration by Jud Conf 4/95 — Considered by cmte 9/95 — Republished for public comment 4/96 — Tabled, pending consideration of discovery amendments proposed by the American College of Trial Lawyers 1/97 — S. 225 reintroduced by Sen Kohl 4/97 — Stotler letter to Sen Hatch 10/97 — Considered by subc and left for consideration by full cmte 3/98 — Cmte determined no need has been shown to amend **COMPLETED**
[CV26] — Depositions to be held in county where witness resides; better distinction between retained and "treating" experts	Don Boswell 12/6/96 (96-CV-G)	12/96 — Referred to reporter, chair, and Agenda Subc. 5/97 — Reporter recommends that it be considered part of discovery project 3/99 — Agenda Subc rec. Refer to other comte (3) **PENDING FURTHER ACTION**
[CV30] — Allow use by public of audio tapes in the courtroom	Glendora 9/96/96 (96-CV-H)	12/96 — Sent to reporter and chair 11/98 — rejected by cmte **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV30(b)(1)] — That the deponent seek judicial relief from annoying or oppressive questioning during a deposition	Judge Dennis H. Inman 8/6/97 (97-CV-J)	10/97 — Referred to reporter, chair, and Agenda Subc 11/98 — rejected by cmte **COMPLETED**
[CV30(d)(2)] — presumptive one day of seven hours for deposition		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions 6/99 — Stg Comte approves **PENDING FURTHER ACTION**
[CV30(e)] — review of transcript by deponent	Dan Wilen 5/14/99 (99-CV-D)	8/99 — Referred to agenda Subcomte 8/99 — Agenda Subc rec. Refer to other comte (30 **PENDING FURTHER ACTION**
[CV32] — Use of expert witness testimony at subsequent trials without cross examination in mass torts	Honorable Jack Weinstein 7/31/96	7/31/96 — Submitted for consideration 10/96 — Considered by cmte; FJC to conduct study 5/97 — Reporter recommends that it be considered part of discovery project 3/99 — Agenda Subc rec. Refer to other comte (3) **PENDING FURTHER ACTION**
[CV33 & 34] — require submission of a floppy disc version of document	Jeffrey K. Yencho (7/22/99) 99-CV-E	7/99 — referred to Agenda Subcomte 8/99 — Agenda Subc rec. Refer to other subc (3) **PENDING FURTHER ACTION**
[CV34(b)] — requesting party liable for paying reasonable costs of discovery		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions (moved to Rule 26) 6/99 — Stg Comte approves **PENDING FURTHER ACTION**
[CV36(a)] — To not permit false denials, in view of recent Supreme Court decisions	Joanne S. Faulkner, Esq. 3/98 (98-CV-A)	4/98 — Referred to reporter, chair, and Agenda Subc 11/98 — rejected by cmte **COMPLETED**
[CV37(b)(3)] — Sanctions for Rule 26(f) failure	Prof. Roisman	4/94 — Declined to act **DEFERRED INDEFINITELY**
[CV37(c)(1)] — Sanctions for failure to supplement discovery		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments 6/99 — Stg Comte approves **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV39(c) and CV16(e)] — Jury may be treated as advisory if the court states such before the beginning of the trial	Daniel O'Callaghan, Esq.	10/94 — Delayed for further study, no pressing need 4/95 — Declined to act **COMPLETED**
[CV43] — Strike requirement that testimony must be taken orally	Comments at 4/94 meeting	10/93 — Published 10/94 — Amended and forwarded to ST Cmte 1/95 — ST Cmte approves but defers transmission to Jud Conf 9/95 — Jud Conf approves amendment 4/96 — Supreme Court approved 12/96 — Effective **COMPLETED**
[CV43(f)—Interpreters] — Appointment and compensation of interpreters	Karl L. Mulvaney 5/10/94	4/95 — Delayed for further study and consideration 11/95 — Suspended by advisory cmte pending review of Americans with Disabilities Act by CACM 10/96 — Federal Courts Improvement Act of 1996 provides authority to pay interpreters **COMPLETED**
[CV44] — To delete, as it might overlap with Rules of EV dealing with admissibility of public records	Evidence Rules Committee Meeting 10/20-21/97 (97-CV-U)	1/97 — Referred to chair, reporter, and Agenda Subc. 3/98 — Cmte determined no need to amend **COMPLETED**
[CV45] — Nationwide subpoena		5/93 — Declined to act **COMPLETED**
[CV45] — Notice in lieu of attendance subpoenas	J. Michael Schaefer, Esq. 12/28/98 (99-CV-A)	3/99 — Referred to chair, reporter, and Agenda Subc 8/99 — Agenda Subc rec. Remove from agenda **PENDING FURTHER ACTION**
[CV45] — Clarifying status of subpoena after expiration date	K. Dino Kostopoulos, Esq. 1/27/99 (99-CV-B)	3/99 — Referred to chair, reporter, and Agenda Subc 8/99 — Agenda Subc rec. Refer to other comte (3) **PENDING FURTHER ACTION**
[CV45] — Discovering party must specify a date for production far enough in advance to allow the opposing party to file objections to production	Prof. Charles Adams 10/1/98 (98-CV-G)	10/98 — Referred to chair, reporter, Agenda Subc, and Discovery Subc 3/99 — Agenda Subc rec. Refer to other comte (3) **PENDING FURTHER ACTION**
[CV45(d)] — Re-service of subpoena not necessary if continuance is granted and witness is provided adequate notice	William T. Terrell, Esq. 10/9/98 (98-CV-H)	12/98 — Referred to chair, reporter, and Agenda Subc 3/99 — Agenda Subc rec. Refer to other comte (3) **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV47(a)] — Mandatory attorney participation in jury voir dire examination	Francis Fox, Esq.	10/94 — Considered by cmte 4/95 — Approved draft 7/95 — Proposed amendment approved for publication by ST Cmte 9/95 — Published for comment 4/96 — Considered by advisory cmte; recommended increased attention by Fed. Jud. Center at judicial training **COMPLETED**
[CV47(b)] — Eliminate peremptory challenges	Judge Willaim Acker 5/97 (97-CV-F) #2828	6/97 — Referred to reporter, chair, and Agenda Subc 11/98 — Cmte declined t take action **COMPLETED**
[CV48] — Implementation of a twelve-person jury	Judge Patrick Higginbotham	10/94 — Considered by cmte 7/95 — Proposed amendment approved for publication by ST Cmte 9/95 — Published for comment 4/96 — Forwarded to ST Cmte for submission to Jud Conf 6/96 — ST Cmte approves 9/96 — Jud Conf rejected 10/96 — Cmte's post-mortem discussion **COMPLETED**
[CV50] — Uniform date for filing post trial motion	BK Rules Committee	5/93 —Approved for publication 6/93 — ST Cmte approves publication 4/94 — Approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CV50(b)] — When a motion is timely after a mistrial has been declared	Judge Alicemarie Stotler 8/26/97 (97-CV-M)	8 /97 — Sent to reporter and chair 10/97 — Referred to Agenda Subc 3/99 — Agenda Subc rec. Accumulate for periodic revision (1) **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV51] — Jury instructions filed before trial	Judge Stotler (96-CV-E) Gregory B. Walters, Cir. Exec., for the Jud. Council of the Ninth Cir. 12/4/97 (97-CV-V)	11/8/96 — Referred to chair 5/97 — Reporter recommends consideration of comprehensive revision 1/98 — Referred to reporter, chair, and Agenda Subc 3/98 — Cmte considered 11/98 — Cmte considered 3/99 — Agenda Subc rec.Ready for full comte consideration 4/99 — Cmte considered **PENDING FURTHER ACTION**
[CV52] — Uniform date for filing for filing post trial motion	BK Rules Cmte	5/93 —Approved for publication 6/93 — ST Cmte approves publication 4/94 — Approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CV53] — Provisions regarding pretrial and post-trial masters	Judge Wayne Brazil	5/93 — Considered by cmte 10/93 — Considered by cmte 4/94 — Draft amendments to CV16.1 regarding "pretrial masters" 10/94 — Draft amendments considered 11/98 — Subcom appointed to study issue 3/99 — Agenda Subc rec. Refer to other comte (3) **DEFERRED INDEFINITELY**
[CV56] — To clarify cross-motion for summary judgment	John J. McCarthy 11/21/97	12/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV56(a)] — Clarification of timing	Scott Cagan 2/97 (97-CV-B) #2475	3/97 — Referred to reporter, chair, and Agenda Subc 5/97 — Reporter recommends rejection 3/99 — Agenda Subc rec. Accumulate for periodic revision (1) **PENDING FURTHER ACTION**
[CV56(c)] — Time for service and grounds for summary adjudication	Judge Judith N. Keep 11/21/94	4/95 — Considered by cmte; draft presented 11/95 — Draft presented, reviewed, and set for further discussion 3/99 — Agenda Subc rec. Accumulate fore periodic revision **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV59] — Uniform date for filing for filing post trial motion	BK Rules Committee	5/93 —Approved for publication 6/93 — ST Cmteapproves publication 4/94 — Approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CV60(b)] — Parties are entitled to challenge judgments provided that the prevailing party cites the judgment as evidence	William Leighton 7/20/94	10/94 — Delayed for further study 4/95 — Declined to act **COMPLETED**
[CV62(a)] — Automatic stays	Dep. Assoc. AG, Tim Murphy	4/94 — No action taken **COMPLETED**
[CV64] — Federal prejudgment security	ABA proposal	11/92 — Considered by cmte 5/93 — Considered by cmte 4/94 — Declined to act **DEFERRED INDEFINITELY**
[CV65(f)] — rule made applicable to copyright impoundment cases	see request on copyright	11/98 — Request for publication 6/99 — Stg Comte approves **PENDING FURTHER ACTION**
[CV65.1] — To amend to avoid conflict between 31 U.S.C. § 9396 governing the appointment of agents for sureties and the Code of Conduct for Judicial Employees	Judge H. Russel Holland 8/22/97 (97-CV-L)	10/97 — Referred to reporter, chair, and Agenda Subc 11/98 — Cmte declined to act in light of earlier action taken at March 1998 meeting **COMPLETED**
[CV68] — Party may make a settlement offer that raises the stakes of the offeree who would continue the litigation	Agenda book for 11/92 meeting; Judge Swearingen 10/30/96 (96-CV-C); S. 79 Civil Justice Fairness Act of 1997 and § 3 of H.R. 903	1/21/93 — Unofficial solicitation of public comment 5/93, 10/93, 4/94 — Considered by cmte 4/94 — Federal Judicial Center agrees to study rule 10/94 — Delayed for further consideration 1995 — Federal Judicial Center completes its study **DEFERRED INDEFINITELY** 10/96 — Referred to reporter, chair, and Agenda Subc. (Advised of past comprehensive study of proposal) 1/97 — S. 79 introduced § 303 would amend the rule 4/97 — Stotler letter to Hatch 5/97 — Reporter recommends continued monitoring 3/99 — Agenda Subc rec. Remove from agenda (5) **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV73(b)] — Consent of additional parties to magistrate judge jurisdiction	Judge Easterbrook 1/95	4/95 — Initially brought to cmte's attention 11/95 — Delayed for review, no pressing need 10/96 — Considered along with repeal of CV74, 75, and 76 5/97 — Reporter recommends continued monitoring 3/99 — Agenda Subc rec. Remove from agenda (5) **PENDING FURTHER ACTION**
[CV 74,75, and 76] — Repeal to conform with statute regarding alternative appeal route from magistrate judge decisions	Federal Courts Improvement Act of 1996 (96-CV-A) #1558	10/96 — Recommend repeal rules to conform with statute and transmit to ST Cmte 1/97 — Approved by ST Cmte 3/97 — Approved by Jud Conf 4/97 — Approved by Sup Ct 12/97 — Effective **COMPLETED**
[CV 77(b)] — Permit use of audiotapes in courtroom	Glendora 9/3/96 (96-CV-H) #1975	12/96 — Referred to reporter and chair 5/97 — Reporter recommends that other Conf. Cmte should handle the issue 3/99 — Agenda Subc rec. Remove from agenda (5) **PENDING FURTHER ACTION**
[CV77(d)] — Fax noticing to produce substantial cost savings while increasing efficiency and productivity	Michael E. Kunz, Clerk of Court 9/10/97 (97-CV-N)	9/97 — Mailed to reporter, chair, and Agenda Subc 3/99 — Agenda Subc rec. Ready for consideration by full comte (4) 4/99 — request publication **PENDING FURTHER ACTION**
[CV77(d)] — Facsimile service of notice to counsel	William S. Brownell, District Clerks Advisory Group 10/20/97 (CV-Q)	11/97 — Referred to reporter, chair, and Agenda Subc 3/99 — Agenda Subc rec. Ready for consideration by full comte (4) **PENDING FURTHER ACTION**
[CV77.1] — Sealing orders		10/93 — Considered 4/94 — No action taken **DEFERRED INDEFINITELY**
[CV81] — To add injunctions to the rule	John J. McCarthy 11/21/97	12/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV 81(a)(2)] — Inconsistent time period vs. Habeas Corpus rule 1(b)	Judge Mary Feinberg 1/28/97 (97-CV-E) #2164	2/97 — Referred to reporter, chair, and Agenda Subc. 5/97 — Considered and referred to Criminal Rules Cmte for coordinated response 3/99 — Agenda Subc rec. Hold until more information available (2) **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV81(a)(1)] — Applicability to D.C. mental health proceedings	Joseph Spaniol, 10/96	10/96 — Cmte considered 5/97 — Reporter recommends consideration as part of a technical amendment package 10/98 — Cmte. includes it in package submitted to Stg. Cmte. for publication 1/99 — Stg. Cmte. approves for publication **PENDING FURTHER ACTION**
[CV81(a)(1)] — Applicability to copyright proceedings and substitution of notice of removal for petition for removal	see request on copyright	11/98 — Request for publication 1/99 — Stg. Cmte. approves for publication **PENDING FURTHER ACTION**
[CV81(c)] — Removal of an action from state courts — technical conforming change deleting "petition"	Joseph D. Cohen 8/31/94	4/95 — Accumulate other technical changes and submit eventually to Congress 11/95 — Reiterated April 1995 decision 5/97 — Reporter recommends that it be included in next technical amendment package 3/99 — Agenda Subc rec. Accumulate for periodic revision (1) 4/99 — Cmte considered **PENDING FURTHER ACTION**
[CV82] — To delete obsolete citation	Charles D. Cole, Jr., Esq. 11/3/99 (99-CV-G)	12/99 — Referred to reporter, chair, and Agenda Subcommittee **PENDING FURTHER ACTION**
[CV83(a)(1)] — Uniform effective date for local rules and transmission to AO		3/98 — Cmte considered 11/98 — Draft language considered 3/99 — Agenda Subc rec. Refer to other comte (3) **PENDING FURTHER ACTION**
[CV83] — Negligent failure to comply with procedural rules; local rule uniform numbering		5/93 — Recommend for publication 6/93 — Approved for publication 10/93 — Published for comment 4/94 — Revised and approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CV83(b)] — Authorize Conference to permit local rules inconsistent with national rules on an experimental basis		4/92 — Recommend for publication 6/92 — Withdrawn at Stg. Comte meeting **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV84] — Authorize Conference to amend rules		5/93 — Considered by cmte 4/94 — Recommend no change **COMPLETED**
[Recycled Paper and Double-Sided Paper]	Christopher D. Knopf 9/20/95	11/95 — Considered by cmte **DEFERRED INDEFINITELY**
[Pro Se Litigants] — To create a committee to consider the promulgation of a specific set of rules governing cases filed by pro se litigants	Judge Anthony J. Battaglia, on behalf of the Federal Magistrate Judge Assn. Rules Cmte, to support proposal by Judge David Piester 7/17/97 (97-CV-I);	7/97 — Mailed to reporter and chair 10/97 — Referred to Agenda Subc 3/99 — Agenda Subc rec. Schedule for further study (3) **PENDING FURTHER ACTION**
[CV Form 1] — Standard form AO 440 should be consistent with with summons Form 1	Joseph W. Skupniewitz, Clerk 10/2/98 (98-CV-F)	10/98 — Referred to chair, reporter, and Agenda Subc 3/99 — Agenda Subc rec. Ready for full comte consideration (4) **PENDING FURTHER ACTION**
[CV Form 17] Complaint form for copyright infringement	Professor Edward Cooper 10/27/97	10/97 — Referred to cmte 3/99 — Agenda Subc rec. Ready for full comte consideration (4) **PENDING FURTHER ACTION**
[Adoption of form complaints for prisoner actions]	Iyass Suliman, prisoner 8/3/99 (99-CV-F)	8/99 Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[Interrogatories on Disk]	Michelle Ritz 5/13/98 (98-CV-C); see also Jeffrey Yencho suggestion re: Rules 3 and 34 (99-CV-E)	5/98 — Referred to reporter, chair, and Agenda Subc 3/99 — Agenda Subc rec. Refer to other comte (3) **PENDING FURTHER ACTION**
[To change standard AO forms 241 and 242 to reflect amendments in the law under the Antiterrorism and Effective Death Penalty Act of 1997]	Judge Harvey E. Schlesinger 8/10/98 (98-CV-D)	8/98 — Referred to reporter, chair, and Agenda Subc 3/99 — Agenda Subc rec. Refer to other comte (3) **PENDING FURTHER ACTION**

AGENDA DOCKETING

ADVISORY COMMITTEE ON CRIMINAL RULES

Proposal	Source, Date, and Doc #	Status
[CR 4] — Require arresting officer to notify pretrial services officer, U.S. Marshal, and U.S. Attorney of arrest	Local Rules Project	10/95 — Subc appointed 4/96 — Rejected by subc **COMPLETED**
[CR 5] — Video Teleconferencing of Initial Appearances and Arraignments	Judge Fred Biery 5/98	5/98 — Referred to chair and reporter for consideration 10/98 — Referred to subcmte 10/99 — Approved for publication by advisory cmte **PENDING FURTHER ACTION**
[CR 5] — To allow initial appearances, arraignments, attorney status hearings, and possibly petty pleas to be taken by video conferencing.	Judge Durwood Edwards 6/98	6/98 — Referred to chair and reporter for consideration 10/98 — Referred to subcmte 10/99 — Approved for publication by advisory cmte **PENDING FURTHER ACTION**
[CR 5(a)] — Time limit for hearings involving unlawful flight to avoid prosecution arrests	DOJ 8/91; 8/92	10/92 — Subc appointed 4/93 — Considered 6/93 — Approved for publication 9/93 — Published for public comment 4/94 — Revised and forwarded to ST Cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CR 5(c)] — Eliminate consent requirement for magistrate judge consideration	Judge Swearingen 10/28/96 (96-CR-E)	1/97 — Sent to reporter 4/97 — Recommends legislation to ST Cmte 6/97 — Recommitted by ST Cmte 10/97—Adv. Cmte declines to amend provision. 3/98 — Jud Conf instructs rules cmtes to propose amendment 4/98 — Approves amendment, but defers until style project completed 6/98 — Stg Cmte concurs with deferral 6/99 — Considered 10/99 — Approved for publication by advisory cmte **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 5.1] — Extend production of witness statements in CR26.2 to 5.1.	Michael R. Levine, Asst. Fed. Defender 3/95	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Approved by ST Cmte 8/96— Published for public comment 4/97— Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[CR 6] — Statistical reporting of indictments	David L. Cook AO 3/93	10/93 — Cmte declined to act on the issue **COMPLETED**
[CR6(a)] — Reduce number of grand jurors	H.R. 1536 introduced by Cong Goodlatte	5/97 — Introduced by Congressman Goodlatte, referred to CACM with input from Rules Cmte 10/97—Adv Cmte unanimously voted to oppose any reduction in grand jury size. 1/98—ST Cmte voted to recommend that the Judicial Conference oppose the legislation. 3/98 — Jud Conf concurs **COMPLETED**
[CR 6(d)] — Allow witness to be accompanied into grand jury by counsel	Omnibus Approp. Act (P.L.105-277)	10/98 — Considered; Subcomm. Appointed 1/99 — Stg Cmte approved subcomm rec. not to allow representation 3/99 — Jud Conf approves report for submission to Congress **COMPLETED**
[CR 6(d)] — Interpreters allowed during grand jury	DOJ 1/22/97 (97-CR-B)	1/97 — Sent directly to chair 4/97 — Draft presented and approved for request to publish 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Approved by Stg Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. 12/1— Effective **COMPLETED**
[CR 6(e)] — Intra-Department of Justice use of Grand Jury materials	DOJ	4/92 — Rejected motion to send to ST Cmte for public comment 10/94 — Discussed and no action taken **COMPLETED**
[CR 6(e)(3)(C)(iv)] — Disclosure of Grand Jury materials to State Officials	DOJ	4/96 — Cmte decided that current practice should be reaffirmed 10/99 — Approved for publication by advisory cmte **COMPLETED**
[CR 6(e)(3)(C)(iv)] — Disclosure of Grand Jury materials to State attorney discipline agencies	Barry A. Miller, Esq. 12/93	10/94 — Considered, no action taken **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR6(f)] — Return by foreperson rather than entire grand jury	DOJ 1/22/97 (97-CR-A)	1/97 — Sent directly to chair 4/97— Draft presented and approved for publication 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Approved by Stg Cmte 9/98 — Approved by Judicial Conference 4/99 — Approved by Sup. Ct. 12/1— Effective **COMPLETED**
[CR7(c)(2)] — Reflect proposed new Rule 32.2 governing criminal forfeitures		4/97— Draft presented and approved for publication 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of R. 32.2 rejection by Stg. Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference — 1/99— Approved by Stg Cmte 3/99— Approved by Jud Conf **COMPLETED**
[CR 8(c) — Apparent mistake in federal Rules Governing §§ 2255 and 2254	Judge peter C. Dorsey 7/9/97 (97-CR-F)	8/97 — Referred to reporter and chair 10/97—referred to subcmte for study **PENDING FURTHER ACTION**
[CR 10] — Arraignment of detainees through video teleconferencing; Defendant's presence not required	DOJ 4/92	4/92 — Deferred for further action 10/92 — Subc appointed 4/93 — Considered 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Action deferred, pending outcome of FJC pilot programs 10/94 — Considered 4/98 —Draft amendments considered, but subcmte appointed to further study 10/98 — Considered by cmte; reporter to redraft and submit at next meeting 4/99 — Considered 10/99— Approved for publication by advisory cmte **PENDING FURTHER ACTION**
[CR 10] — Guilty plea at an arraignment	Judge B. Waugh Crigler 10/94	10/94 — Suggested and briefly considered **DEFERRED INDEFINITELY**
[CR 11] — Magistrate judges authorized to hear guilty pleas, and inform accused of possible deportation	James Craven, Esq. 1991	4/92 — Disapproved **COMPLETED**
[CR 11] — Advise defendant of impact of negotiated factual stipulation	David Adair & Toby Slawsky, AO 4/92	10/92 — Motion to amend withdrawn **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 11(c)] — Advise defendant of any appeal waiver provision which may be contained in plea agreement	Judge Maryanne Trump Barry 7/19/96 (96-CR-A)	10/96 — Considered, draft presented 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to Stg Cmte 6/98 — Approved by Stg Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. 12/99— Effective **COMPLETED**
[CR 11(d)] — Examine defendant's prior discussions with an government attorney	Judge Sidney Fitzwater 11/94 & 3/99	4/95 — Discussed and no motion to amend **COMPLETED** 3/99 — Sent to chair and reporter **PENDING FURTHER ACTION**
[CR 11(e)] — Judge, other than the judge assigned to hear case, may take part in plea discussions	Judge Jensen 4/95	10/95 — Considered 4/96 —Tabled as moot, but continued study by subcmte on other Rule 11 issues **DEFERRED INDEFINITELY**
[CR 11(e)(4) — Binding Plea Agreement (Hyde decision)	Judge George P. Kazen 2/96	4/96 — Considered 10/96 — Considered 4/97 — Deferred until Sup Ct decision **COMPLETED**
[CR 11(e)(1) (A)(B) and (C)] — Sentencing Guidelines effect on particular plea agreements	CR Rules Committee 4/96	4/96 — To be studied by reporter 10/96 — Draft presented and considered 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to Stg Cmte 6/98 — Approved by Stg Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. 12/99 — Effective **COMPLETED**
[CR 11]—Pending legislation regarding victim allocution	Pending legislation 97-98	10/97—Adv Cmte expressed view that it was not opposed to addressing the legislation and decided to keep the subcmte in place to monitor/respond to the legislation.
[CR 11(e)(6) — Court required to inquire whether the defendant is entitled to an adjustment for acceptance of responsibility	Judge John W. Sedwick 10/98 (98-CR-C)	**PENDING FURTHER ACTION**
[CR 12] — Inconsistent with Constitution	Paul Sauers 8/95	10/95 — Considered and no action taken **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 12(b)] — Entrapment defense raised as pretrial motion	Judge Manuel L. Real 12/92 & Local Rules Project	4/93 — Denied 10/95 — Subcmte appointed 4/96 — No action taken **COMPLETED**
[CR 12(i)] — Production of statements		7/91 — Approved by ST Cmte for publication 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR12.2]—authority of trial judge to order mental examination.	Presented by Mr. Pauley on behalf of DOJ at 10/97 meeting.	10/97—Adv Cmte voted to consider draft amendment at next meeting. 4/98 — Deferred for further study of constitutional issues 10/98 — Considered draft amendments, continued for further study 4/99 — Considered **PENDING FURTHER ACTION**
[CR 16] — Disclosure to defense of information relevant to sentencing	John Rabiej 8/93	10/93 — Cmte took no action **COMPLETED**
[CR 16] — Prado Report and allocation of discovery costs	'94 Report of Jud Conf	4/94 — Voted that no amendment be made to the CR rules **COMPLETED**
[CR 16] — Prosecution to inform defense of intent to introduce extrinsic act evidence	CR Rules Committee '94	10/94 — Discussed and declined **COMPLETED**
[CR 16(a)(1)] — Disclosure of experts		7/91 — Approved by for publication by St Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 16(a)(1)(A)] — Disclosure of statements made by organizational defendants	ABA	11/91 — Considered 4/92 — Considered 6/92 — Approved by ST Cmte for publication, but deferred 12/92 — Published 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 16(a)(1)(C)] — Government disclosure of materials implicating defendant	Prof. Charles W. Ehrhardt 6/92 & Judge O'Brien	10/92 — Rejected 4/93 — Considered 4/94 — Discussed and no motion to amend **COMPLETED**
[CR 16(a)(1)(E)] — Require defense to disclose information concerning defense expert testimony	Jo Ann Harris, Asst. Atty. Gen., CR Div., DOJ 2/94; clarification of the word "complies" Judge Propst (97-CR-C)	4/94 — Considered 6/94 — Approved for publication by ST Cmte 9/94 — Published for public comment 7/95 — Approved by ST Cmte 9/95 — Rejected by Jud Conf. 1/96 — Discussed at ST meeting 4/96 — Reconsidered and voted to resubmit to ST Cmte 6/96 — Approved by ST Cmte 9/96 — Approved by Jud Conf 4/97 — Approved by Sup Ct 12/97 — Effective **COMPLETED** 3/97 — Referred to reporter and chair 10/98 — Incorporated in proposed amendments to Rule 12.2 **PENDING FURTHER ACTION**
[CR 16(a) and (b)] — Disclosure of witness names and statements before trial	William R. Wilson, Jr., Esq. 2/92 5/18/99 (99-CR-D)	2/92 — No action 10/92 — Considered and decided to draft amendment 4/93 — Deferred until 10/93 10/93 — Considered 4/94 — Considered 6/94 — Approved for publication by ST Cmte 9/94 — Published for public comment 4/95 — Considered and approved 7/95 — Approved by ST Cmte 9/95 — Rejected by Jud Conf **COMPLETED** 5/99— Sent to chair and reporter **PENDING FURTHER ACTION**
[CR 16(d)] — Require parties to confer on discovery matters before filing a motion	Local Rules Project & Mag Judge Robert Collings 3/94	10/94 — Deferred 10/95 — Subcmte appointed 4/96 — Rejected by subcmte **COMPLETED**
[CR23(b)] — Permits six-person juries in felony cases	S. 3 introduced by Sen Hatch 1/97	1/97 — Introduced as § 502 of the Omnibus Crime Prevention Act of 1997 10/97—Adv. Cmte voted to oppose the legislation 1/98— ST Cmte expressed grave concern about any such legislation. **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 24(a)] — Attorney conducted voir dire of prospective jurors	Judge William R. Wilson, Jr. 5/94	10/94 — Considered 4/95 — Considered 6/95 — Approved for publication by ST Cmte 9/95 — Published for public comment 4/96 — Rejected by advisory cmte, but should be subject to continued study and education; FJC to pursue educational programs **COMPLETED**
[CR 24(b)] — Reduce or equalize peremptory challenges in an effort to reduce court costs	Renewed suggestions from judiciary; Judge Acker (97-CR-E); pending legislation S-3.	2/91 — ST Cmte, after publication and comment, rejected CR Cmte 1990 proposal 4/93 — No motion to amend 1/97 — Omnibus Crime Control Act of 1997 (S.3) introduced [Section 501] 6/97 — Stotler letter to Chairman Hatch **COMPLETED** 10/97—Adv. Cmte decided to take no action on proposal to randomly select petit and venire juries and abolish peremptory challenges. 10/97—Adv. Cmte directed reporter to prepare draft amendment equalizing peremptory challenges at 10 per side. 4/98 — Approved by 6 to 5 vote and will be included In style package **PENDING FURTHER ACTION**
[CR 24(c)] — Alternate jurors to be retained in deliberations	Judge Bruce M. Selya 8/96 (96-CR-C)	10/96 — Considered and agreed to in concept; reporter to draft appropriate implementing language 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to Stg Cmte 6/98 — Approved by Stg Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. **COMPLETED**
[CR 26] — Questioning by jurors	Prof. Stephen Saltzburg	4/93 — Considered and tabled until 4/94 4/94 — Discussed and no action taken **COMPLETED**
[CR 26] — Expanding oral testimony, including video transmission	Judge Stotler 10/96	10/96 — Discussed 4/97 — Subcmte will be appointed 10/97—Subcmte recommended amendment. Adv Cmte voted to consider a draft amendment at next meeting. 4/98 — Deferred for further study 10/98 — Cmte approved, but deferred request to publish until spring meeting or included in style package 4/99 — Considered 10/99 — Approved for publication by advisory cmte **PENDING FURTHER ACTION**
[CR 26] — Court advise defendant of right to testify	Robert Potter	4/95 — Discussed and no motion to amend **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 26.2] — Production of statements for proceedings under CR 32(e), 32.1(c), 46(i), and Rule 8 of § 2255		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 26.2] — Production of a witness' statement regarding preliminary examinations conducted under CR 5.1	Michael R. Levine, Asst. Fed. Defender 3/95	10/95 — Considered by cmte 4/96 — Draft presented and approved 6/96 — Approved by ST Cmte 8/96 — Published for public comment 4/97— Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Jud Conf approves 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[CR26.2(f)] — Definition of Statement	CR Rules Cmte 4/95	4/95 — Considered 10/95 — Considered and no action to be taken **COMPLETED**
[CR 26.3] — Proceedings for a mistrial		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 29(b)] — Defer ruling on motion for judgment of acquittal until after verdict	DOJ 6/91	11/91 — Considered 4/92 — Forwarded to ST Cmte for public comment 6/92 — Approved for publication, but delayed pending move of RCSO 12/92 — Published for public comment on expedited basis 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**
[CR 30] — Permit or require parties to submit proposed jury instructions before trial	Local Rules Project	10/95 — Subcmte appointed 4/96 — Rejected by subcmte **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 30] — discretion in timing submission of jury instructions	Judge Stotler 1/15/97 (97-CR-A)	1/97 — Sent directly to chair and reporter 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Deferred for further study 10/98 — Considered by cmte, but deferred pending Civil Rules Cmte action on CV 51 **PENDING FURTHER ACTION**
[CR 31] — Provide for a 5/6 vote on a verdict	Sen. Thurmond, S.1426, 11/95	4/96 — Discussed, rulemaking should handle it **COMPLETED**
[CR 31(d)] — Individual polling of jurors	Judge Brooks Smith	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Approved by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[31(e)] — Reflect proposed new Rule 32.2 governing criminal forfeitures		4/97— Draft presented and approved for publication 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of rejection of R. 32.2 by Stg Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference 1/99— Approved by Stg Cmte 3/99 — Approved by Jud Conf **COMPLETED**
[CR 32] — Amendments to entire rule; victims' allocution during sentencing	Judge Hodges, before 4/92; pending legislation reactivated issue in 1997/98.	10/92 — Forwarded to ST Cmte for public comment 12/92 — Published 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED** 10/97—Adv Cmte expressed view that it was not opposed to addressing the legislation and decided to keep the subcmte in place to monitor/respond to the legislation. **PENDING FURTHER ACTION**
[CR 32]—mental examination of defendant in capital cases	Extension of amendment to CR 12.2(DOJ) at 10/97 meeting.	10/97— Adv Cmte voted to proceed with the drafting of an amendment. 10/98 — Incorporated in proposed amendments to Rule 12.2 **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 32]—release of presentence and related reports	Request of Criminal Law Committee	10/98 — Reviewed recommendation of subcomm and agreed that no rules necessary **COMPLETED**
[CR 32(d)(2) — Forfeiture proceedings and procedures reflect proposed new Rule 32.2 governing criminal forfeitures	Roger Pauley, DOJ, 10/93	4/94 — Considered 6/94 — Approved by ST Cmte for public comment 9/94 — Published for public comment 4/95 — Revised and approved 6/95 — Approved by ST Cmte 9/95 — Approved by Jud Conf 4/96 — Approved by Sup Ct 12/96 — Effective **COMPLETED** 4/97— Draft presented and approved for publication 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of rejection of R. 32.2 by Stg Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference 1/99— Approved by Stg Cmte 3/99 — Approved by Jud Conf **COMPLETED**
[CR 32(e)] — Delete provision addressing probation and production of statements (later renumbered to CR32(c)(2))	DOJ	7/91 — Approved by ST Cmte for publication 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective **COMPLETED**
[CR 32.1] — Production of statements		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 32.1]— Technical correction of "magistrate" to "magistrate judge."	Rabiej (2/6/98)	2/98—Letter sent advising chair & reporter 4/98 — Approved, but deferred until style project completed **PENDING FURTHER ACTION**
[CR 32.1]—pending victims rights/allocution litigation	Pending litigation 1997/98.	10/97—Adv Cmte expressed view that it was not opposed to addressing the legislation and decided to keep the subcmte in place to monitor/respond to the legislation. **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 32.2] — Create forfeiture procedures	John C. Keeney, DOJ, 3/96 (96-CR-D)	10/96 — Draft presented and considered 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Rejected by Stg Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference 1/99 — Approved by Stg Cmte 3/99 — Approved by Jud Conf **COMPLETED**
[CR 33] — Time for filing motion for new trial on ground of newly discovered evidence	John C. Keeney, DOJ 9/95	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[CR 35(b)] — Recognize combined pre-sentencing and post-sentencing assistance	Judge T. S. Ellis, III 7/95	10/95 — Draft presented and considered 4/96 — Forwarded to ST Cmte 6/96 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[CR 35(b)] To permit sentence reduction when defendant assists government before or within 1 year after sentence	Judge Ed Carnes 3/99 (99-CR-A)	3/99— Referred to chair and reporter
[CR 35(b)] To resolve conflict in circuits	Asst. Attorney Gen./ Crim. Div. 4/99 (99-CR-C)	3/99— Referred to chair and reporter
[CR 35(b)] — Recognize assistance in any offense	S.3, Sen Hatch 1/97	1/97 — Introduced as § 602 and 821 of the Omnibus Crime Prevention Act of 1997 6/97 — Stotler letter to Chairman Hatch **COMPLETED**
[CR 35(c)] — Correction of sentence, timing	Jensen, 1994 9th Cir. decision	10/94 — Considered 4/95 — No action pending restylization of CR Rules 4/99 — Considered **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR35(b)] — Substantial asssistance provided after one year	Judge Edward E. Carnes 3/99 (99-CR-A)	**PENDING FURTHER ACTION**
[CR 38(e)] — Conforming amendment to CR 32.2		4/97— Draft presented and approved for publication 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of rejection of R. 32.2 by Stg Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference 1/99— Approved by Stg Cmte 3/99 — Approved by Jud Conf **COMPLETED**
[CR 40] — Commitment to another district (warrant may be produced by facsimile)		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 40] —Treat FAX copies of documents as certified	Mag Judge Wade Hampton 2/93	10/93 — Rejected **COMPLETED**
[CR 40(a)] — Technical amendment conforming with change to CR5	Criminal Rules Cmte 4/94	4/94 — Considered, conforming change no publication necessary 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CR 40(a)] —Proximity of nearest judge for removal proceedings	Mag Judge Robert B. Collings 3/94	10/94 — Considered and deferred further discussion until 4/95 10/96 — Considered and rejected **COMPLETED**
[CR 40(d)] — Conditional release of probationer; magistrate judge sets terms of release of probationer or supervised release	Magistrate Judge Robert B. Collings 11/92	10/92 — Forwarded to ST Cmte for publication 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**
[CR 41] — Search and seizure warrant issued on information sent by facsimile		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 41] — Warrant issued by authority within the district	J.C. Whitaker 3/93	10/93 — Failed for lack of a motion **COMPLETED**
[CR 41(c)(2)(D)] — recording of oral search warrant	J. Dowd 2/98	4/98 — Tabled until study reveals need for change **DEFERRED INDEFINITELY**
[CR 41(c)(1) and (d) — enlarge time period	Judge B. Waugh Crigler 11/98 (98-CR-D)	**PENDING FURTHER ACTION**
[CR 41(d)] — covert entry for purposes of observation only	DOJ 9/2/99	10/99 — Considered **PENDING FURTHER ACTION**
[CR 41(d)] — tracking devices	DOJ 7/15/99	10/99 — Considered **PENDING FURTHER ACTION**
[CR 43(b)] —Sentence absent defendant	DOJ 4/92	10/92 — Subcmte appointed 4/93 — Considered 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Deleted video teleconferencing provision & forwarded to ST Cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CR 43(b)] — Arraignment of detainees by video teleconferencing		10/98 — Subcmte appointed 4/99 — Considered **PENDING FURTHER ACTION**
[CR 43(c)(4)] — Defendant need not be present to reduce or change a sentence	John Keeney, DOJ 1/96	4/96 — Considered 6/96 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[CR 43(c)(5) — Defendant to waive personal arraignment on subsequent, superseding indictments and enter plea of not guilty in writing	Judge Joseph G. Scoville, 10/16/97 (97-CR-I) and Mario Cano 97---	10/97 — Referred to reporter and chair 4/98 —Draft amendments considered, subcmte appointed 10/98 — Cmte considered; reporter to submit draft at next meeting **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 46] — Production of statements in release from custody proceedings		6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 46] — Release of persons after arrest for violation of probation or supervised release	Magistrate Judge Robert Collings 3/94	10/94 — Defer consideration of amendment until rule might be amended or restylized **PENDING FURTHER ACTION**
[CR 46] — Requirements in AP 9(a) that court state reasons for releasing or detaining defendant in a CR case	11/95 Stotler letter	4/96 — Discussed and no action taken **COMPLETED**
[CR 46 (e)] — Forfeiture of bond	H.R. 2134	4/98 — Opposed amendment **COMPLETED**
[CR 46(i)] — Typographical error in rule in cross-citation	Jensen	7/91 — Approved for publication by ST Cmte 4/94 — Considered 9/94 — No action taken by Jud Conf because Congress corrected error **COMPLETED**
[CR 47] — Require parties to confer or attempt to confer before any motion is filed	Local Rules Project	10/95 — Subcmte appointed 4/96 — Rejected by subcmte **COMPLETED**
[CR 49] — Double-sided paper	Environmental Defense Fund 12/91	4/92 — Chair informed EDF that matter was being considered by other cmtes in Jud Conf **COMPLETED**
[CR 49(c)] — Fax noticing to produce substantial cost savings while increasing efficiency and productivity	Michael E. Kunz, Clerk of Court 9/10/97 (97-CR-G)	9/97 — Mailed to reporter and chair 4/98 — Referred to Technology Subcmte 4/99 — Considered **PENDING FURTHER ACTION**
[CR49(c)] — Facsimile service of notice to counsel	William S. Brownell, 10/20/97 (CR-J)	11/97 — Referred to reporter and chair, pending Technology Subcmte study 4/99 — Considered **PENDING FURTHER ACTION**
[CR 49(e)] —Delete provision re filing notice of dangerous offender status — conforming amendment	Prof. David Schlueter 4/94	4/94 — Considered 6/94 — ST Cmte approved without publication 9/94 — Jud Conf approved 4/95 — Sup Ct approved 12/95 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR53] — Cameras in the courtroom		7/93 — Approved by ST Cmte 10/93 — Published 4/94 — Considered and approved 6/94 — Approved by ST Cmte 9/94 — Rejected by Jud Conf 10/94 — Guidelines discussed by cmte **COMPLETED**
[CR54] — Delete Canal Zone	Roger Pauley, minutes 4/97 mtg	4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to Stg Cmte 6/98 —Approved by Stg Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. 12/99— Effective **COMPLETED**
[CR 57] — Local rules technical and conforming amendments & local rule renumbering	ST meeting 1/92	4/92 — Forwarded to ST Cmte for public comment 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Forwarded to ST Cmte 12/95 — Effective **COMPLETED**
[CR 57] — Uniform effective date for local rules	Stg Cmte meeting 12/97	4/98 — Considered an deferred for further study **PENDING FURTHER ACTION**
[CR 58] — Clarify whether forfeiture of collateral amounts to a conviction	Magistrate Judge David G. Lowe 1/95	4/95 — No action **COMPLETED**
[CR 58 (b)(2)] — Consent in magistrate judge trials	Judge Philip Pro 10/24/96 (96- CR-B)	1/97 — Reported out by CR Rules Cmte and approved by ST Cmte for transmission to Jud Conf without publication; consistent with Federal Courts Improvement Act 4/97 — Approved by Sup Ct 12/97 — Effective **COMPLETED**
[CR 59] — Authorize Judicial Conference to correct technical errors with no need for Supreme Court & Congressional action	Report from ST Subcommittee on Style	4/92 — Considered and sent to ST Cmte 6/93 — Approved for publication by ST Cmte 10/93 — Published for public comment 4/94 — Approved as published and forwarded to ST Cmte 6/94 — Rejected by ST Cmte **COMPLETED**
[Megatrials] — Address issue	ABA	11/91 — Agenda 1/92 — ST Cmte, no action taken **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[Rule 8. Rules Governing §2255] — Production of statements at evidentiary hearing		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[Rules Governing Habeas Corpus Proceedings]— miscellaneous changes to Rule 8 & Rule 4 for §2255 & §2254 proceedings	CV Cmte	10/97 — Subcmte appointed 4/98 — Considered; further study 10/98 — Cmte approved some proposals and deferred others for further consideration **PENDING FURTHER ACTION**
[CR8(c)] — Apparent mistakes in Federal Rules Governing § 2255 and § 2254	Judge Peter Dorsey 7/9/97 (97-CR-F)	8/97 — Referred to reporter 10/97 — Referred to subcmte 4/98 — Cmte considered 10/98 — Cmte considered **PENDING FURTHER ACTION**
[U.S. Attorneys admitted to practice in Federal courts]	DOJ 11/92	4/93 — Considered **COMPLETED**
[Restyling CR Rules]		10/95 — Considered 4/96 — On hold pending consideration of restyled AP Rules published for public comment 4/98 — Advised that Style Subc intends to complete first draft by the end of the year 12/98 — Style subcmte completes its draft 4/99 — Considered Rules 1-9 6/99 — Considered Rules 1-22 **PENDING FURTHER ACTION**
Style: Rules 1-9	SubCmte A	4/99 — Considered

AGENDA DOCKETING

ADVISORY COMMITTEE ON EVIDENCE RULES

Proposal	Source, Date, and Doc #	Status
[EV 101] — Scope		6/92 — Approved by ST Cmte. 9/92 — Approved by Jud. Conf. 4/93 — Approved by Sup. Ct. 12/93 — Effective 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 102 — Purpose and Construction		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 103] — Ruling on EV		9/93 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 103(a)] — When an *in limine* motion must be renewed at trial (earlier proposed amendment would have added a new Rule 103(e))		9/93 — Considered 5/94 — Considered 10/94 — Considered 1/95 — Approved for publication by ST Cmte. 5/95 — Considered. Note revised. 9/95 — Published for public comment 4/96 — Considered 11/96 — Considered. Subcommittee appointed to draft alternative. 4/97 — Draft requested for publication 6/97 — ST Cmte. recommitted to advisory cmte for further study 10/97 — Request to publish revised version 1/98 — Approved for publication by ST Cmte. 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — Stg Comte approved 9/99 — Judicial Conference Approved **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[EV104] — Preliminary Questions		9/93 — Considered 1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 105] — Limited Admissibility		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 106] — Remainder of or Related Writings or Recorded Statements		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 106] — Admissibility of "hearsay" statement to correct a misimpression arising from admission of part of a record	Prof. Daniel Capra (4/97)	4/97 — Reporter to determine whether any amendment is appropriate 10/97 — No action necessary **COMPLETED**
[EV 201] — Judicial Notice of Adjudicative Facts		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Decided not to amend **COMPLETED**
[EV 201(g)] — Judicial Notice of Adjudicative Facts		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Decided to take no action **DEFERRED INDEFINITELY**
[EV 301] — Presumptions in General Civil Actions and Proceedings. (Applies to evidentiary presumptions but not substantive presumptions.)		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Deferred until completion of project by Uniform Rules Committee **PENDING FURTHER ACTION**
[EV 302] — Applicability of State Law in Civil Actions and Proceedings		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 401] — Definition of "Relevant Evidence"		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 402] — Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 403] — Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 404] — Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes	Sen. Hatch S.3, § 503 (1/97)(dealing with 404(a)	9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 10/94 — Considered with EV 405 as alternative to EV 413-415 4/97 — Considered 6/97 — Stotler letter to Hatch on S.3 10/97 — Recommend publication 1/98 — Approved for publication by the ST Cmte. 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — Stg Comte approved 9/99 — Judicial Conference Approved **PENDING FURTHER ACTION**
[EV 404(b)] — Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes: Other crimes, wrongs, or acts. (Uncharged misconduct could only be admitted if the probative value of the evidence substantially outweighs the prejudicial effect.)	Sen. Hatch S.3, § 713 (1/97)	9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 10/94 — Discussed 11/96 — Considered and rejected any amendment 4/97 — Considered 6/97 — Stotler letter to Hatch on S.3 10/97 — Proposed amendment in the Omnibus Crime Bill rejected **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 405] — Methods of Proving Character. (Proof in sexual misconduct cases.)		9/93 — Considered 5/94 — Considered 10/94 — Considered with EV 404 as alternative to EV 413-415 **COMPLETED**
[EV 406] — Habit; Routine Practice		10/94 — Decided not to amend (Comprehensive Review) 1/95 — Approved for publication by ST Cmte. **COMPLETED**
[EV 407] — Subsequent Remedial Measures. (Extend exclusionary principle to product liability actions, and clarify that the rule applies only to measures taken after injury or harm caused by a routine event.)	Subcmte. reviewed possibility of amending (Fall 1991)	4/92 — Considered and rejected by CR Rules Cmte. 9/93 — Considered 5/94 — Considered 10/94 — Considered 5/95 — Considered 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Approved & submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by ST Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 12/97 — Enacted **COMPLETED**
[EV 408] — Compromise and Offers to Compromise		9/93 — Considered 5/94 — Considered 1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 409] — Payment of Medical and Similar Expenses		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
EV 410] — Inadmissibility of Pleas, Plea Discussions, and Related Statements		9/93 — Considered and recommended for CR Rules Cmte. **COMPLETED**
[EV 411] — Liability Insurance		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 412] — Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition	Prof. David Schlueter (4/92); Prof. Stephen Saltzburg (4/92)	4/92 — Considered by CR Rules Cmte. 10/92 — Considered by CR Rules Cmte. 10/92 — Considered by CV Rules Cmte. 12/92 — Published 5/93 — Public Hearing, Considered by EV Cmte. 7/93 — Approved by ST Cmte. 9/93 — Approved by Jud. Conf. 4/94 — Recommitted by Sup. Ct. with a change 9/94 — Sec. 40140 of the Violent Crime Control and Law Enforcement Act of 1994 (superseding Sup. Ct. action) 12/94 — Effective **COMPLETED**
[EV 413] — Evidence of Similar Crimes in Sexual Assault Cases		5/94 — Considered 7/94 — Considered by ST Cmte. 9/94 — Added by legislation 1/95 — Considered 1/95 — Reported to but disregarded by Congress 7/95 — Effective **COMPLETED**
[EV 414] — Evidence of Similar Crimes in Child Molestation Cases		5/94 — Considered 7/94 — Considered by ST Cmte. 9/94 — Added by legislation 1/95 — Considered 1/95 — Reported to but disregarded by Congress 7/95 — Effective **COMPLETED**
[EV 415] — Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation		5/94 — Considered 7/94 — Considered by ST Cmte. 9/94 — Added by legislation 1/95 — Considered 1/95 — Reported to but disregarded by Congress 7/95 — Effective **COMPLETED**
[EV 501] — General Rule. (Guarantee that the confidentiality of communications between sexual assault victims and their therapists or trained counselors be adequately protected in Federal court proceedings.)	42 U.S.C., § 13942(c) (1996)	10/94 — Considered 1/95 — Considered 11/96 — Considered 1/97 — Considered by ST Cmte. 3/97 — Considered by Jud. Conf. 4/97 — Reported to Congress **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 501] — Privileges, extending the same attorney-client privilege to in-house counsel as to outside counsel		11/96 — Decided not to take action 10/97 — Rejected proposed amendment to extend the same privilege to in-house counsel as to outside counsel 10/98 — Subcmte appointed to study the issue **COMPLETED**
[Privileges] — To codify the federal law of privileges	EV Rules Committee (11/96)	11/96 — Denied 10/98 — Cmte. reconsidered and appointed a subcmte to further study the issue 4/99 — Considered pending further study 10/99 — Subcomte established to study **PENDING FURTHER ACTION**
[EV 501] Parent/Child Privilege	Proposed Legislation	4/98 — Considered; draft statement in opposition prepared **COMPLETED**
[EV 601] — General Rule of Competency		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 602] — Lack of Personal Knowledge		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 603] — Oath or Affirmation		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 604] — Interpreters		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 605] — Competency of Judge as Witness		9/93 — Considered 10/94 — Decided not to amend (Comprehensive Review) 1/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 606] — Competency of Juror as Witness		9/93 — Considered 10/94 — Decided not to amend (Comprehensive Review) 1/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 607] —Who May Impeach		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 608] — Evidence of Character and Conduct of Witness		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 608(b)] — Inconsistent rulings on exclusion of extrinsic evidence		10/99 — Considered **PENDING FURTHER ACTION**
[EV 609] — Impeachment by EV of Conviction of Crime. See 404(b)		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Considered 4/97 — Declined to act **COMPLETED**
[EV 609(a) — Amend to include the conjunction "or" in place of "and" to avoid confusion.	Victor Mroczka 4/98 (98-EV-A)	5/98 — Referred to chair and reporter for consideration 10/98 — Cmte declined to act **COMPLETED**
[EV 610] — Religious Beliefs or Opinions		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 611] — Mode and Order of Interrogation and Presentation		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 611(b)] — Provide scope of cross-examination not be limited by subject matter of the direct		4/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Decided not to proceed **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 612] — Writing Used to Refresh Memory		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 613] — Prior Statements of Witnesses		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 614] — Calling and Interrogation of Witnesses by Court		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 615] — Exclusion of Witnesses. (Statute guarantees victims the right to be present at trial under certain circumstances and places some limits on rule, which requires sequestration of witnesses. Explore relationship between rule and the Victim's Rights and Restitution Act of 1990 and the Victim Rights Clarification Act of 1997 passed in 1996.)	42 U.S.C., § 10606 (1990)	9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Considered 4/97 — Submitted for approval without publication 6/97 — Approved by ST Cmte. 9/97 — Approved by Jud. Conf. 4/98 — Sup Ct approved 12/98 — Effective **COMPLETED**
[EV 615] — Exclusion of Witnesses	Kennedy-Leahy Bill (S. 1081)	10/97 — Response to legislative proposal considered; members asked for any additional comments **COMPLETED**
[EV 701] — Opinion testimony by lay witnesses		10/97 — Subcmte. formed to study need for amendment 4/98 — Recommend publication 6/98 — Stg. Cmte approves request to publish 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — Stg Comte approved 9/99 — Judicial Conference Approved **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[EV 702] — Testimony by Experts	H.R. 903 and S. 79 (1997)	2/91 — Considered by CV Rules Cmte. 5/91 — Considered by CV Rules Cmte. 6/91 — Approved for publication by ST Cmte. 8/91 — Published for public comment by CV Rules Cmte. 4/92 — Considered and revised by CV and CR Rules Cmtes. 6/92 — Considered by ST Cmte. 4/93 — Considered 5/94 — Considered 10/94 — Considered 1/95 — Considered (Contract with America) 4/97 — Considered. Reporter tasked with drafting proposal. 4/97 — Stotler letters to Hatch and Hyde 10/97 — Subcmte. formed to study issue further 4/98 — Recommend publication 6/98 — Stg. Cmte approves request to publish 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — Stg Comte approved 9/99 — Judicial Conference Approved **PENDING FURTHER ACTION**
[EV 703] — Bases of Opinion Testimony by Experts. (Whether rule, which permits an expert to rely on inadmissible evidence, is being used as means of improperly evading hearsay rule.)		4/92 — Considered by CR Rules Cmte. 6/92 — Considered by ST Cmte. 5/94 — Considered 10/94 — Considered 11/96 — Considered 4/97 — Draft proposal considered. 10/97 — Subcmte. formed to study issue further 4/98 — Recommend publication 6/98 — Stg. Cmte approves request to publish 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — Stg Comte approved 9/99 — Judicial Conference Approved **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[EV 705] — Disclosure of Facts or Data Underlying Expert Opinion		5/91 — Considered by CV Rules Cmte. 6/91 — Approved for publication by ST Cmte. 8/91 — Published for public comment by CV Rules Cmte. 4/92 — Considered by CV and CR Rules Cmtes 6/92 — Approved by ST Cmte. 9/92 — Approved by Jud. Conf. 4/93 — Approved by Sup. Ct. 12/93 — Effective **COMPLETED**
[EV 706] — Court Appointed Experts. (To accommodate some of the concerns expressed by the judges involved in the breast implant litigation, and to determine whether the rule should be amended to permit funding by the government in civil cases.)	Carnegie (2/91)	2/91 — Tabled by CV Rules Cmte. 11/96 — Considered 4/97 — Considered. Deferred until CACM completes their study. **PENDING FURTHER ACTION**
[EV 801(a-c)] — Definitions: Statement; Declarant; Hearsay		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 801(d)(1)] — Definitions: Statements which are not hearsay. Prior statement by witness.		1/95 — Considered and approved for publication 5/95 — Decided not to amend (Comprehensive Review) 9/95 — Published for public comment **COMPLETED**
[EV 801(d)(1)] Hearsay exception for prior consistent statements that would otherwise be admissible to rehabilitate a witness's credibility	Judge Bullock	4/98 — Considered; tabled **PENDING FURTHER ACTION**
[EV 801(d)(2)] — Definitions: Statements which are not hearsay. Admission by party-opponent. (*Bourjaily*)	Drafted by Prof. David Schlueter, Reporter, 4/92	4/92 — Considered and tabled by CR Rules Cmte 1/95 — Considered by ST Cmte. 5/95 — Considered draft proposed 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 802] — Hearsay Rule		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 803(1)-(5)] — Hearsay Exceptions; Availability of Declarant Immaterial		1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 803(6)] — Hearsay Exceptions; Authentication by Certification (See Rule 902 for parallel change)	Roger Pauley, DOJ 6/93	9/93 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 11/96 — Considered 4/97 — Draft prepared and considered. Subcommittee appointed for further drafting. 10/97 — Draft approved for publication 1/98 — Approved for publication by the ST Cmte. 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved 6/99 — Stg Comte approved 9/99 — Judicial Conference Approved **PENDING FURTHER ACTION**
[EV 803(7)-(23)] — Hearsay Exceptions; Availability of Declarant Immaterial		1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 803(8)] — Hearsay Exceptions; Availability of Declarant Immaterial: Public records and reports.		9/93 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered regarding trustworthiness of record 11/96 — Declined to take action regarding admission on behalf of defendant **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 803(24)] — Hearsay Exceptions; Residual Exception	EV Rules Committee (5/95)	5/95 — Combined with EV804(b)(5) and transferred to a new Rule 807. 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 803(24)] — Hearsay Exceptions; Residual Exception (Clarify notice requirements and determine whether it is used too broadly to admit dubious evidence)		10/96 — Considered and referred to reporter for study 10/97 — Declined to act **COMPLETED**
[EV 804(a)] — Hearsay Exceptions; Declarant Unavailable: Definition of unavailability	Prof. David Schlueter (4/92); Prof. Stephen Saltzburg (4/92)	4/92 — Considered by CR Rules Cmte. 6/92 — Considered by ST Cmte. for publication 1/95 — Considered and approved for publication 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 804(b)(1)-(4)] — Hearsay Exceptions		10/94 — Considered 1/95 — Considered and approved for publication by ST Cmte. 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 804(b)(3)] — Degree of corroboration regarding declaration against penal interest		10/99 — Considered by comte **PENDING FURTHER ACTION**
[EV 804(b)(5)] — Hearsay Exceptions; Other exceptions		5/95 — Combined with EV804(b)(5) and transferred to a new Rule 807. 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 804(b)(6)] — Hearsay Exceptions; Declarant Unavailable. (To provide that a party forfeits the right to object on hearsay grounds to the admission of a statement made by a declarant whose unavailability as a witness was procured by the party's wrongdoing or acquiescence.)	Prof. David Schlueter (4/92); Prof. Stephen Saltzburg (4/92)	4/92 — Considered by CR Rules Cmte. 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by ST Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 805] — Hearsay Within Hearsay		1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 806] — Attacking and Supporting Credibility of Declarant. (To eliminate a comma that mistakenly appears in the current rule. Technical amendment.)	EV Rules Committee 5/95	5/95 — Decided not to amend 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 806] — To admit extrinsic evidence to impeach the character for veracity of a hearsay declarant		11/96 — Declined to act **COMPLETED**
[EV 807] — Other Exceptions. Residual exception. The contents of Rule 803(24) and Rule 804(b)(5) have been combined to form this new rule.	EV Rules Committee 5/95	5/95 — This new rule is a combination of Rules 803(24) and 804(b)(5). 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 10/96 — Expansion considered and rejected 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 807] — Notice of using the provisions	Judge Edward Becker	4/96 — Considered 11/96 — Reported. Declined to act. **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 901] — Requirement of Authentication or Identification		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 902] — Self-Authentication		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — Stg Comte approved **COMPLETED**
[EV 902] — Use of seals		10/99 — Comte considered **PENDING FURTHER ACTION**
[EV 902(6)] — Extending applicability to news wire reports	Committee member (10/98)	10/98 — to be considered when and if other changes to the rule are being considered **PENDING FURTHER ACTION**
[EV 902 (11) and (12)] — Self-Authentication of domestic and foreign records (See Rule 803(6) for consistent change)		4/96 — Considered 10/97 — Approved for publication 1/98 — Approved for publication by the ST Cmte. 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — ST Cmte Approved 9/99 — Judicial Conference Approved **PENDING FURTHER ACTION**
[EV 903] — Subscribing Witness' Testimony Unnecessary		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1001] — Definitions		9/93 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1001] — Definitions (Cross references to automation changes)		10/97 — Considered **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[EV 1002] — Requirement of Original. Technical and conforming amendments.		9/93 — Considered 10/93 — Published for public comment 4/94 — Recommends Jud. Conf. make technical or conforming amendments 5/95 — Decided not to amend 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1003] — Admissibility of Duplicates		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1004] — Admissibility of Other Evidence of Contents		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1005] — Public Records		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1006] — Summaries		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1007] — Testimony or Written Admission of Party		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1008] — Functions of Court and Jury		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1101] — Applicability of Rules		6/92 — Approved by ST Cmte. 9/92 — Approved by Jud. Conf. 4/93 — Approved by Sup. Ct. 12/93 — Effective 5/95 — Decided not to amend 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/98 — Considered 10/98 — Reporter submits report; cmte declined to act **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 1102] — Amendments to permit Jud. Conf. to make technical changes	CR Rules Committee (4/92)	4/92 — Considered by CR Rules Cmte. 6/92 — Considered by ST Cmte. 9/93 — Considered 6/94 — ST Cmte. did not approve 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1103] — Title		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[Admissibility of Videotaped Expert Testimony]	EV Rules Committee (11/96)	11/96 — Denied but will continue to monitor 1/97 — Considered by ST Cmte. **PENDING FURTHER ACTION**
[Attorney-client privilege for in-house counsel]	ABA resolution (8/97)	10/97 — Referred to chair 10/97 — Denied **COMPLETED**
[Automation] — To investigate whether the EV Rules should be amended to accommodate changes in automation and technology	EV Rules Committee (11/96)	11/96 — Considered 4/97 — Considered 4/98 — Considered **PENDING FURTHER ACTION**
[Circuit Splits] — To determine whether the circuit splits warrant amending the EV Rules		11/96 — Considered 4/97 — Considered **COMPLETED**
[Obsolete or Inaccurate Rules and Notes] — To identify where the Rules and/or notes are obsolete or inaccurate.	EV Rules Committee (11/96)	5/93 — Considered 9/93 — Considered. Cmte. did not favor updating absent rule change 11/96 — Considered 1/97 — Considered by the ST Cmte. 4/97 — Considered and forwarded to ST Cmte. 10/97 — Referred to FJC 1/98 — ST Cmte. Informed of reference to FJC 6/98 — Reporter's Notes published **COMPLETED**
[Statutes Bearing on Admissibility of EV] — To amend the EV Rules to incorporate by reference all of the statutes identified, outside the EV Rules, which regulate the admissibility of EV proffered in federal court		11/96 — Considered 4/97 — Considered and denied **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[Sentencing Guidelines] — Applicability of EV Rules		9/93 — Considered 11/96 — Decided to take no action **COMPLETED**

Item 4

Agenda Item IV
Committee on Rules of
Practice and Procedure
January 2000
Information

FEDERAL JUDICIAL CENTER UPDATE

This is a brief update of Judicial Center training and research projects and activities that may be of interest to the Committee on Rules of Practice and Procedure. The research projects described below are only a few of the many projects undertaken by the Center, many of them in support of this and other Judicial Conference committees. The educational programs noted here represent a small number of the seminars, workshops, and in-court programs offered in person or electronically by the Center.

I. Selected Research Projects

A. Disclosure of Financial Interests of Parties in Federal Cases. At the request of the chair of the Committee on Rules of Practice and Procedure, we examined existing requirements in appellate, district, and bankruptcy courts for parties to disclose financial interests. Our report provides information on: (1) the scope of financial information required by the courts and (2) the means used by courts and judges to require parties to submit such information. Interim reports were presented at the fall 1999 meetings of the Advisory Committees on Appellate, Civil, and Bankruptcy Rules, which will use the information to help determine the form a disclosure rule should take.

B. Civil Litigation Management Manual (with AOUSC). The Civil Justice Reform Act instructs the Judicial Conference to prepare a manual on litigation management and cost and delay reduction. The litigation manual is being developed for the Committee on Court Administration and Case Management as a joint FJC/AOUSC project. Staff is assisted by two liaison judges from CACM as well as by an advisory group of seven judges.

C. Discovery of Electronic Documents/Evidence. In anticipation of a possible upcoming need of the Advisory Committee on Civil Rules, we are designing and undertaking a project to examine issues arising out of the discovery of electronic documents and evidence in the federal courts. We expect to complete this project and report our findings by the fall of next year.

D. Electronic Evidence in the Courtroom. This is an internally generated project that will help the Center to focus on specific empirical studies that should be undertaken on the subject of electronic evidence in the courtroom. A major goal is to develop a typology of what is generally considered as electronic evidence. Our work will rely

on social and behavioral science research that addresses the unique evidentiary issues that arise with various types of electronic evidence. We also expect that our effort will help to encourage and influence research by others on this subject.

E. **Options for Revising District Court Case Weights.** At the request of the Statistics Subcommittee of the Judicial Resources Committee, we prepared a brief report discussing a number of options for revising the current case weights.

F. **Special Masters.** A subcommittee of the Advisory Committee on Civil Rules asked the Center to conduct an empirical study of the variety of current uses of special masters in the district courts. Our study assessed the functions of special masters appointed under Fed. R. Civ. P. 53, with particular attention to problems that have arisen in connection with special masters, and the need, if any, for changes in the current rules. We expect to do a follow-up study to examine compensation of special masters, related activities of magistrate judges, and courts' use of other adjuncts under Rule 53. The results of this phase of the study will be available by the Spring of next year.

G. **Template for Appellate Chief Judges' Deskbook.** We have prepared a template or outline for this deskbook in response to requests from chief circuit judges. The Center has produced a companion volume, *Deskbook for Chief District Judges* (2nd ed. 1993), which the Judicial Conference Bankruptcy Committee and the Administrative Office used to create a separate *Deskbook for Chief Judges of United States Bankruptcy Courts* (2nd ed. 1995). The template is intended to assist each circuit to prepare its own chief judge's deskbook. The administrative procedures in the 13 circuits are sufficiently diverse to make impractical a common desk reference for them. It would be equally impractical for the Center to fashion and maintain a deskbook for each circuit.

II. Selected Federal Judicial History Research

The following are examples of projects undertaken in response to the Center's statutory mission to "conduct, coordinate, and encourage programs relating to the history of the judicial branch." As with the rest of this report, not listed are technical assistance activities and numerous responses to information requests.

A. **Landmark Statutes in the History of the Organization and Administration of the Federal Judiciary.** The Center's Federal Judicial History Office completed the selection and editing of twenty-five landmark statutes in the history of the organization and administration of the federal judiciary. The texts of these acts will be presented on the Center's Web page with an introductory note explaining the historical importance of each.

B. Biographical Database Reference Reports. The History Office has prepared a series of reference reports drawn from the federal judges' biographical database. Samples of the reports, which demonstrate the research potential of the database, will be published in the next edition of the newsletter, *The Court Historian.*

C. Internet Judicial Biographical Database. Working with the Center's Office of Systems Innovation and Development, the History Office has begun the transfer of the judges' biographical database to an internet application. This database of the service record of judges since 1789 will be available on line as part of an expanded history section of the Center's Web page.

III. Selected Programs on the Federal Judicial Television Network

The Center continues to manage the Federal Judicial Television Network (FJTN) and the teletraining studio in the Thurgood Marshall Building. To aid viewers, the Center produces the *FJTN Bulletin*, which lists and describes broadcasts from the Center, AO, and the USSC.

A. Programs for Judges. Currently scheduled Center educational programs primarily for judges include the annual review of the Supreme Court's decisions in the 1998-99 term, an overview of the Alternative Dispute Resolution Act of 1998, and an update on bankruptcy law. In September, shortly after new law clerks begin their appointments, the Center will air a revised two-day Orientation Program for Law Clerks. The Center encourages judges to build in-court orientation programs for law clerks around this broadcast.

B. Programs for Court Staff. Among the original broadcasts scheduled for court staff are new editions in three of the Center's series for probation and pretrial services officers: substance abuse, guidelines and sentencing, and special needs offenders; management training programs for all supervisors; a program on working with multidefendant criminal cases for all staff, and video magazines that illustrate how individual courts adapt to new procedures and processes, such as total quality service.

IV. Selected Educational Programs for Judges and Court Staff

In addition to training offered through the Federal Judicial Television Network as noted above, the Center uses seminars, workshops, local court programs and computer- and audio-based conferences to provide educational programs for judges and court staff.

A. **Judges.** Examples of some of the programs completed this past year and those scheduled for the upcoming year include:

1. **Seminar for Court of Appeals Judges.** In October 1999, the Center presented a three-day seminar for court of appeals judges. The workshop, which was on the craft of judging, included discussions of opinion writing, the relationship of courts of appeals and district courts, and methods for dealing with increasing caseloads.

2. **Mediation Workshops for Bankruptcy and Magistrate Judges.** On November 10-12, 1999, the Center conducted a mediation workshop for magistrate judges. The program emphasized development of core mediation skills through intensive, hands-on training. Another workshop will be held February 28-March 2, 2000.

3. **Conference for District Court ADR Administrators.** In response to the 1998 ADR Act's requirement that each district court appoint a judge or staff member to administer its ADR program, the Center held a conference December 13-15, 1999 for district court ADR administrators. The purpose of the program, which was funded by a Hewlett Foundation gift to the Center's Foundation, was to give those who hold this relatively new position an opportunity to discuss the range of responsibilities and issues they may encounter.

4. **Case Management Workshop.** The Center will conduct a Case Management Workshop for about thirty district and magistrate judges in Atlanta, GA, August 1-4, 2000.

B. Court Staff. Highlights of educational offerings for court staff scheduled for the next several months include:

- in-court training to give employees in operational support positions an understanding of the knowledge, skills, and attitudes needed to do their jobs effectively;
- in-court training to sharpen probation and pretrial services officers' testifying skills;
- three updated training guides to enhance in-court orientation programs for new officers and supervisors and to assist all officers in conducting financial investigations;
- an April workshop for teams of chief district judges and clerks to identify the critical elements of executive teamwork;
- a national conference in May for chief probation and pretrial services officers;
- national orientation seminars for officers;
- a new class of mid-level managers in the three year Federal Court Leadership Program; and
- on-line, video, or audioconferences to provide advanced training for operations managers, deputies-in-charge, chief deputies, and court training specialists.

Item 5A

DATE: December 3, 1999

TO: Judge Anthony J. Scirica, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Will Garwood, Chair
Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on October 21 and 22 in Tucson, Arizona. At that meeting, the Advisory Committee approved numerous items for action by the Standing Committee. The Advisory Committee also removed several other items from its study agenda. Detailed information about the Advisory Committee's activities can be found in the minutes of the meeting and in the Committee's docket, both of which are attached to this report.

II. Action Items

The restylized Federal Rules of Appellate Procedure ("FRAP") took effect on December 1, 1998. As you no doubt recall, the Advisory Committee decided that further amendments to FRAP would not be forwarded to the Standing Committee until the bench and bar had an opportunity to become accustomed to the restylized rules. The Advisory Committee has continued to approve proposed amendments — and we have kept the Standing Committee appraised of our actions — but to date we have not sought permission to publish those proposed rule changes.

The bench and bar have now had over a year to become accustomed to the restylized rules. Moreover, any proposed amendments to FRAP would not be published until August 2000, giving the bench and bar another nine months to work with the restylized rules before being asked to comment on proposed changes to those rules. The Advisory Committee now seeks the Standing Committee's permission to publish the following proposed amendments in August 2000:

A. Rule 1(b)

The Advisory Committee proposes abrogating Rule 1(b), which provides that "[t]hese rules do not extend or limit the jurisdiction of the courts of appeals."

In 1990, Congress amended the Rules Enabling Act to give the Supreme Court authority to use the federal rules of practice and procedure to define when a ruling of a district court is final for purposes of 28 U.S.C. § 1291. In 1992, Congress amended 28 U.S.C. § 1292 to give the Supreme Court authority to use the federal rules of practice and procedure to provide for appeals of interlocutory decisions that are not already authorized by § 1292. Both § 1291 and § 1292 are unquestionably jurisdictional statutes, and thus, as soon as FRAP is amended to define finality for purposes of the former or to authorize interlocutory appeals not provided for by the latter, FRAP will "extend or limit the jurisdiction of the courts of appeals," and Rule 1(b) will become obsolete. For that reason, the Advisory Committee proposes that Rule 1(b) be abrogated.

This amendment was approved by the Advisory Committee at its October 1998 meeting.

Rule 1. Scope of Rules; Title

(b) ~~**Rules Do Not Affect Jurisdiction.** These rules do not extend or limit the jurisdiction of the courts of appeals.~~ [Abrogated]

Committee Note

Subdivision (b). Two recent enactments make it likely that, in the future, one or more of the Federal Rules of Appellate Procedure ("FRAP") will extend or limit the jurisdiction of the courts of appeals. In 1990, Congress amended the Rules Enabling Act to give the Supreme Court authority to use the federal rules of practice and procedure to define when a ruling of a district court is final for purposes of 28 U.S.C. § 1291. *See* 28 U.S.C. § 2072(c). In 1992, Congress amended 28 U.S.C. § 1292 to give the Supreme Court authority to use the federal rules of practice and procedure to provide for appeals of interlocutory decisions that are not already authorized by 28 U.S.C. § 1292. *See* 28 U.S.C. § 1292(e). Both § 1291 and § 1292 are unquestionably jurisdictional statutes, and thus, as soon as FRAP is amended to define finality for purposes of the former or to authorize interlocutory appeals not provided for by the latter, FRAP will "extend or limit the jurisdiction of the courts of appeals," and subdivision (b) will become obsolete. For that reason, subdivision (b) has been abrogated.

B. Rule 4(a)(1)

The courts of appeals have split on the question whether an appeal from an order granting or denying an application for a writ of error *coram nobis* is governed by the time limitations of Rule 4(a) (which apply in civil cases) or by the time limitations of Rule 4(b) (which apply in

criminal cases). The Advisory Committee proposes to resolve this conflict by amending Rule 4(a)(1) to make it clear that the time limitations of Rule 4(a) apply to appeals from *coram nobis* dispositions.

There is some doubt about whether, in the view of the Supreme Court, writs of error *coram nobis* continue to exist. As the Committee Note emphasizes, the Advisory Committee takes no position on that issue. Rather, the amendment simply provides that *if* such writs continue to exist, appeals from orders that grant or deny those writs are governed by Rule 4(a).

This amendment was approved by the Advisory Committee at its April 1998 meeting.

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(C) An appeal from an order granting or denying an application for a writ of error *coram nobis* is an appeal in a civil case for purposes of Rule 4(a).

Committee Note

Subdivision 4(a)(1)(C). The federal courts of appeals have reached conflicting conclusions about whether an appeal from an order granting or denying an application for a writ of error *coram nobis* is governed by the time limitations of Rule 4(a) (which apply in civil cases) or by the time limitations of Rule 4(b) (which apply in criminal cases). *Compare United States v. Craig*, 907 F.2d 653, 655-57, *amended* 919 F.2d 57 (7th Cir. 1990); *United States v. Cooper*, 876 F.2d 1192, 1193-94 (5th Cir. 1989); and *United States v. Keogh*, 391 F.2d 138, 140 (2d Cir. 1968) (applying the time limitations of Rule 4(a)); *with Yasui v. United States*, 772 F.2d 1496, 1498-99 (9th Cir. 1985); and *United States v. Mills*, 430 F.2d 526, 527-28 (8th Cir. 1970)

(applying the time limitations of Rule 4(b)). A new part (C) has been added to Rule 4(a)(1) to resolve this conflict by providing that the time limitations of Rule 4(a) will apply.

Subsequent to the enactment of Fed. R. Civ. P. 60(b) and 28 U.S.C. § 2255, the Supreme Court has recognized the continued availability of a writ of error *coram nobis* in at least one narrow circumstance. In 1954, the Court permitted a litigant who had been convicted of a crime, served his full sentence, and been released from prison, but who was continuing to suffer a legal disability on account of the conviction, to seek a writ of error *coram nobis* to set aside the conviction. *United States v. Morgan*, 346 U.S. 502 (1954). As the Court recognized, in the *Morgan* situation an application for a writ of error *coram nobis* "is of the same general character as [a motion] under 28 U.S.C. § 2255." *Id.* at 506 n.4. Thus, it seems appropriate that the time limitations of Rule 4(a), which apply when a district court grants or denies relief under 28 U.S.C. § 2255, should also apply when a district court grants or denies a writ of error *coram nobis*. In addition, the strong public interest in the speedy resolution of criminal appeals that is reflected in the shortened deadlines of Rule 4(b) is not present in the *Morgan* situation, as the party seeking the writ of error *coram nobis* has already served his or her full sentence.

Notwithstanding *Morgan*, it is not clear whether the Supreme Court continues to believe that the writ of error *coram nobis* is available in federal court. In civil cases, the writ has been expressly abolished by Fed. R. Civ. P. 60(b). In criminal cases, the Supreme Court has recently stated that it has become "'difficult to conceive of a situation'" in which the writ "'would be necessary or appropriate.'" *Carlisle v. United States*, 517 U.S. 416, 429 (1996) (quoting *United States v. Smith*, 331 U.S. 469, 475 n.4 (1947)). The amendment to Rule 4(a)(1) is not intended to express any view on this issue; rather, it is merely meant to specify time limitations for appeals.

Rule 4(a)(1)(C) applies only to motions that are in substance, and not merely in form, applications for writs of error *coram nobis*. Litigants may bring and label as applications for a writ of error *coram nobis* what are in reality motions for a new trial under Fed. R. Crim. P. 33 or motions for correction or reduction of a sentence under Fed. R. Crim. P. 35. In such cases, the time limitations of Rule 4(b), and not those of Rule 4(a), should be enforced.

C. Rule 4(a)(5)(A)(ii)

Rule 4(a)(5)(A) permits a district court to extend the time to file a notice of appeal if two conditions are met. First, the party seeking the extension must file its motion no later than 30 days after the expiration of the time originally prescribed by Rule 4(a). Second, the party seeking the extension must show either excusable neglect or good cause.

The text of Rule 4(a)(5)(A) does not distinguish between motions filed prior to the expiration of the original deadline and those filed after the expiration of the original deadline. Regardless of whether the motion is filed before or during the 30 days after the original deadline expires, Rule 4(a)(5)(A) provides that the district court may grant an extension if a party shows *either* excusable neglect *or* good cause.

Only the First Circuit applies Rule 4(a)(5)(A) as written. All other circuits hold that the good cause standard applies only to motions brought *prior* to the expiration of the original deadline and that the excusable neglect standard applies only to motions brought *after* the expiration of the original deadline. These courts have relied heavily upon the Advisory Committee Note to the 1979 amendment to Rule 4(a)(5), without realizing that the Note refers to a prior draft of the 1979 amendment that was ultimately rejected.

The proposed amendment is intended to resolve the circuit split by instructing the courts to apply Rule 4(a)(5)(A) as written. It will also bring Rule 4(a)(5)(A) into harmony in this respect with Rule 4(b)(4), as the Committee Note observes.

This amendment was approved by the Advisory Committee at its October 1998 meeting.

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(5) **Motion for Extension of Time.**

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) <u>regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires,</u> that party shows excusable neglect or good cause.

Committee Note

Subdivision (a)(5)(A)(ii). Rule 4(a)(5)(A) permits the district court to extend the time to file a notice of appeal if two conditions are met. First, the party seeking the extension must file its motion no later than 30 days after the expiration of the time originally prescribed by Rule 4(a). Second, the party seeking the extension must show either excusable neglect or good cause. The text of Rule 4(a)(5)(A) does not distinguish between motions filed prior to the expiration of the original deadline and those filed after the expiration of the original deadline. Regardless of whether the motion is filed before or during the 30 days after the original deadline expires, the district court may grant an extension if a party shows either excusable neglect or good cause.

Despite the text of Rule 4(a)(5)(A), most of the courts of appeals have held that the good cause standard applies only to motions brought prior to the expiration of the original deadline and that the excusable neglect standard applies only to motions brought after the expiration of the original deadline. *See Pontarelli v. Stone*, 930 F.2d 104, 109-10 (1st Cir.1991) (collecting cases from the Second, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits). These courts have relied heavily upon the Committee Note to the 1979 amendment to Rule 4(a)(5). What these courts have overlooked is that the Committee Note refers to a draft of the 1979 amendment that was ultimately rejected. The rejected draft directed that the good cause standard apply only to motions filed prior to the expiration of the original deadline. Rule 4(a)(5), as actually amended, did not. *See* 16A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3950.3, at 148-49 (2d ed. 1996).

The failure of the courts of appeals to apply Rule 4(a)(5)(A) as written has also created tension between that rule and Rule 4(b)(4). As amended in 1998, Rule 4(b)(4) permits the district court to extend the time for filing a notice of appeal in a *criminal* case for an additional 30 days upon a finding of excusable neglect or good cause. Both Rule 4(b)(4) and the Committee Note to the 1998 amendment make it clear that an extension can be granted for either excusable neglect or good cause, regardless of whether a motion for an extension is filed before or after the time prescribed by Rule 4(b) expires.

Rule 4(a)(5)(A)(ii) has been amended to correct this misunderstanding and to bring the rule in harmony in this respect with Rule 4(b)(4). A motion for an extension filed prior to the expiration of the original deadline may be granted if the movant shows either excusable neglect or good cause. Likewise, a motion for an extension filed during the 30 days following the expiration of the original deadline may be granted if the movant shows either excusable neglect or good cause.

D. Rule 4(a)(7)

FRCP 58 provides that, to be "effective," a "judgment" must be set forth on a separate document. "Judgment" is defined in FRCP 54(a) to include not only what are traditionally regarded as "judgments," but also "any order from which an appeal lies." Rule 4(a)(7), in turn, provides that a judgment or order is not "entered" for purposes of Rule 4(a) (which, *inter alia*, specifies when notices of appeal must be filed) until that judgment or order "is entered in compliance with Rule[] 58 . . . of the Federal Rules of Civil Procedure." Several circuit splits have arisen out of uncertainties about how Rule 4(a)(7)'s definition of when a judgment or order is "entered" interacts with FRCP 54(a)/58's definition of when a judgment or appealable order is "effective." The Advisory Committee proposes amending Rule 4(a)(7) to resolve four of those circuit splits.

1. The first circuit split is over the question whether Rule 4(a)(7) simply incorporates the separate document requirement as it exists in FRCP 54(a)/58, or whether Rule 4(a)(7) imposes a separate document requirement that is independent of and different from the separate document

requirement imposed by FRCP 54(a)/58. The amendment makes it clear that Rule 4(a)(7) does not independently impose a separate document requirement. Rather, it requires judgments and orders to be set forth on separate documents only when FRCP 54(a)/58 do.

2. The second circuit split is over the question whether, when a judgment or order is required to be set forth on a separate document but is not, the time to appeal the judgment or order ever begins to run. All of the circuits, save one, hold that parties have forever to appeal a judgment or order in these circumstances. The First Circuit disagrees and holds that parties will be deemed to have waived their right to have a judgment or order set forth on a separate document three months after the judgment or order is entered in the civil docket.

Under the amendment, a judgment or order will be treated as entered *for purposes of Rule 4(a)(7)* 150 days after the judgment or order is entered in the civil docket. On the 150th day, the time to appeal the judgment or order will begin to run, even if the judgment or order is one that must otherwise be set forth on a separate document under FRCP 54(a)/58, and even if the judgment or order has not been so set forth. This cap will ensure that parties will not have forever to appeal a judgment or order that should have been set forth on a separate document but was not.

3. The third circuit split is over the question whether the appellant may waive the separate document requirement, even when the appellee objects. In *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387 (1978), the Supreme Court held that the parties to an appeal may waive the separate document requirement. In other words, the Supreme Court held that although the parties do not *have* to appeal a judgment or order that has not been set forth on a separate document, the parties may *choose* to do so (assuming that the judgment or order is otherwise appealable). But the Supreme Court did not indicate whether the consent of all parties is necessary, or whether the appellant (for whose benefit the separate document requirement is imposed) may waive the requirement over the objection of the appellee.

The circuits have split. Some circuits permit an appellee to object to an attempted *Mallis* waiver and to force the appellant to return to the trial court, request entry of judgment on a separate document, and appeal a second time. Other courts disagree and permit *Mallis* waivers even if the appellee objects. The amendment codifies the Supreme Court's holding in *Mallis* and makes it clear that the decision whether to waive entry of a judgment or order on a separate document is the appellant's alone.

4. The final circuit split concerns the question whether an appellant who chooses to waive the separate document requirement must appeal within 30 days (60 days if the government is a party) from the entry in the civil docket of the judgment or order that should have been set forth on a separate document but was not. The majority of circuits hold that the appellant is under no such time constraint; according to these circuits, if a judgment or order has not been entered on a separate document, the time to appeal has never begun to run, and the appellant can choose to bring an appeal and waive the separate document requirement at any time. The minority of circuits disagree and embrace the approach taken by the Fifth Circuit in *Townsend v. Lucas*, 745 F.2d 933 (5th Cir. 1984). These courts reason that, if an appellant waives the separate document requirement, then the appeal is from the judgment or order that should have

been set forth on a separate document but was not. The time limitations of Rule 4(a)(1) apply to that appeal, so the appeal must be brought within 30 (or 60) days of the improperly entered judgment or order. If the appeal is not brought within that time period, then the separate document requirement cannot be waived; instead, the appellant must return to the district court, move for entry of the judgment or order on a separate document, and appeal from that properly entered judgment or order within 30 (or 60) days.

The Advisory Committee agrees with the majority of courts that have rejected the *Townsend* approach. The amendment has been drafted to avoid imposing the *Townsend* requirement, and the Committee Note explicitly rejects *Townsend*.

An earlier version of this amendment was approved by the Advisory Committee at its October 1998 meeting. That amendment was later withdrawn after the Advisory Committee questioned whether some of the assumptions upon which it had acted were accurate. After exhaustive research by Prof. Schiltz and extensive discussions at three different meetings, the Advisory Committee finally approved the amendment that appears below at its October 1999 meeting.

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(7) **Entry Defined.**

(A) A judgment or order is entered for purposes of this Rule 4(a)

(i) when it is entered in the civil docket in compliance with Rules ~~58~~ ~~and~~ 79(a) of the Federal Rules of Civil Procedure and,

(ii) if entry on a separate document is required by Rules 54(a) and 58 of the Federal Rules of Civil Procedure,

- when it is set forth on a separate document as required by Rules 54(a) and 58 of the Federal Rules of Civil Procedure, or
- 150 days after it is entered in the civil docket in compliance with Rule 79(a) of the Federal Rules of Civil Procedure,

whichever comes first.

(B) The failure to set forth a judgment or order on a separate document when required by Rules 54(a) and 58 of the Federal Rules of Civil Procedure does not invalidate an appeal from that judgment or order.

Committee Note

Subdivision (a)(7). Several circuit splits have arisen out of uncertainties about how Rule 4(a)(7)'s definition of when a judgment or order is "entered" interacts with the requirement in Fed. R. Civ. P. 58 that, to be "effective," a judgment must be set forth on a separate document. Rule 4(a)(7) has been amended to address those circuit splits.

1. The first circuit split addressed by the amendment concerns the extent to which orders that dispose of post-judgment motions must be set forth on separate documents. Under Rule 4(a)(4)(A), the filing of certain post-judgment motions tolls the time to appeal the underlying judgment until "entry" of the order disposing of the last such remaining motion. Rule 4(a)(7) provides that a judgment or order is "entered" for purposes of Rule 4(a) "when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure." Fed. R. Civ. P. 58, in turn, provides that a "judgment" is not "effective" until it is "set forth on a separate document," and Fed. R. Civ. P. 54(a) defines "judgement" as including "any order from which an appeal lies."

Courts have taken at least four approaches in deciding whether an order that disposes of a post-judgment motion must be set forth on a separate document before it is considered entered under Rule 4(a)(7):

First, some courts seem to interpret Rule 4(a)(7) to incorporate the separate document requirement as it exists in the Federal Rules of Civil Procedure. *See, e.g., United States v. Haynes*, 158 F.3d 1327, 1329 (D.C. Cir. 1998); *Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 229, 232-33 (1st Cir. 1992) (en banc); *RR Village Ass'n v. Denver Sewer Corp.*, 826 F.2d 1197, 1200-01 (2d Cir. 1987). Read in this manner, Rule 4(a)(7) does not itself impose a separate document requirement. Rather, it simply provides that when — and only when — Fed. R. Civ. P. 54(a) and 58 impose a separate document requirement, a judgment or order will not be treated as entered for purposes of Rule 4(a) until it is set forth on a separate document. Under this approach, then, whether an order disposing of a Rule 4(a)(4)(A) motion must be set forth on a separate document depends entirely on whether the order is one "from which an appeal lies." If it is, then the order is not entered under Rule 4(a)(7) until it is set forth on a separate document; if it is not, then the order is entered under Rule 4(a)(7) as soon as it is entered in the civil docket in compliance with Fed. R. Civ. P. 79(a).

Second, some courts seem to interpret Rule 4(a)(7) *independently* to impose a separate document requirement, and not just when Fed. R. Civ. P. 54(a) and 58 would, but on *all*

judgments and orders whose entry is of consequence under Rule 4(a). *See, e.g., Hard v. Burlington N. R.R. Co.*, 870 F.2d 1454, 1457-58 (9th Cir. 1989); *Allen ex rel. Allen v. Horinek*, 827 F.2d 672, 673 (10th Cir. 1987); *Stern v. Shouldice*, 706 F.2d 742, 746 (6th Cir. 1983); *Calhoun v. United States*, 647 F.2d 6, 8-10 (9th Cir. 1981). Under this approach, all orders disposing of Rule 4(a)(4)(A) motions must be set forth on separate documents before they are considered entered under Rule 4(a)(7). Whether an appeal lies from such an order is irrelevant.

Third, some courts hold that the separate document requirement applies to orders that *grant* post-judgment motions, but not to orders that *deny* post-judgment motions. *See, e.g., Copper v. City of Fargo*, 184 F.3d 994, 998 (8th Cir. 1999) (per curiam); *Marré v. United States*, 38 F.3d 823, 825 (5th Cir. 1994); *Hollywood v. City of Santa Maria*, 886 F.2d 1228, 1231-32 (9th Cir. 1989); *Charles v. Daley*, 799 F.2d 343, 346-47 (7th Cir. 1986). These courts reason that, when a post-judgment motion is denied, the original judgment remains in effect, and therefore entry of the order denying the motion on a separate document is unnecessary. When a post-judgment motion is granted, the original judgment is generally altered or amended, and the altered or amended judgment should be set forth on a separate document.

Finally, the Eleventh Circuit holds that the separate document requirement does not apply to *any* order that grants or denies a post-judgment motion, whether or not the order is one from which an appeal lies. Indeed, according to the Eleventh Circuit, the separate document requirement does not even apply to an altered or amended judgment. *See Wright v. Preferred Research, Inc.*, 937 F.2d 1556, 1560-61 (11th Cir. 1991).

Rule 4(a)(7) has been amended to adopt the first of these four approaches. Under the amended rule, a judgment or order is treated as entered under Rule 4(a)(7) when it is entered in the civil docket in compliance with Fed. R. Civ. P. 79(a), with one exception: If *Fed. R. Civ. P. 54(a) and 58* require that a particular judgment or order must be set forth on a separate document, then that judgment or order will not be treated as entered for purposes of Rule 4(a)(7) until it is so set forth (or, as explained below, until 150 days after its entry in the civil docket). Thus, whether an order disposing of a post-judgment motion must be set forth on a separate document before it is treated as entered depends entirely on whether the order is one "from which an appeal lies" under the law of the relevant circuit. If it is, then Fed. R. Civ. P. 54(a) and 58 require that it be set forth on a separate document, and it will not be treated as entered for purposes of Rule 4(a)(7) until it is so set forth (or until 150 days after its entry in the civil docket). If it is not, then it will be treated as entered for purposes of Rule 4(a)(7) as soon as it is entered in the civil docket, whether or not it is also set forth on a separate document.

2. The second circuit split addressed by the amendment concerns the following question: When a judgment or order is required to be set forth on a separate document under Fed. R. Civ. P. 54(a) and 58 but is not, does the time to appeal the judgment or order ever begin to run? According to every circuit except the First Circuit, the answer is "no." "A party safely may defer the appeal until Judgment Day if that is how long it takes to enter [the judgment or order on] the [separate] document." *In re Kilgus*, 811 F.2d 1112, 1117 (7th Cir. 1987). The First Circuit,

fearing that "long dormant cases could be revived years after the parties had considered them to be over" if Fed. R. Civ. P. 54(a) and 58 and Rule 4(a)(7) were applied literally, holds that parties will be deemed to have waived their right to have a judgment or order set forth on a separate document three months after the judgment or order is entered in the civil docket. *Fiore*, 960 F.2d at 236. Other circuits have rejected this three month cap as contrary to the relevant rules, *see, e.g.*, *Haynes*, 158 F.3d at 1331; *Hammack v. Baroid Corp.*, 142 F.3d 266, 270 (5th Cir. 1998); *Pack v. Burns Int'l Sec. Serv.*, 130 F.3d 1071, 1072-73 (D.C. Cir. 1997); *Rubin v. Schottenstein, Zox & Dunn*, 110 F.3d 1247, 1253 n.4 (6th Cir. 1997), *vacated on other grounds* 143 F.3d 263 (6th Cir. 1998) (en banc), although no court has questioned the wisdom of imposing such a cap as a matter of policy.

Rule 4(a)(7) has been amended to impose such a cap. As noted above, a judgment or order is treated as entered for purposes of Rule 4(a)(7) when it is entered in the civil docket, unless Fed. R. Civ. P. 54(a) and 58 require the judgment or order to be set forth on a separate document, in which case the judgment or order will not be treated as entered for purposes of Rule 4(a)(7) until it is so set forth. There is one exception: A judgment or order will be treated as entered *for purposes of Rule 4(a)(7)* — notwithstanding anything to the contrary in the Federal Rules of Civil Procedure — 150 days after the judgment or order is entered in the civil docket in compliance with Fed. R. Civ. P. 79(a). On the 150th day, the time to appeal the judgment or order will begin to run, even if the judgment or order is one that must otherwise be set forth on a separate document under Fed. R. Civ. P. 54(a) and 58, and even if the judgment or order has not been so set forth.

This cap will ensure that parties will not be given forever to appeal a judgment or order that should have been set forth on a separate document but was not. In the words of the First Circuit, "When a party allows a case to become dormant for such a prolonged period of time, it is reasonable to presume that it views the case as over. A party wishing to pursue an appeal and awaiting the separate document of judgment from the trial court can, and should, within that period file a motion for entry of judgment. This approach will guard against the loss of review for those actually desiring a timely appeal while preventing resurrection of litigation long treated as dead by the parties." *Fiore*, 960 F.2d at 236.

3. The third circuit split addressed by the amendment concerns whether the appellant may waive the separate document requirement over the objection of the appellee. In *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387 (1978) (per curiam), the Supreme Court held that the "parties to an appeal may waive the separate-judgment requirement of Rule 58." Specifically, the Supreme Court held that when a district court enters an order and "clearly evidence[s] its intent that the . . . order . . . represent[s] the final decision in the case," the order is a "final decision" for purposes of 28 U.S.C. § 1291, even if the order has not been set forth on a separate document for purposes of Fed. R. Civ. P. 58. *Id.* Such an order would not be "effective" — that is, the time to appeal the order would not begin to run, and thus a potential appellant would not *have* to appeal. However, such an order would be a "final decision" — and thus, a potential appellant *could* appeal if it wanted to.

Courts have disagreed about whether the consent of all parties is necessary to waive the separate document requirement. Some circuits permit appellees to object to attempted *Mallis* waivers and to force appellants to return to the trial court, request entry of judgment on a separate document, and appeal a second time. *See, e.g.*, *Selletti v. Carey*, 173 F.3d 104, 109-10 (2d Cir. 1999); *Williams v. Borg*, 139 F.3d 737, 739-40 (9th Cir.), *cert. denied*, 119 S. Ct. 353 (1998); *Silver Star Enters., Inc. v. M/V Saramacca*, 19 F.3d 1008, 1013 (5th Cir. 1994); *Whittington v. Milby*, 928 F.2d 188, 192 (6th Cir. 1991); *Wang Labs., Inc. v. Applied Computer Sciences, Inc.*, 926 F.2d 92, 96 (1st Cir. 1991); *Anoka Orthopaedic Assocs., P.A. v. Lechner*, 910 F.2d 514, 515 n.2 (8th Cir. 1990); *Long Island Lighting Co. v. Town of Brookhaven*, 889 F.2d 428, 430 (2d Cir. 1989). Other courts disagree and permit *Mallis* waivers even if the appellee objects. *See, e.g.*, *Haynes*, 158 F.3d at 1331; *Miller v. Artistic Cleaners*, 153 F.3d 781, 783-84 (7th Cir. 1998); *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1006 n.8 (3d Cir. 1994); *Mitchell v. Idaho*, 814 F.2d 1404, 1405 (9th Cir. 1987).

New Rule 4(a)(7)(B) is intended both to codify the Supreme Court's holding in *Mallis* and to make clear that the decision whether to waive entry of a judgment or order on a separate document is the appellant's alone. It is, after all, the appellant who needs a clear signal as to when the time to file a notice of appeal has begun to run. If the appellant chooses to bring an appeal without awaiting entry of the judgment or order on a separate document, then there is no reason why the appellee should be able to object. All that would result from honoring the appellee's objection would be delay. The appellant would return to the trial court, ask the court to enter the judgment or order on a separate document, and appeal again. "Wheels would spin for no practical purpose." *Mallis*, 435 U.S. at 385.

4. The final circuit split addressed by the amendment concerns the question whether an appellant who chooses to waive the separate document requirement must appeal within 30 days (60 days if the government is a party) from the entry in the civil docket of the judgment or order that should have been set forth on a separate document but was not. In *Townsend v. Lucas*, 745 F.2d 933 (5th Cir. 1984), the district court dismissed a 28 U.S.C. § 2254 action on May 6, 1983, but failed to enter judgment on a separate document. The plaintiff appealed on January 10, 1984. The Fifth Circuit held that the appeal was premature, in that the time to appeal the May 6 order had never begun to run because the May 6 order had not been set forth on a separate document. However, the Fifth Circuit said that it had to dismiss the appeal, rather than consider it on the merits, even though the parties were willing to waive the separate document requirement. The Fifth Circuit reasoned that, if the plaintiff waived the separate document requirement, then his appeal would be from the May 6 order, and if his appeal was from the May 6 order, then it was untimely under Rule 4(a)(1). By dismissing the appeal, the Fifth Circuit said, it was giving the plaintiff the opportunity to return to the district court, move for entry of judgment on a separate document, and appeal from that judgment within 30 days. *Id.* at 934. Several other cases have embraced the *Townsend* approach. *See, e.g.*, *Armstrong v. Ahitow*, 36 F.3d 574, 575 (7th Cir. 1994); *Hughes v. Halifax County Sch. Bd.*, 823 F.2d 832, 835-36 (4th Cir. 1987); *Harris v. McCarthy*, 790 F.2d 753, 756 n.1 (9th Cir. 1986).

Those cases are in the distinct minority. There are numerous cases in which courts have heard appeals that were not filed within 30 days (60 days if the government was a party) from the judgment or order that should have been set forth on a separate document but was not. *See, e.g.*, *Haynes*, 158 F.3d at 1330-31; *Pack*, 130 F.3d at 1073; *Rubin*, 110 F.3d at 1253; *Clough v. Rush*, 959 F.2d 182, 186 (10th Cir. 1992); *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1218-19 (9th Cir. 1990); *Allah v. Superior Court*, 871 F.2d 887, 890 (9th Cir. 1989); *Gregson & Assocs. Architects v. Virgin Islands*, 675 F.2d 589, 593 (3d Cir. 1982) (per curiam). In the view of these courts, the remand in *Townsend* was "precisely the purposeless spinning of wheels abjured by the Court in the [*Mallis*] case." 15B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3915, at 259 n.8 (3d ed. 1992).

The Advisory Committee agrees with the majority of courts that have rejected the *Townsend* approach. In drafting new Rule 4(a)(7)(B), the Advisory Committee has been careful to avoid phrases such as "otherwise timely appeal" that might imply an endorsement of *Townsend*.

E. Rule 4(b)(5)

The circuits disagree about whether the filing of a FRCrP 35(c) motion to correct a sentence tolls the time to appeal the underlying judgment of conviction and, if so, for how long. Rule 4(b)(3)(A) lists the motions that toll the time to appeal in a criminal case, and notably omits any mention of FRCrP 35(c) motions. Some courts have nonetheless held that the list of tolling motions in Rule 4(b)(3)(A) is not exclusive; that under the "*Healy* doctrine" of the common law, any "motion for reconsideration" is sufficient to toll the time to appeal; and that a FRCrP 35(c) motion is such a "motion for reconsideration."

The Advisory Committee proposes to amend Rule 4(b)(3)(A) to make it clear that the filing of a FRCP 35(c) motion does not toll the time to appeal.

This amendment (which was drafted by the Department of Justice) was approved by the Advisory Committee at its October 1999 meeting.

Rule 4. Appeal as of Right — When Taken

(b) Appeal in a Criminal Case.

(5) **Jurisdiction.** The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(c), nor does the filing of a motion under 35(c) affect the validity of a

notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(c) does not suspend the time for filing a notice of appeal from a judgment of conviction.

Committee Note

Subdivision (b)(5). Federal Rule of Criminal Procedure 35(c) permits a district court, acting within seven days after the imposition of sentence, to correct an erroneous sentence in a criminal case. Some courts have held that the filing of a motion for correction of a sentence suspends the time for filing a notice of appeal from the judgment of conviction. *See, e.g.*, *United States v. Carmouche*, 138 F.3d 1014, 1016 (5th Cir. 1998) (per curiam); *United States v. Morillo*, 8 F.3d 864, 869 (1st Cir. 1993). Those courts establish conflicting timetables for appealing a judgment of conviction after the filing of a motion to correct a sentence. In the First Circuit, the time to appeal is suspended only for the period provided by Fed. R. Crim. P. 35(c) for the district court to correct a sentence; the time to appeal begins to run again once seven days have passed after sentencing, even if the motion is still pending. By contrast, in the Fifth Circuit, the time to appeal does not begin to run again until the district court actually issues an order disposing of the motion.

Rule 4(b)(5) has been amended to eliminate the inconsistency concerning the effect of a motion to correct a sentence on the time for filing a notice of appeal. The amended rule makes it clear that the time to appeal continues to run, even if a motion to correct a sentence is filed. The amendment is consistent with Rule 4(b)(3)(A), which lists the motions that toll the time to appeal, and notably omits any mention of a Fed. R. Crim. P. 35(c) motion. The amendment also should promote certainty and minimize the likelihood of confusion concerning the time to appeal a judgment of conviction.

If a district court corrects a sentence pursuant to Fed. R. Crim. P. 35(c), the time for filing a notice of appeal of the corrected sentence under Rule 4(b)(1) would begin to run when the court enters a new judgment reflecting the corrected sentence.

F. Rule 5(c)

The Advisory Committee proposes that Rule 5(c) be amended to correct a typographical error that arose during the restyling of the appellate rules. The error is described in the Committee Note.

This amendment was approved by the Advisory Committee at its October 1999 meeting.

Rule 5. Appeal by Permission

(c) **Form of Papers; Number of Copies.** All papers must conform to Rule ~~32(a)(1)~~ 32(c)(2). An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

Committee Note

Subdivision (c). A petition for permission to appeal, a cross-petition for permission to appeal, and an answer to a petition or cross-petition for permission to appeal are all "other papers" for purposes of Rule 32(c)(2), and all of the requirements of Rule 32(a) apply to those papers, except as provided in Rule 32(c)(2). During the 1998 restyling of the Federal Rules of Appellate Procedure, Rule 5(c) was inadvertently changed to suggest that only the requirements of Rule 32(a)(1) apply to such papers. Rule 5(c) has been amended to correct that error.

G. Rule 15(f)

Under Rule 4(a)(4)(A), the timely filing of certain post-judgment motions tolls the time to appeal the underlying judgment until the district court disposes of the last such remaining motion. Rule 4(a)(4)(B)(i) provides that if a notice of appeal is filed while one of these post-judgment motions is pending, the notice of appeal is held in abeyance and becomes effective to appeal the underlying judgment when the court disposes of the last such remaining motion.

The proposed amendment to Rule 15(f) is intended to align the treatment of premature petitions for review of agency orders with the treatment of premature notices of appeal from court decisions. The amendment provides that when, under governing law, an agency order is rendered non-final and non-appealable by the filing of a petition for rehearing, petition for reopening, petition for reconsideration, or functionally similar petition, any petition for review or application to enforce that non-final order will be held in abeyance and become effective when the agency disposes of the last such finality-blocking petition. The amendment does *not* address the question of *when* (or even *whether*) the filing of a petition for rehearing or similar paper renders an agency action non-final and non-appealable; that question is left to the myriad statutes, regulations, and judicial decisions that govern various agencies.

This amendment was approved by the Advisory Committee at its October 1998 meeting.

Rule 15. Review or Enforcement of an Agency Order — How Obtained; Intervention

(f) **Petition or Application Filed Before Agency Action Becomes Final.** If a petition for review or application to enforce is filed after an agency announces or enters its order — but before it disposes of any petition for rehearing, reopening, or reconsideration that renders that order non-final and non-appealable — the petition or application becomes effective to appeal or seek enforcement of the order when the agency disposes of the last such petition for rehearing, reopening, or reconsideration.

Committee Note

Subdivision (f). Subdivision (f) is modeled after Rule 4(a)(4)(B)(i) and is intended to align the treatment of premature petitions for review of agency orders with the treatment of premature notices of appeal. Subdivision (f) does not address whether or when the filing of a petition for rehearing, reopening, or reconsideration renders an agency order non-final and hence non-appealable. That is left to the wide variety of statutes, regulations, and judicial decisions that govern agencies and appeals from agency decisions. *See, e.g., ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270 (1987). Rather, subdivision (f) provides that when, under governing law, an agency order is rendered non-final and non-appealable by the filing of a petition for rehearing, petition for reopening, petition for reconsideration, or functionally similar petition, any petition for review or application to enforce that non-final order will be held in abeyance and become effective when the agency disposes of the last such finality-blocking petition.

Subdivision (f) is designed to eliminate a procedural trap. Some circuits hold that petitions for review of agency orders that have been rendered non-final (and hence non-appealable) by the filing of a petition for rehearing (or similar petition) are "incurably premature," meaning that they do not ripen or become valid after the agency disposes of the rehearing petition. *See, e.g., TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 134 (D.C. Cir. 1989) (per curiam); *Chu v. INS*, 875 F.2d 777, 781 (9th Cir. 1989), *overruled on other grounds by Pablo v. INS*, 72 F.3d 110 (9th Cir. 1995); *West Penn Power Co. v. EPA*, 860 F.2d 581, 588 (3d Cir. 1988); *Aeromar, C. Por A. v. Department of Transp.*, 767 F.2d 1491, 1493-94 (11th Cir. 1985). In these circuits, if a party aggrieved by an agency action does not file a second timely petition for review after the petition for rehearing is denied by the agency, that party will find itself out of time: Its first petition for review will be dismissed as premature, and the deadline for filing a second petition for review will have passed. Subdivision (f) removes this trap.

H. Rule 24(a)

The Advisory Committee proposes two amendments to Rule 24(a) to resolve potential conflicts between the rule and the Prison Litigation Reform Act ("PLRA"). Rule 24(a)(2) now provides that after a litigant's motion to proceed IFP is granted, the litigant need not prepay any part of the filing fee; the PLRA, by contrast, provides that a prisoner whose motion to proceed IFP is granted must usually prepay at least a part of the filing fee, and then pay the remainder of the fee in installments. Rule 24(a)(3) now provides that if a litigant is given permission to proceed IFP in the district court, that status "automatically" carries over to the appellate court; the PLRA, by contrast, provides that a prisoner must reapply in order to proceed IFP on appeal, even if the prisoner was permitted to proceed IFP in the district court. The amendments to Rule 24(a) would make it clear that nothing in the rule is meant to supercede anything in the PLRA.

The amendment to Rule 24(a)(2) was approved by the Advisory Committee at its April 1998 meeting. The amendment to Rule 24(a)(3) was approved by the Advisory Committee at its October 1999 meeting.

Rule 24. Proceeding in Forma Pauperis

(a) Leave to Proceed in Forma Pauperis.

(1) **Motion in the District Court.** Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that:

(A) shows in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay or to give security for fees and costs;

(B) claims an entitlement to redress; and

(C) states the issues that the party intends to present on appeal.

(2) **Action on the Motion.** If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and costs, unless the law requires otherwise. If the district court denies the motion, it must state its reasons in writing.

(3) **Prior Approval.** A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless

(A) the district court — before or after the notice of appeal is filed — certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis. ~~In that event, the district court must~~ and states in writing its reasons for the certification or finding; or

(B) the law requires otherwise.

Committee Note

Subdivision (a)(2). Section 804 of the Prison Litigation Reform Act of 1995 ("PLRA") amended 28 U.S.C. § 1915 to require that prisoners who bring civil actions or appeals from civil actions must "pay the full amount of a filing fee." 28 U.S.C. § 1915(b)(1). Prisoners who are unable to pay the full amount of the filing fee at the time that their actions or appeals are filed are generally required to pay part of the fee and then to pay the remainder of the fee in installments. 28 U.S.C. § 1915(b). By contrast, Rule 24(a)(2) provides that, after the district court grants a litigant's motion to proceed on appeal in forma pauperis, the litigant may proceed "without prepaying or giving security for fees and costs." Thus, the PLRA and Rule 24(a)(2) appear to be in conflict.

Rule 24(a)(2) has been amended to resolve this conflict. Recognizing that future legislation regarding prisoner litigation is likely, the Advisory Committee has not attempted to incorporate into Rule 24 all of the requirements of the current version of 28 U.S.C. § 1915. Rather, the Advisory Committee has amended Rule 24(a)(2) to clarify that the rule is not meant to conflict with anything required by the PLRA or any other law.

Subdivision (a)(3). Rule 24(a)(3) has also been amended to eliminate an apparent conflict with the PLRA. Rule 24(a)(3) provides that a party who was permitted to proceed in forma pauperis in the district court may continue to proceed in forma pauperis in the court of appeals without further authorization, subject to certain conditions. The PLRA, by contrast, provides that a prisoner who was permitted to proceed in forma pauperis in the district court and

who wishes to continue to proceed in forma pauperis on appeal may not do so "automatically," but must seek permission. *See, e.g., Morgan v. Haro*, 112 F.3d 788, 789 (5th Cir. 1997) ("A prisoner who seeks to proceed IFP on appeal must obtain leave to so proceed despite proceeding IFP in the district court.").

Rule 24(a)(3) has been amended to resolve this conflict. Again, recognizing that future legislation regarding prisoner litigation is likely, the Advisory Committee has not attempted to incorporate into Rule 24 all of the requirements of the current version of 28 U.S.C. § 1915. Rather, the Advisory Committee has amended Rule 24(a)(3) to clarify that the rule is not meant to conflict with anything required by the PLRA or any other law.

I. The "Time Computation" Package

1. Rule 26(a)(2)

This amendment is intended to eliminate a discrepancy between the rules of appellate procedure, on the one hand, and the rules of civil and criminal procedure, on the other hand. FRCP 6(a) and FRCrP 45(a) provide that, in computing any period of time, "[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." Rule 26(a)(2) provides that, in computing any period of time, a litigant should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 7 days, unless stated in calendar days." Thus, deadlines of 7, 8, 9, and 10 days are calculated differently under the rules of civil and criminal procedure than they are under the rules of appellate procedure. Because no good reason for this discrepancy is apparent, and because this discrepancy creates a trap for unwary litigants, the Advisory Committee proposes amending Rule 26(a)(2) to bring it into conformity with FRCP 6(a) and FRCrP 45(a) by changing "less than 7 days" to "less than 11 days."

This amendment was approved by the Advisory Committee at its October 1998 meeting.

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

(1) Exclude the day of the act, event, or default that begins the period.

(2) Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than ~~7~~ 11 days, unless stated in calendar days.

Committee Note

Subdivision (a)(2). The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure compute time differently than the Federal Rules of Appellate Procedure. Fed. R. Civ. P. 6(a) and Fed. R. Crim. P. 45(a) provide that, in computing any period of time, "[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." By contrast, Fed. R. App. P. 26(a)(2) provides that, in computing any period of time, a litigant should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 7 days, unless stated in calendar days." Thus, deadlines of 7, 8, 9, and 10 days are calculated differently under the rules of civil and criminal procedure than they are under the rules of appellate procedure. This creates a trap for unwary litigants. No good reason for this discrepancy is apparent, and thus Rule 26(a)(2) has been amended so that, under all three sets of rules, intermediate Saturdays, Sundays, and legal holidays will be excluded when computing deadlines under 11 days but will be counted when computing deadlines of 11 days and over.

2. Rules 4(a)(4)(A)(vi), 27(a)(3)(A), 27(a)(4) and 41(b)

If the proposed amendment to Rule 26(a)(2) is approved, all deadlines in FRAP of 7, 8, 9, and 10 days will be lengthened as a *practical* matter. There are numerous 7 and 10 day deadlines in FRAP. (There are no 8 or 9 day deadlines.) With three exceptions, the Advisory Committee is not concerned about the fact that those deadlines will be lengthened as a practical matter. The three exceptions are as follows:

a. Rule 27(a)(3)(A) presently gives parties 10 days to respond to a motion — which, under amended Rule 26(a)(2), would mean that parties would never have fewer than 14 days to file such a response. The Advisory Committee believes that 14 days is an unduly lengthy period of time to file a response to a motion and therefore proposes amending Rule 27(a)(3)(A) to substitute "7" for "10."

b. Rule 27(a)(4) presently gives parties 7 days to reply to a response to a motion — which, under amended Rule 26(a)(2), would mean that parties would never have fewer than 9 days to file such a reply. The Advisory Committee believes that 9 days is an unduly lengthy period of time to file a reply to a response to a motion and therefore proposes amending Rule 27(a)(4) to substitute "5" for "7."

c. Rule 41(b) directs that the mandate of a court must issue 7 days after the time to file a petition for rehearing expires or 7 days after the court denies a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. Under the present version of Rule 26(a)(2), 7 days means 7 days, and thus mandates always issue exactly one week after the triggering event (except when the seventh day falls on a legal holiday). Because the practice of issuing mandates exactly one week after the triggering event is

extremely familiar to judges, parties, and clerks, and because the Advisory Committee believes that mandates should not issue more than 7 days after the triggering event, the Advisory Committee proposes amending Rule 41(b) by substituting "7 calendar days" for "7 days." Under Rule 26(a)(2), intermediate Saturdays, Sundays, and legal holidays are always counted in computing deadlines that are stated in "calendar days."

The Advisory Committee also proposes amending Rule 4(a)(4)(A)(vi) to delete a parenthetical that would become superfluous in light of the proposed change to Rule 26(a)(2).

These amendments were approved by the Advisory Committee at its April 1999 meeting.

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(4) **Effect of a Motion on a Notice of Appeal.**

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(vi) for relief under Rule 60 if the motion is filed no later than 10 days ~~(computed using Federal Rule of Civil Procedure 6(a))~~ after the judgment is entered.

Committee Note

Subdivision (a)(4)(A)(vi). Rule 4(a)(4)(A)(vi) has been amended to remove a parenthetical that directed that the 10 day deadline be "computed using Federal Rule of Civil Procedure 6(a)." That parenthetical has become superfluous because Rule 26(a)(2) has been amended to require that all deadlines under 11 days be calculated as they are under Fed. R. Civ. P. 6(a).

Rule 27. Motions

(a) In General.

(3) **Response.**

(A) **Time to file.** Any party may file a response to a motion; Rule 27(a)(2) governs its contents. The response must be filed within ~~10~~ 7 days after service of the motion unless the court shortens or extends the time. A motion authorized by Rules 8, 9, 18, or 41 may be granted before the ~~10~~7-day period runs only if the court gives reasonable notice to the parties that it intends to act sooner.

Committee Note

Subdivision (a)(3)(A). Subdivision (a)(3)(A) presently requires that a response to a motion be filed within 10 days after service of the motion. Intermediate Saturdays, Sundays, and legal holidays are counted in computing that 10 day deadline, which means that, except when the 10 day deadline ends on a weekend or legal holiday, parties generally must respond to motions within 10 actual days.

Fed. R. App. P. 26(a)(2) has been amended to provide that, in computing any period of time, a litigant should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days." This change in the method of computing deadlines means that 10 day deadlines (such as that in subdivision (a)(3)(A)) have been lengthened as a practical matter. Under the new computation method, parties would never have less than 14 actual days to respond to motions, and legal holidays could extend that period to as much as 18 days.

Permitting parties to take two weeks or more to respond to motions would introduce significant and unwarranted delay into appellate proceedings. For that reason, the 10 day deadline in subdivision (a)(3)(A) has been reduced to 7 days. This change will, as a practical matter, ensure that every party will have at least 9 actual days — but, in the absence of a legal holiday, no more than 11 actual days — to respond to motions. The court continues to have discretion to shorten or extend that time in appropriate cases.

Rule 27. Motions

(a) In General.

(4) **Reply to Response.** Any reply to a response must be filed within ~~7~~ 5 days after service of the response. A reply must not present matters that do not relate to the response.

Committee Note

Subdivision (a)(4). Subdivision (a)(4) presently requires that a reply to a response to a motion be filed within 7 days after service of the response. Intermediate Saturdays, Sundays, and legal holidays are counted in computing that 7 day deadline, which means that, except when the 7 day deadline ends on a weekend or legal holiday, parties generally must reply to responses to motions within one week.

Fed. R. App. P. 26(a)(2) has been amended to provide that, in computing any period of time, a litigant should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days." This change in the method of computing deadlines means that 7 day deadlines (such as that in subdivision (a)(4)) have been lengthened as a practical matter. Under the new computation method, parties would never have less than 9 actual days to reply to responses to motions, and legal holidays could extend that period to as much as 13 days.

Permitting parties to take 9 or more days to reply to a response to a motion would introduce significant and unwarranted delay into appellate proceedings. For that reason, the 7 day deadline in subdivision (a)(4) has been reduced to 5 days. This change will, as a practical matter, ensure that every party will have 7 actual days to file replies to responses to motions (in the absence of a legal holiday).

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

(b) When Issued. The court's mandate must issue 7 calendar days after the time to file a petition for rehearing expires, or 7 calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

Committee Note

Subdivision (b). Subdivision (b) directs that the mandate of a court must issue 7 days after the time to file a petition for rehearing expires or 7 days after the court denies a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. Intermediate Saturdays, Sundays, and legal holidays are counted in computing that 7 day deadline, which means that, except when the 7 day deadline ends on a weekend or legal holiday, the mandate issues exactly one week after the triggering event.

Fed. R. App. P. 26(a)(2) has been amended to provide that, in computing any period of time, one should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days." This change in the method of computing deadlines means that 7 day deadlines (such as that in subdivision (b)) have been lengthened as a practical matter. Under the new computation method, a mandate would never issue sooner than 9 actual days after a triggering event, and legal holidays could extend that period to as much as 13 days.

Delaying mandates for 9 or more days would introduce significant and unwarranted delay into appellate proceedings. For that reason, subdivision (b) has been amended to require that mandates issue 7 *calendar* days after a triggering event.

J. Rules 27(d)(1)(B), 32(a)(2), 32(c)(2)(A)

Rule 32 specifies that covers must be used on an appellant's brief (blue), an appellee's brief (red), an intervenor's or amicus curiae's brief (green), a reply brief (gray), and a separately bound appendix (white). Otherwise, Rule 32 makes it clear that a cover is not required on any other kind of document.

Under Rule 32(d), the courts of appeals are required to accept documents that comply with the form requirements of Rule 32. Thus, the courts of appeals cannot — in their local rules or otherwise — *force* litigants to use a cover on a document when Rule 32 does not. However, nothing prohibits the courts of appeals from using local rules to provide that if a cover is *voluntarily* used by a litigant, that cover must be a particular color. Four circuits specify cover colors for petitions for panel rehearing or rehearing en banc (CAFC, CA7, CA9, and CA11), three circuits specify cover colors for answers to petitions for panel rehearing or responses to petitions for rehearing en banc (CAFC, CA9, and CA11), two circuits specify cover colors for supplemental briefs (CADC and CA11), and one circuit specifies cover colors for motions (CA7).

These conflicting local rules create a needless hardship for counsel, particularly those who practice in more than one circuit. The Advisory Committee proposes three amendments that would supercede all local rulemaking on the issue of cover colors:

1. an amendment to Rule 27(d)(1)(B) to provide that if a cover is voluntarily used on a motion, it must be white;

2. an amendment to Rule 32(a)(2) to provide that tan covers must be used on supplemental briefs; and

3. an amendment to Rule 32(c)(2)(A) to provide that if a cover is voluntarily used on any "other paper," it must be white.

These amendments were approved by the Advisory Committee at its April 1998 meeting.

Rule 27. Motions

(d) Form of Papers; Page Limits; and Number of Copies

(1) **Format.**

(B) **Cover.** A cover is not required, but there must be a caption that includes the case number, the name of the court, the title of the case, and a brief descriptive title indicating the purpose of the motion and identifying the party or parties for whom it is filed. If a cover is used, it must be white.

Committee Note

Subdivision (d)(1)(B). A cover is not required on motions, responses to motions, or replies to responses to motions. However, Rule 27(d)(1)(B) has been amended to provide that if a cover is nevertheless used on such a paper, the cover must be white. The amendment is intended to promote uniformity in federal appellate practice.

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) Form of a Brief.

(2) **Cover.** Except for filings by unrepresented parties, the cover of the appellant's brief must be blue; the appellee's, red; an intervenor's or amicus curiae's, green;

and any reply brief, gray; and any supplemental brief, tan. The front cover of a brief must contain:

(A) the number of the case centered at the top;

(B) the name of the court;

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

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

(E) the title of the brief, identifying the party or parties for whom the brief is filed; and

(F) the name, office address, and telephone number of counsel representing the party for whom the brief is filed.

Committee Note

Subdivision (a)(2). On occasion, a court may permit or order the parties to file supplemental briefs addressing an issue that was not addressed — or adequately addressed — in the principal briefs. Rule 32(a)(2) has been amended to require that tan covers be used on such supplemental briefs. The amendment is intended to promote uniformity in federal appellate practice. At present, the local rules of the circuit courts conflict. *See, e.g.*, D.C. Cir. R. 28(g) (requiring yellow covers on supplemental briefs); 11th Cir. R. 32, I.O.P. 1 (requiring white covers on supplemental briefs).

Rule 32. Form of Briefs, Appendices, and Other Papers

(c) Form of Other Papers.

(1) **Motion.** The form of a motion is governed by Rule 27(d).

(2) **Other Papers.** Any other paper, including a petition for panel rehearing and a petition for hearing or rehearing en banc, and any response to such a petition,

must be reproduced in the manner prescribed by Rule 32(a), with the following exceptions:

(A) A ~~a~~ cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2)~~; and~~. If a cover is used, it must be white.

(B) Rule 32(a)(7) does not apply.

Committee Note

Subdivision (c)(2)(A). Under Rule 32(c)(2)(A), a cover is not required on a petition for panel rehearing, petition for hearing or rehearing en banc, answer to a petition for panel rehearing, response to a petition for hearing or rehearing en banc, or any other paper. Rule 32(d) makes it clear that no court can require that a cover be used on any of these papers. However, nothing prohibits a court from providing in its local rules that if a cover on one of these papers is "voluntarily" used, it must be a particular color. Several circuits have adopted such local rules. *See, e.g.*, Fed. Cir. R. 35(c) (requiring yellow covers on petitions for hearing or rehearing en banc and brown covers on responses to such petitions); Fed. Cir. R. 40(a) (requiring yellow covers on petitions for panel rehearing and brown covers on answers to such petitions); 7th Cir. R. 28 (requiring blue covers on petitions for rehearing filed by appellants or answers to such petitions, and requiring red covers on petitions for rehearing filed by appellees or answers to such petitions); 9th Cir. R. 40-1 (requiring blue covers on petitions for panel rehearing filed by appellants and red covers on answers to such petitions, and requiring red covers on petitions for panel rehearing filed by appellees and blue covers on answers to such petitions); 11th Cir. R. 35-6 (requiring white covers on petitions for hearing or rehearing en banc).

These conflicting local rules create a hardship for counsel who practice in more than one circuit. For that reason, Rule 32(c)(2)(A) has been amended to provide that if a party chooses to use a cover on a paper that is not required to have one, that cover must be white. The amendment is intended to preempt all local rulemaking on the subject of cover colors and thereby promote uniformity in federal appellate practice.

K. Rule 28(j)

Rule 28(j) permits a party to notify the court of appeals by letter of "pertinent and significant authorities" that come to the party's attention after the party has filed its brief. At present, Rule 28(j) *requires* parties to state "the reasons for the supplemental citations" but *forbids* the parties to include "argument" in their letters. This distinction is almost impossible for

clerks' offices to enforce. As a result, parties often abuse Rule 28(j) and file lengthy and argumentative letters.

The Advisory Committee proposes amending Rule 28(j) to eliminate the rarely enforced ban on "argument" and to incorporate in its place an easily enforced 250 word limit on the letters. In short, under the amendment, parties could say anything they want about supplemental authorities in their Rule 28(j) letters, but they couldn't say much.

This amendment was approved by the Advisory Committee at its April 1998 meeting.

Rule 28. Briefs

(j) **Citation of Supplemental Authorities.** If pertinent and significant authorities come to a party's attention after the party's brief has been filed — or after oral argument but before decision — a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state ~~without argument~~ the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 250 words. Any response must be made promptly and must be similarly limited.

Committee Note

Subdivision (j). In the past, Rule 28(j) has required parties to describe supplemental authorities "without argument." Enforcement of this restriction has been lax, in part because of the difficulty of distinguishing "state[ment] . . . [of] the reasons for the supplemental citations," which is required, from "argument" about the supplemental citations, which is forbidden.

As amended, Rule 28(j) continues to require parties to state the reasons for supplemental citations, with reference to the part of a brief or oral argument to which the supplemental citations pertain. But Rule 28(j) no longer forbids "argument." Rather, Rule 28(j) permits parties to decide for themselves what they wish to say about supplemental authorities. The only restriction upon parties is that the body of a Rule 28(j) letter — that is, the part of the letter that begins with the first word after the salutation and ends with the last word before the complimentary close — cannot exceed 250 words. All words found in footnotes will count toward the 250 word limit.

L. Rule 31(b)

Rule 31(b) inadvertently implies that parties who are not represented by counsel need not be served with briefs. The Advisory Committee proposes amending Rule 31(b) to correct that mistake.

This amendment was approved by the Advisory Committee at its September 1997 meeting.

Rule 31. Serving and Filing Briefs

(b) Number of Copies. Twenty-five copies of each brief must be filed with the clerk and 2 copies must be served on <u>each unrepresented party and on</u> counsel for each separately represented party. An unrepresented party proceeding in forma pauperis must file 4 legible copies with the clerk, and one copy must be served on <u>each unrepresented party and on</u> counsel for each separately represented party. The court may by local rule or by order in a particular case require the filing or service of a different number.

Committee Note

Subdivision (b). In requiring that two copies of each brief "must be served on counsel for each separately represented party," Rule 31(b) may be read to imply that copies of briefs need not be served on unrepresented parties. The Rule has been amended to clarify that briefs must be served on all parties, including those who are not represented by counsel.

M. Rule 32(a)(7)(C)/New Form 6

Effective December 1, 1998, Rule 32(a) has required that briefs *either* meet specified page limitations *or* meet new "type-volume" limitations. If a party opts to rely on the type-volume limitations, the party must file a "certificate of compliance" under Rule 32(a)(7)(C).

To aid counsel in filing that certificate, the Advisory Committee proposes to add a new "Form 6" to the Appendix of Forms. The Advisory Committee also proposes to amend Rule 32(a)(7)(C) to provide that, although use of Form 6 is not *required*, when Form 6 is used courts must regard it as sufficient.

I should note that the new Form 6 also requests from the parties information that is not required by any rule, but that will assist the clerks' offices in enforcing the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6).

This amendment and form were approved by the Advisory Committee at its April 1998 meeting.

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) Form of Brief.

(7) **Length.**

(C) **Certificate of compliance.**

(i) A brief submitted under Rule 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:

- the number of words in the brief; or
- the number of lines of monospaced type in the brief.

(ii) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet the requirements of Rule 32(a)(7)(C)(i).

Committee Note

Subdivision (a)(7)(C). If the principal brief of a party exceeds 30 pages, or if the reply brief of a party exceeds 15 pages, Rule 32(a)(7)(C) provides that the party or the party's attorney must certify that the brief complies with the type-volume limitation of Rule 32(a)(7)(B). Rule 32(a)(7)(C) has been amended to refer to Form 6 (which has been added to the Appendix of

Forms) and to provide that a party or attorney who uses Form 6 has complied with Rule 32(a)(7)(C). No court may provide to the contrary, in its local rules or otherwise.

Form 6 requests not only the information mandated by Rule 32(a)(7)(C), but also information that will assist courts in enforcing the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6). Parties and attorneys are not required to use Form 6, but they are encouraged to do so.

Form 6. Certificate of Compliance With Rule 32(a)

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

☐ this brief contains [*state the number of*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

☐ this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

☐ this brief has been prepared in a proportionally spaced typeface using [*state name and version of word processing program*] in [*state font size and name of type style*], *or*

☐ this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

(s)_____

Attorney for _____

Dated: _____

N. Rule 32(d)

The Advisory Committee recently discovered that nothing in FRAP requires any brief, motion, or other paper to be signed. The Advisory Committee proposes to amend Rule 32 to add a signature requirement similar to the signature requirement imposed in the district courts by FRCP 11(a). Because the courts of appeals already have authority to sanction attorneys and parties who file papers that contain misleading or frivolous assertions, the Advisory Committee does not propose that Rule 32 be amended to incorporate "good faith" provisions similar to those found in FRCP 11(b) and 11(c).

An earlier version of this amendment was approved by the Advisory Committee at its April 1999 meeting. After a member of the Advisory Committee pointed out that the amendment approved in April 1999 would overlap to some extent with other provisions of FRAP, the Advisory Committee approved a modified version of this amendment at its October 1999 meeting.

Rule 32. Form of Briefs, Appendices, and Other Papers

(d) **Signature.** Every brief, motion, or other paper filed with the court must be signed by the party filing the paper or, if the party is represented, by one of the party's attorneys.

(de) **Local Variation.** Every court of appeals must accept documents that comply with the form requirements of this rule. By local rule or order in a particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule.

Committee Note

Subdivisions (d) and (e). Former subdivision (d) has been redesignated as subdivision (e), and a new subdivision (d) has been added. The new subdivision (d) requires that every brief, motion, or other paper filed with the court be signed by the attorney or unrepresented party who files it, much as Fed. R. Civ. P. 11(a) imposes a signature requirement on papers filed in district court. (An appendix filed with the court does not have to be signed.) By requiring a signature, subdivision (d) ensures that a readily identifiable attorney or party takes responsibility for every paper. The courts of appeals already have authority to sanction attorneys and parties who file papers that contain misleading or frivolous assertions, *see, e.g.*, 28 U.S.C. § 1912, Fed. R. App. P. 38 & 46(b)(1)(B), and thus subdivision (d) has not been amended to incorporate provisions similar to those found in Fed. R. Civ. P. 11(b) and 11(c).

O. Rule 44

Under 28 U.S.C. § 2403(a), when the constitutionality of a federal statute is challenged in a case in which the United States is not a party, the court must notify the Attorney General of that challenge. Under 28 U.S.C. § 2403(b), when the constitutionality of a state statute is challenged in a case in which the state is not a party, the court must notify the state's attorney general of that challenge. For some reason, 28 U.S.C. § 2403(a) is implemented in FRAP, but not 28 U.S.C. § 2403(b). The Advisory Committee proposes amending Rule 44 to correct this omission.

This amendment was approved by the Advisory Committee at its April 1998 meeting.

Rule 44. Case Involving a Constitutional Question When the United States or the Relevant State is Not a Party

(a) **Constitutional Challenge to Federal Statute.** If a party questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General.

(b) **Constitutional Challenge to State Statute.** If a party questions the constitutionality of a statute of a State in a proceeding in which that State or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the attorney general of the State.

Committee Note

Rule 44 requires that a party who "questions the constitutionality of an Act of Congress" in a proceeding in which the United States is not a party must provide written notice of that challenge to the clerk. Rule 44 is designed to implement 28 U.S.C. § 2403(a), which states that:

> In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene . . . for argument on the question of constitutionality.

The subsequent section of the statute — § 2403(*b*) — contains virtually identical language imposing upon the courts the duty to notify the attorney general of a *state* of a constitutional challenge to any statute of that state. But § 2403(b), unlike § 2403(a), was not implemented in Rule 44.

Rule 44 has been amended to correct this omission. The text of former Rule 44 regarding constitutional challenges to federal statutes now appears as Rule 44(a), while new language regarding constitutional challenges to state statutes now appears as Rule 44(b).

III. Information Items

A. Electronic Service Rules

The Advisory Committee hopes to approve electronic service rules at its April 2000 meeting, to present those rules to the Standing Committee in June 2000, and to publish those rules for comment in August 2000.

B. Withholding of Amendment Regarding Local Rules

At its April 1998 meeting, the Advisory Committee approved a draft amendment to Rule 47(a)(1). The amendment would do two things: First, it would bar the enforcement of any local rule that had not been filed with the Administrative Office. Second, it would require that any change to a local rule must take effect on December 1, barring an emergency.

The Advisory Committee intended to seek the Standing Committee's permission to publish this amendment at the January 2000 meeting. However, the Advisory Committee has decided to postpone presenting this amendment to the Standing Committee. The Advisory Committee has several concerns.

First, Judge Niemeyer, Prof. Cooper, and others have suggested to the Standing Committee that using FRAP to prescribe a uniform effective date for changes to local rules might violate 28 U.S.C. § 2071(b), which provides that a local rule "shall take effect upon the date specified by the prescribing court." We are unaware of any case law on this issue, and we have not yet received a response to our request for guidance from the Standing Committee on whether it wishes to move forward on this matter notwithstanding the concerns about § 2071(b). Second, the Administrative Office has asserted that conditioning the enforcement of local rules upon their receipt by the A.O. would trigger a flood of inquiries to the A.O. Most members of the Advisory Committee are skeptical about whether the problem feared by the A.O. would materialize, but we are certainly open to alternative suggestions. Finally, the Advisory Committee has moved more quickly on these issues than the other advisory committees, and thus the other advisory committees have not yet fully considered the § 2071(b) issue or other possible problems.

For all of these reasons, the Advisory Committee has determined that the proposed amendment to Rule 47(a)(1) will be withheld pending further action by the other advisory committees or direction from the Standing Committee.

Item5B

DRAFT

Minutes of Fall 1999 Meeting of
Advisory Committee on Appellate Rules
October 21 & 22, 1999
Tucson, Arizona

I. Introductions

Judge Will Garwood called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, October 21, 1999, at 8:30 a.m. at the Westward Look Resort in Tucson, Arizona. The following Advisory Committee members were present: Judge Samuel A. Alito, Jr., Judge Diana Gribbon Motz, Judge Stanwood R. Duval, Jr., Chief Justice Pascal F. Calogero, Jr., Hon. John Charles Thomas, Prof. Carol Ann Mooney, Mr. W. Thomas McGough, Jr., and Mr. Sanford Svetcov. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, was present representing the Solicitor General. Also present were Judge Phyllis A. Kravitch, the liaison from the Standing Committee; Prof. Daniel R. Coquillette, the Reporter to the Standing Committee; Mr. Charles R. "Fritz" Fulbruge III, the liaison from the appellate clerks; Mr. Peter G. McCabe and Mr. John K. Rabiej from the Administrative Office; Ms. Carol Krafka and Ms. Judith McKenna from the Federal Judicial Center; and Mr. Michael J. Meehan, former member of the Advisory Committee.

Judge Garwood welcomed Mr. Svetcov to the Committee. Mr. Svetcov replaced Mr. Meehan as a member of the Advisory Committee on October 1, 1999.

II. Approval of Minutes of April 1999 Meeting

The minutes of the April 1999 meeting were approved with the following correction: In the last line of the fourth paragraph on page 26, change "principle" to "principal."

III. Report on June 1999 Meeting of Standing Committee

The Reporter described the Standing Committee's most recent meeting. This Advisory Committee had no action items on the Standing Committee's agenda. However, Judge Garwood told the Standing Committee that this Advisory Committee intended to present a package of proposed amendments to the Standing Committee at its January 2000 meeting. Judge Garwood also communicated this Advisory Committee's views on proposed amendments to the Federal Rules of Civil Procedure ("FRCP") that would authorize electronic service. Those views are described in the minutes of this Advisory Committee's April 1999 meeting.

IV. Action Items

A. Item No. 98-02 (FRAP 4 — clarify application of FRAP 4(a)(7) to orders granting or denying post-judgment relief/apply one way waiver doctrine to requirement of compliance with FRCP 58)

Judge Garwood introduced the following proposed amendment and Committee Note:

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(7) **Entry Defined.**

(A) A judgment or order is entered for purposes of this Rule 4(a) when

(i) it is entered in the civil docket in compliance with Rules ~~58 and~~ 79(a) of the Federal Rules of Civil Procedure and,

(ii) if entry on a separate document is required by Rules 54(a) and 58 of the Federal Rules of Civil Procedure,

- when it is set forth on a separate document as required by Rules 54(a) and 58 of the Federal Rules of Civil Procedure, or
- 150 days after it is entered in the civil docket in compliance with Rule 79(a) of the Federal Rules of Civil Procedure,

whichever comes first.

(B) The failure to set forth a judgment or order on a separate document when required by Rules 54(a) and 58 of the Federal Rules of Civil Procedure does not invalidate an appeal from that judgment or order.

Committee Note

Subdivision (a)(7). Several circuit splits have arisen out of uncertainties about how Rule 4(a)(7)'s definition of when a judgment or order is "entered" interacts with the requirement in Fed. R. Civ. P. 58 that, to be "effective," a judgment must be set forth on a separate document. Rule 4(a)(7) has been amended to address those circuit splits.

1. The first circuit split addressed by the amendment concerns the extent to which orders that dispose of post-judgment motions must be set forth on separate documents. Under Rule 4(a)(4)(A), the filing of certain post-judgment motions tolls the time to appeal the underlying judgment until "entry" of the order disposing of the last such remaining motion. Rule 4(a)(7) provides that a judgment or order is "entered" for purposes of Rule 4(a) "when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure." Fed. R. Civ. P. 58, in turn, provides that a "judgment" is not "effective" until it is "set forth on a separate document," and Fed. R. Civ. P. 54(a) defines "judgement" as including "any order from which an appeal lies."

Courts have taken at least four approaches in deciding whether an order that disposes of a post-judgment motion must be set forth on a separate document before it is considered entered under Rule 4(a)(7):

First, some courts seem to interpret Rule 4(a)(7) to incorporate the separate document requirement as it exists in the Federal Rules of Civil Procedure. *See, e.g., United States v. Haynes*, 158 F.3d 1327, 1329 (D.C. Cir. 1998); *Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 229, 232-33 (1st Cir. 1992) (en banc); *RR Village Ass'n v. Denver Sewer Corp.*, 826 F.2d 1197, 1200-01 (2d Cir. 1987). Read in this manner, Rule 4(a)(7) does not itself impose a separate document requirement. Rather, it simply provides that when — and only when — Fed. R. Civ. P. 54(a) and 58 impose a separate document requirement, a judgment or order will not be treated as entered for purposes of Rule 4(a) until it is set forth on a separate document. Under this approach, then, whether an order disposing of a Rule 4(a)(4)(A) motion must be set forth on a separate document depends entirely on whether the order is one "from which an appeal lies." If it is, then the order is not entered under Rule 4(a)(7) until it is set forth on a separate document; if it is not, then the order is entered under Rule 4(a)(7) as soon as it is entered in the civil docket in compliance with Fed. R. Civ. P. 79(a).

Second, some courts seem to interpret Rule 4(a)(7) *independently* to impose a separate document requirement, and not just when Fed. R. Civ. P. 54(a) and 58 would, but on *all* judgments and orders whose entry is of consequence under Rule 4(a). *See, e.g., Hard v. Burlington N. R.R. Co.*, 870 F.2d 1454, 1457-58 (9th Cir. 1989); *Allen ex rel. Allen v. Horinek*, 827 F.2d 672, 673 (10th Cir. 1987); *Stern v. Shouldice*, 706 F.2d 742, 746 (6th Cir. 1983); *Calhoun v. United States*, 647 F.2d 6, 8-10 (9th Cir. 1981). Under this approach, all orders disposing of Rule 4(a)(4)(A) motions must be set forth on separate documents before they are considered entered under Rule 4(a)(7). Whether an appeal lies from such an order is irrelevant.

Third, some courts hold that the separate document requirement applies to orders that *grant* post-judgment motions, but not to orders that *deny* post-judgment motions. *See, e.g., Copper v. City of Fargo*, No. 98-2144, 1999 WL 516758, at *3 (8th Cir. July 22, 1999) (per curiam); *Marré v. United States*, 38 F.3d 823, 825 (5th Cir. 1994); *Hollywood v. City of Santa Maria*, 886 F.2d 1228, 1231-32 (9th Cir. 1989); *Charles v. Daley*, 799 F.2d 343, 346-47 (7th Cir. 1986). These courts reason that, when a post-judgment motion is denied, the original judgment

remains in effect, and therefore entry of the order denying the motion on a separate document is unnecessary. When a post-judgment motion is granted, the original judgment is generally altered or amended, and the altered or amended judgment should be set forth on a separate document.

Finally, the Eleventh Circuit holds that the separate document requirement does not apply to *any* order that grants or denies a post-judgment motion, whether or not the order is one from which an appeal lies. Indeed, according to the Eleventh Circuit, the separate document requirement does not even apply to an altered or amended judgment. *See Wright v. Preferred Research, Inc.*, 937 F.2d 1556, 1560-61 (11th Cir. 1991).

Rule 4(a)(7) has been amended to adopt the first of these four approaches. Under the amended rule, a judgment or order is treated as entered under Rule 4(a)(7) when it is entered in the civil docket in compliance with Fed. R. Civ. P. 79(a), with one exception: If *Fed. R. Civ. P. 54(a) and 58* require that a particular judgment or order must be set forth on a separate document, then that judgment or order will not be treated as entered for purposes of Rule 4(a)(7) until it is so set forth (or, as explained below, until 150 days after its entry in the civil docket). Thus, whether an order disposing of a post-judgment motion must be set forth on a separate document before it is treated as entered depends entirely on whether the order is one "from which an appeal lies" under the law of the relevant circuit. If it is, then Fed. R. Civ. P. 54(a) and 58 require that it be set forth on a separate document, and it will not be treated as entered for purposes of Rule 4(a)(7) until it is so set forth (or until 150 days after its entry in the civil docket). If it is not, then it will be treated as entered for purposes of Rule 4(a)(7) as soon as it is entered in the civil docket, whether or not it is also set forth on a separate document.

One additional point of clarification: When a court orders that a judgment be entered (or that a judgment be altered or amended), Fed. R. Civ. P. 54(a) and 58, read literally, would seem to require that *both* the order *and* the judgment be set forth on separate documents. Because the parties can waive entry of the judgment on a separate document (as discussed below), an order for judgment (or an order to alter or amend a judgment) would seem to be "an[] order from which an appeal lies," and thus Fed. R. Civ. P. 54(a) and 58 would seem to require that such an order — as well as any subsequently entered judgment (or altered or amended judgment) — be set forth on a separate document. However, the Advisory Committee is not aware of any case that so holds. Rather, all courts seem to assume that when an order directs that a judgment (or altered or amended judgment) be entered, only the judgment (or altered or amended judgment) needs to be set forth on a separate document. At that point, both the order and the judgment (or altered or amended judgment) should be treated as entered for purposes of Rule 4(a)(7).

2. The second circuit split addressed by the amendment concerns the following question: When a judgment or order is required to be set forth on a separate document under Fed. R. Civ. P. 54(a) and 58 but is not, does the time to appeal the judgment or order ever begin to run? According to every circuit except the First Circuit, the answer is "no." "A party safely may defer the appeal until Judgment Day if that is how long it takes to enter [the judgment or order on] the [separate] document." *In re Kilgus*, 811 F.2d 1112, 1117 (7th Cir. 1987). The First Circuit,

fearing that "long dormant cases could be revived years after the parties had considered them to be over" if Fed. R. Civ. P. 54(a) and 58 and Rule 4(a)(7) were applied literally, holds that parties will be deemed to have waived their right to have a judgment or order set forth on a separate document three months after the judgment or order is entered in the civil docket. *Fiore*, 960 F.2d at 236. Other circuits have rejected this three month cap as contrary to the relevant rules, *see, e.g.*, *Haynes*, 158 F.3d at 1331; *Hammack v. Baroid Corp.*, 142 F.3d 266, 270 (5th Cir. 1998); *Pack v. Burns Int'l Sec. Serv.*, 130 F.3d 1071, 1072-73 (D.C. Cir. 1997); *Rubin v. Schottenstein, Zox & Dunn*, 110 F.3d 1247, 1253 n.4 (6th Cir. 1997), *vacated on other grounds* 143 F.3d 263 (6th Cir. 1998) (en banc), although no court has questioned the wisdom of imposing such a cap as a matter of policy.

Rule 4(a)(7) has been amended to impose such a cap. As noted above, a judgment or order is treated as entered for purposes of Rule 4(a)(7) when it is entered in the civil docket, unless Fed. R. Civ. P. 54(a) and 58 require the judgment or order to be set forth on a separate document, in which case the judgment or order will not be treated as entered for purposes of Rule 4(a)(7) until it is so set forth. There is one exception: A judgment or order will be treated as entered *for purposes of Rule 4(a)(7)* — notwithstanding anything to the contrary in Federal Rules of Civil Procedure — 150 days after the judgment or order is entered in the civil docket in compliance with Fed. R. Civ. P. 79(a). On the 150th day, the time to appeal the judgment or order will begin to run, even if the judgment or order is one that must otherwise be set forth on a separate document under Fed. R. Civ. P. 54(a) and 58, and even if the judgment or order has not been so set forth.

This cap will ensure that parties will not be given forever to appeal a judgment or order that should have been set forth on a separate document but was not. In the words of the First Circuit, "When a party allows a case to become dormant for such a prolonged period of time, it is reasonable to presume that it views the case as over. A party wishing to pursue an appeal and awaiting the separate document of judgment from the trial court can, and should, within that period file a motion for entry of judgment. This approach will guard against the loss of review for those actually desiring a timely appeal while preventing resurrection of litigation long treated as dead by the parties." *Fiore*, 960 F.2d at 236.

3. The third circuit split addressed by the amendment concerns whether the appellant may waive the separate document requirement over the objection of the appellee. In *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387 (1978) (per curiam), the Supreme Court held that the "parties to an appeal may waive the separate-judgment requirement of Rule 58." Specifically, the Supreme Court held that when a district court enters an order and "clearly evidence[s] its intent that the . . . order . . . represent[s] the final decision in the case," the order is a "final decision" for purposes of 28 U.S.C. § 1291, even if the order has not been set forth on a separate document for purposes of Fed. R. Civ. P. 58. *Id.* Such an order would not be "effective" — that is, the time to appeal the order would not begin to run, and thus a potential appellant would not *have* to appeal. However, such an order would be a "final decision" — and thus, a potential appellant *could* appeal if it wanted to.

Courts have disagreed about whether the consent of all parties is necessary to waive the separate document requirement. Some circuits permit appellees to object to attempted *Mallis* waivers and to force appellants to return to the trial court, request entry of judgment on a separate document, and appeal a second time. *See, e.g.*, *Selletti v. Carey*, 173 F.3d 104, 109-10 (2d Cir. 1999); *Williams v. Borg*, 139 F.3d 737, 739-40 (9th Cir.), *cert. denied*, 119 S. Ct. 353 (1998); *Silver Star Enters., Inc. v. M/V Saramacca*, 19 F.3d 1008, 1013 (5th Cir. 1994); *Whittington v. Milby*, 928 F.2d 188, 192 (6th Cir. 1991); *Wang Labs., Inc. v. Applied Computer Sciences, Inc.*, 926 F.2d 92, 96 (1st Cir. 1991); *Anoka Orthopaedic Assocs., P.A. v. Lechner*, 910 F.2d 514, 515 n.2 (8th Cir. 1990); *Long Island Lighting Co. v. Town of Brookhaven*, 889 F.2d 428, 430 (2d Cir. 1989). Other courts disagree and permit *Mallis* waivers even if the appellee objects. *See, e.g.*, *Haynes*, 158 F.3d at 1331; *Miller v. Artistic Cleaners*, 153 F.3d 781, 783-84 (7th Cir. 1998); *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1006 n.8 (3d Cir. 1994); *Mitchell v. Idaho*, 814 F.2d 1404, 1405 (9th Cir. 1987).

New Rule 4(a)(7)(B) is intended both to codify the Supreme Court's holding in *Mallis* and to make clear that the decision whether to waive entry of a judgment or order on a separate document is the appellant's alone. It is, after all, the appellant who needs a clear signal as to when the time to file a notice of appeal has begun to run. If the appellant chooses to bring an appeal without awaiting entry of the judgment or order on a separate document, then there is no reason why the appellee should be able to object. All that would result from honoring the appellee's objection would be delay. The appellant would return to the trial court, ask the court to enter the judgment or order on a separate document, and appeal again. "Wheels would spin for no practical purpose." *Mallis*, 435 U.S. at 385.

4. The final circuit split addressed by the amendment concerns the question whether an appellant who chooses to waive the separate document requirement must appeal within 30 days (60 days if the government is a party) from the entry in the civil docket of the judgment or order that should have been set forth on a separate document but was not. In *Townsend v. Lucas*, 745 F.2d 933 (5th Cir. 1984), the district court dismissed a 28 U.S.C. § 2254 action on May 6, 1983, but failed to enter judgment on a separate document. The plaintiff appealed on January 10, 1984. The Fifth Circuit held that the appeal was premature, in that the time to appeal the May 6 order had never begun to run because the May 6 order had not been set forth on a separate document. However, the Fifth Circuit said that it had to dismiss the appeal, rather than consider it on the merits, even though the parties were willing to waive the separate document requirement. The Fifth Circuit reasoned that, if the plaintiff waived the separate document requirement, then his appeal would be from the May 6 order, and if his appeal was from the May 6 order, then it was untimely under Rule 4(a)(1). By dismissing the appeal, the Fifth Circuit said, it was giving the plaintiff the opportunity to return to the district court, move for entry of judgment on a separate document, and appeal from that judgment within 30 days. *Id.* at 934. Several other cases have embraced the *Townsend* approach. *See, e.g.*, *Armstrong v. Ahitow*, 36 F.3d 574, 575 (7th Cir. 1994); *Hughes v. Halifax County Sch. Bd.*, 823 F.2d 832, 835-36 (4th Cir. 1987); *Harris v. McCarthy*, 790 F.2d 753, 756 n.1 (9th Cir. 1986).

Those cases are in the distinct minority. There are numerous cases in which courts have heard appeals that were not filed within 30 days (60 days if the government was a party) from the judgment or order that should have been set forth on a separate document but was not. *See, e.g.*, *Haynes*, 158 F.3d at 1330-31; *Pack*, 130 F.3d at 1073; *Rubin*, 110 F.3d at 1253; *Clough v. Rush*, 959 F.2d 182, 186 (10th Cir. 1992); *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1218-19 (9th Cir. 1990); *Allah v. Superior Court*, 871 F.2d 887, 890 (9th Cir. 1989); *Gregson & Assocs. Architects v. Virgin Islands*, 675 F.2d 589, 593 (3d Cir. 1982) (per curiam). In the view of these courts, the remand in *Townsend* was "precisely the purposeless spinning of wheels abjured by the Court in the [*Mallis*] case." 15B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3915, at 259 n.8 (3d ed. 1992).

The Advisory Committee agrees with the majority of courts that have rejected the *Townsend* approach. In drafting new Rule 4(a)(7)(B), the Advisory Committee has been careful to avoid phrases such as "otherwise timely appeal" that might imply an endorsement of *Townsend*.

Judge Garwood said that, after this Committee had struggled for almost two years with various issues raised by the application of the separate document requirement of FRCP 58 to orders that dispose of the post-judgment motions listed in FRAP 4(a)(4)(A), he had asked the Reporter to thoroughly research these issues over the summer. The Reporter had done so, and his conclusions were contained in a lengthy research memo included in the agenda book. Judge Garwood then asked the Reporter to discuss the amendment and Committee Note that he had drafted.

The Reporter said that the draft amendment and Committee Note attempted to address four questions, all of which were the subject of circuit splits. The first two questions were addressed by new FRAP 4(a)(7)(A); the second two questions were addressed by new FRAP 4(a)(7)(B).

1. When, if ever, should the separate document requirement apply to orders that dispose of post-judgment motions? Under FRAP 4(a)(4)(A), the filing of certain post-judgment motions tolls the time to appeal the underlying judgment until "entry" of the order disposing of the last such remaining motion. The circuits have divided on the question whether an order disposing of a post-judgment motion must be set forth on a separate document before it is deemed to be entered.

At past meetings of this Committee, we have noted the circuit split on this issue, but we have not fully understood it. We have assumed that the extent to which the separate document requirement applies to orders disposing of post-judgment motions is solely a function of FRAP 4(a)(7), which currently provides that "[a] judgment or order is entered for purposes of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure." We have further assumed that FRCP 58 itself only imposes the separate document requirement on what are traditionally regarded as "judgments." We have failed to recognize that, in FRCP 54(a), "judgment" is defined broadly to include any appealable order — including

appealable orders that dispose of post-judgment motions. Thus, the separate document requirement is imposed on at least some orders disposing of post-judgment motions by *two* separate sources: FRAP 4(a)(7) and FRCP 54(a)/58.

Case law does not clearly address how FRAP 4(a)(7) and FRCP 54(a)/58 interact in the context of orders disposing of post-judgment motions. As the draft Committee Note describes, courts have taken at least four approaches in deciding whether an order that disposes of a post-judgment motion must be set forth on a separate document before it is deemed to be entered for purposes of FRAP 4(a). First, some courts seem to interpret FRAP 4(a)(7) to incorporate the separate document requirement as it exists in the FRCP. Read in this manner, FRAP 4(a)(7) does not itself impose a separate document requirement. Rather, it simply provides that when — and only when — FRCP 54(a)/58 impose a separate document requirement, a judgment or order will not be treated as entered for purposes of FRAP 4(a) until it is set forth on a separate document. Second, some courts seem to interpret FRAP 4(a)(7) *independently* to impose a separate document requirement, and not just when FRCP 54(a)/58 would, but on *all* judgments and orders whose entry is of consequence under FRAP 4(a). Third, some courts hold that the separate document requirement applies to orders that *grant* post-judgment motions, but not to orders that *deny* post-judgment motions. Finally, the Eleventh Circuit holds that the separate document requirement does not apply to *any* order that grants or denies a post-judgment motion, whether or not the order is one from which an appeal lies.

Under the draft amendment, FRAP 4(a)(7) would adopt the first of these four approaches — the "incorporation" approach. FRAP 4(a)(7) would not itself impose a separate document requirement on anything. Rather, it would simply incorporate the separate document requirement precisely as it exists in FRCP 54(a)/58. Parties would have to worry only about one separate document requirement, rather than two. And, although problems would still exist — such as the often difficult problem of ascertaining whether an order disposing of a post-judgment motion is appealable and therefore required to be set forth on a separate document under FRCP 54(a)/58 — at least FRAP will not be *adding* to the problems that already exist under the FRCP.

2. *Should a* Fiore*-type cap be adopted so that parties do not have forever to appeal when a judgment or order is required to be set forth on a separate document but is not?* No matter what this Committee does with regard to the first question, a separate document requirement will continue to exist in some form, because FRCP 54(a)/58 will continue to exist. And thus, no matter what this Committee does, there will continue to be occasions on which a judgment or order should be set forth on a separate document but is not. All of the circuits — save one — have made it clear that, in these circumstances, the parties have forever to bring an appeal. The First Circuit is the exception. In *Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 229, 236 (1st Cir. 1992) (en banc), the First Circuit imposed a "cap" on the time that a litigant has to appeal a judgment or order that should have been set forth on a separate document but was not. The First Circuit held that, if a party fails to request that a judgment or order be set forth on a separate document within three months after the entry of that judgment or order in the civil docket, the party will be deemed to have waived its right to a separate document, and the time to appeal will be deemed to have expired. Several circuits have expressly rejected the *Fiore*

approach as inconsistent with the relevant rules, but no court has questioned it as a matter of policy.

The draft amendment and Committee Note incorporate a 150 day cap that works a bit differently than the *Fiore* cap. Under *Fiore*, a party is deemed to have waived its right to *request* entry of a judgment or order on a separate document after three months. Under the draft amendment, the judgment or order is deemed to have been *entered* for purposes of FRAP 4(a) 150 days after the judgment or order is entered in the civil docket. At that point, the 30 (or 60) day deadline for filing a notice of appeal begins to run.

Judge Garwood asked the Reporter to stop at this point so that the Committee could discuss the first two questions — the ones that are addressed in new FRAP 4(a)(7)(A). Several members of the Committee expressed support for the amendment and appreciation for the Reporter's work over the summer. No member of the Committee objected to adopting the "incorporation" approach in the first bulleted paragraph of new FRAP 4(a)(7)(A)(ii). Similarly, no member of the Committee objected to adopting a *Fiore*-type cap in the second bulleted paragraph of new FRAP 4(a)(7)(A)(ii). The only substantive disagreement was over whether the "cap" should be set at 150 days or at some shorter period of time.

Some members argued for a shorter period of time. They argued that after a judgment or order is entered in the civil docket — but not set forth on a separate document — parties do not need the equivalent of six months to appeal (150 days before the time to appeal begins to run, and then 30 or 60 days thereafter). Parties should not be able to "sit on their rights" for such a lengthy period of time; it creates delays in the system and is unfair to appellees. Some members of the Committee suggested that, in these circumstances, the time to appeal should begin to run 60 or 90 days after entry of the judgment or order in the civil docket.

Other members of the Committee disagreed. They reminded the Committee that the 150 day period had been approved at the Committee's April 1999 meeting and argued that, for several reasons, the period should not be changed. First, the separate document requirement is a notice provision; it is designed to give parties clear notice that the time to appeal has begun to run. If parties do not *get* that notice, then it is unreasonable to expect them quickly to file an appeal. Second, the 150 day period (which would require an appeal to be brought within 180 or 210 days, depending upon whether the government is a party) has a close analog in FRAP 4(a)(6)(A), which gives a party who has not been given notice of the entry of a judgment or order 180 days to move to reopen the time to file an appeal. Third, new appellate counsel are often brought in after a trial is concluded, and they need some "motion time" to get familiar with the case and then take steps to protect their client's interests. It is not unreasonable to give appellate counsel six months to become familiar with a case, ascertain whether the judge is finished with the case, discover that a judgment or order that should have been set forth on a separate document was not, and then file either a notice of appeal or a motion for entry of the judgment or order on a separate document. Fourth, appellees can always protect themselves; at any time, they can move for entry of the judgment or order on a separate document, and the time to appeal will begin to run upon such entry. And finally, parties now have *forever* to appeal a judgment or

order that should have been set forth on a separate document but was not; cutting that period to 180 (or 210) days is obviously a major improvement.

One other concern was raised: A member expressed concern that, under new FRAP 4(a)(7)(A), an appealable interlocutory order may be entered in the course of a trial, the party against whom the order was entered may not appeal it, the trial may continue for several more months, and then, after the trial is concluded, the party may find itself foreclosed from appealing the interlocutory order. Other members had a couple of responses. First, case law is clear that a party *may* appeal an appealable interlocutory order but does not *have* to. If a party does not appeal, the order is subsumed within the final judgment, and can be reviewed on appeal from that final judgment. Nothing in new FRAP 4(a)(7)(A) should change that. Second, because the separate document requirement can be waived — as new FRAP 4(a)(7)(B) will make clear — a party that is in doubt can always protect itself by bringing an appeal. The worst that can happen in those circumstances is that the appeal will be dismissed as premature, permitting the party to seek review of the order later.

Judge Garwood asked the Reporter to move on to the two remaining questions, which are addressed in new FRAP 4(a)(7)(B).

3. Should FRAP 4(a) be amended to incorporate the one-way waiver doctrine? In *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387 (1978) (per curiam), the Supreme Court held that the separate document requirement may be waived. As long as a judgment or order is a "final decision" for purposes of § 1291 — or as long as appellate jurisdiction exists under another statute — the parties do not have to wait for the judgment or order to be set forth on a separate document. Rather, they can choose to appeal the judgment or order immediately.

New FRAP 4(a)(7)(B) is intended to codify the *Mallis* decision. It is also intended to resolve a circuit split over who can waive the separate document requirement. Some circuits hold that, since the purpose of the separate document requirement is to give the appellant notice of when the time to appeal begins to run, the decision to waive the requirement should be the appellant's. Other circuits hold that all of the parties must consent to the waiver. If the appellee objects, the appellant must return to the district court, request entry of the judgment or order on a separate document, and then appeal. New FRAP 4(a)(7)(B) is intended to adopt the former view — that is, to deprive the appellee of the right to object to an attempt by the appellant to waive the separate document requirement.

4. Should FRAP 4(a) be amended to resolve the "Townsend issue"? In *Townsend v. Lucas*, 745 F.2d 933 (5th Cir. 1984), the Fifth Circuit held, in essence, that if the parties wish to waive the separate document requirement, then the appeal must be brought within 30 days (60 days if the government is a party) from the entry in the civil docket of the judgment or order that should have been set forth on a separate document but was not. After the 30 (or 60) day period has expired, the parties may not waive the separate document requirement; instead, they must return to the district court, seek entry of the judgment or order on a separate document, and then appeal within 30 (or 60) days of that entry. A couple of circuits have adopted the *Townsend* approach. Most, though, have rejected it, holding that the parties may appeal any time after entry

in the civil docket of a judgment or order that should have been set forth on a separate document but was not. New FRAP 4(a)(7)(B) — and especially the Committee Note — are intended to adopt the majority position.

Judge Garwood invited questions and comments on new FRAP 4(a)(7)(B).

A member expressed support for new FRAP 4(a)(7)(B). She said that incorporating the waiver doctrine — and giving the right to waive to the appellant — were particularly important given what we have done in new FRAP (a)(7)(A). Because we have incorporated the separate document requirement as it exists in FRCP 54(a)/58, whether an order must be set forth on a separate document before the time to appeal begins to run will now turn upon the appealability of the order. That is often difficult to determine. A party may not *know* whether a particular order is appealable (and therefore is defined as a "judgment" by FRCP 54(a), and therefore must be set forth on a separate document under FRCP 58). Thus, it is particularly important that parties be able to protect themselves by filing appeals without waiting for separate documents.

Prof. Coquillette asked the Reporter what amendments to FRCP 54(a)/58 were needed to completely "fix" the problems caused by the separate document requirement. The Reporter said that two came immediately to mind: First, the FRCP could use a signal other than entry on a separate document. There is some confusion about what qualifies as a separate document. Second, FRCP 54(a) could be amended so that "judgment" is not defined to include all appealable orders. One option would be to limit the definition of "judgment" — and thus the application of the separate document requirement — to what lawyers traditionally refer to as "judgments." However, given that FRCP 58 is not the only civil rule that addresses judgments, tinkering with the definition of "judgment" might create unforeseen problems. A second option would be to more carefully define which orders must be set forth on separate documents. Making the question turn on the *appealability* of the order is problematic, as sometimes the time to appeal a judgment begins to run upon the entry of *unappealable* orders that dispose of post-judgment motions.

The Reporter stressed, though, that regardless of what the Civil Rules Committee might do, FRAP 4(a)(7) still has to be amended to make it clear that FRAP does not impose a separate document requirement independent of that imposed by the FRCP. New FRAP 4(a)(7)(A), by simply incorporating the separate document requirement as it exists in the FRCP, does not in any way constrain the Civil Rules Committee from making whatever changes it desires to FRCP 54(a)/58.

At Judge Garwood's request, the Reporter briefly addressed one additional matter. In the past, the Committee has considered amending not only FRAP 4(a)(7), but also FRAP 4(a)(4)(A), 4(a)(4)(B)(i), and FRAP 4(a)(4)(B)(ii). These amendments were intended to address a theoretical concern that had been raised by former Committee member Luther Munford. The Reporter said that, upon reflection, he had decided that amending these provisions was unnecessary. The Reporter said that the explanation for his conclusion was fully set forth in his research memo. Basically, though, Mr. Munford's concerns were grounded upon the assumption that when a court enters an order for judgment (or an order for an amended judgment), *both* the

order *and* the judgment (or amended judgment) must be set forth on separate documents. The Reporter said that he had read over 500 published and unpublished opinions related to the separate document requirement, and he was not aware of a single case that so held. Rather, courts seem to require only that the judgment (or amended judgment) be set forth on a separate document — and when the judgment (or amended judgment) is so set forth, courts treat the order for judgment (or order for amended judgment) as "entered." Given that, Mr. Munford's theoretical concern is unlikely to arise in practice.

Judge Garwood said that he had asked the Reporter to include a paragraph in the Committee Note that was designed to encourage courts to continue on this path and thus to minimize the chances that Mr. Munford's concern would materialize in real life. That paragraph appears as the third full paragraph on page 3 of the draft Committee Note. Several members expressed the view that the paragraph should be removed. They argued that, without a full explanation of the very complicated problem that concerned Mr. Munford, the paragraph was more confusing than helpful. One member disagreed, arguing that the explanation was helpful.

A member moved that the amendment to FRAP 4(a)(7) be approved. The motion was seconded. A member suggested that the amendment would read better if the word "when" was moved from the end of line 4 to the beginning of line 5 (before the word "it"). Other members agreed. The suggestion was accepted as a friendly amendment.

A member asked that the Committee vote separately on new FRAP 4(a)(7)(A) and new FRAP 4(a)(7)(B), as he had objections to the latter, but not to the former. By consensus, the Committee agreed to vote first on new FRAP 4(a)(7)(A). The motion to approve new FRAP 4(a)(7)(A) carried.

A member moved that new FRAP 4(a)(7)(B) be approved. The motion was seconded.

A member objected. He argued that, as drafted, new FRAP 4(a)(7)(B) seemed to "take away" what was accomplished by new FRAP 4(a)(7)(A). The Reporter disagreed. New FRAP 4(a)(7)(A) defines when a party *must* bring an appeal; it specifies when the separate document requirement applies and when the time to appeal begins to run on judgments or orders that are supposed to be set forth on separate documents but are not. New FRAP 4(a)(7)(B), by contrast, defines when a party *may* bring an appeal — that is, whether and when the parties can choose to appeal without waiting for entry of a judgment or order on a separate document.

Another member said that, while he agreed with the Reporter, he wondered whether new FRAP 4(a)(7)(B) could be drafted more clearly. Couldn't the rule state something along the lines of, "The appellant can appeal a judgment or order, even if it hasn't been set forth on a separate document." The Reporter responded that he had considered similar formulations, but he was concerned about two things. First, they might be too broad, in that they may be read as wiping out more than the separate document requirement. Second, they might be too narrow; the rule should make clear that, if an otherwise proper appeal has been filed, no party may rely in any way upon the absence of a separate document.

The Reporter conceded, though, that, as drafted, new FRAP 4(a)(7)(B) requires litigants to think a step ahead. FRAP 4(a)(7)(B) is really a response to an objection. In other words, the purpose of FRAP 4(a)(7)(B) may not be clear until one first considers objecting to an appeal for lack of a separate document, and then realizes that, under FRAP 4(a)(7)(B), all such objections have been eliminated. The member said that he was satisfied with the Reporter's explanation. Another member pointed out that this language had been approved by the Committee twice before at prior meetings.

The motion to approve new FRAP 4(a)(7)(B) carried.

A member moved that the Committee Note be approved, with the exception of the third full paragraph on page 3 (beginning "One additional point of clarification"). The motion was seconded.

The Committee then debated at some length whether the Note was too long. Those members who favored shortening the Note said that it contained more explanation than a judge or practitioner would likely need. For example, the description of the four-way circuit split on how the separate document requirement applies to orders disposing of post-judgment motions is important for this Committee, but the bench and bar probably do not need such a "peeling of the onion." Other members pointed out that in the West paperback compilations that are popular with practitioners — *Federal Civil Judicial Procedure and Rules* and *Federal Criminal Code and Rules* — all Committee Notes are reproduced in full. Long Notes result in thick books, which inconveniences practitioners who not only have to read the Notes, but carry them around.

Other members and the Reporter argued in favor of retaining the Note as written. They pointed out that the amendment to FRAP 4(a)(7) addresses four circuits splits over very, very complicated issues. This Committee needs to remember that it has lived with these issues for two years; judges and practitioners are going to need a lot of help understanding what the Committee has done. The potential benefit to judges and practitioners of the additional explanation outweighs the minor inconvenience of a few more paragraphs in the West volumes. The Reporter also stressed that any judge or lawyer reading the amendment is going to want to know whether and to what extent the law of his or her circuit was changed. Many of the courts of appeals do not even recognize that there *are* circuit splits, much less where their circuits fit within the splits. The Reporter pointed out that the Standing Committee has approved far longer Notes explaining far simpler amendments. A member agreed; he said that while he generally loathes long Committee Notes, this was an exceptionally complicated problem — a problem that had befuddled this Committee for two years and that took a law professor three months to straighten out. This was a rare case in which a long Note was justified.

A member asked whether the Reporter and two or three Committee members could work overnight to draft a shorter version of the Note. Judge Garwood responded that he would first like to put the longer version of the Note to a vote. If the Note was approved, that would not foreclose anyone from proposing a shorter alternative tomorrow.

The motion to approve the Committee Note as drafted, with the exception of the third full paragraph on page 3, carried.

Judge Garwood asked Judge Alito, Mr. Thomas, and Mr. McGough to meet with the Reporter this evening about the possibility of shortening the Note and, if they deemed it advisable, to present a shorter version of the Note for the Committee's consideration tomorrow.

B. Item Nos. 97-05 & 99-01 (FRAP 24(a) — conflicts with PLRA)

The Reporter introduced the following proposed amendment and Committee Note:

Rule 24. Proceeding in Forma Pauperis

(a) Leave to Proceed in Forma Pauperis.

(1) **Motion in the District Court.** Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that:

(A) shows in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay or to give security for fees and costs;

(B) claims an entitlement to redress; and

(C) states the issues that the party intends to present on appeal.

(2) **Action on the Motion.** If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and costs, unless the law requires otherwise. If the district court denies the motion, it must state its reasons in writing.

(3) **Prior Approval.** A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless

(A) the district court — before or after the notice of appeal is filed — certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis. ~~In that event, the district court must~~ and states in writing its reasons for the certification or finding; or

(B) the law requires otherwise.

Committee Note

Subdivision (a)(2). Section 804 of the Prison Litigation Reform Act of 1995 ("PLRA") amended 28 U.S.C. § 1915 to require that prisoners who bring civil actions or appeals from civil actions must "pay the full amount of a filing fee." 28 U.S.C. § 1915(b)(1). Prisoners who are unable to pay the full amount of the filing fee at the time that their actions or appeals are filed are generally required to pay part of the fee and then to pay the remainder of the fee in installments. 28 U.S.C. § 1915(b). By contrast, Rule 24(a)(2) provides that, after the district court grants a litigant's motion to proceed on appeal in forma pauperis, the litigant may proceed "without prepaying or giving security for fees and costs." Thus, the PLRA and Rule 24(a)(2) appear to be in conflict.

Rule 24(a)(2) has been amended to resolve this conflict. Recognizing that future legislation regarding prisoner litigation is likely, the Committee has not attempted to incorporate into Rule 24 all of the requirements of the current version of 28 U.S.C. § 1915. Rather, the Committee has amended Rule 24(a)(2) to clarify that the rule is not meant to conflict with anything required by the PLRA or any other law.

Subdivision (a)(3). Rule 24(a)(3) has also been amended to eliminate an apparent conflict with the PLRA. Rule 24(a)(3) provides that a party who was permitted to proceed in forma pauperis in the district court may continue to proceed in forma pauperis in the court of appeals without further authorization, subject to certain conditions. The PLRA, by contrast, provides that a prisoner who was permitted to proceed in forma pauperis in the district court and who wishes to continue to proceed in forma pauperis on appeal may not do so "automatically," but must seek permission. *See, e.g., Morgan v. Haro*, 112 F.3d 788, 789 (5th Cir. 1997) ("A prisoner who seeks to proceed IFP on appeal must obtain leave to so proceed despite proceeding IFP in the district court.").

Rule 24(a)(3) has been amended to resolve this conflict. Again, recognizing that future legislation regarding prisoner litigation is likely, the Committee has not attempted to incorporate into Rule 24 all of the requirements of the current version of 28 U.S.C. § 1915. Rather, the Committee has amended Rule 24(a)(3) to clarify that the rule is not meant to conflict with anything required by the PLRA or any other law.

The Reporter explained that this amendment is designed to eliminate potential conflicts between FRAP 24 and the Prison Litigation Reform Act ("PLRA"). The amendment to FRAP 24(a)(2) was approved in both form and substance at the Committee's April 1998 meeting, and the amendment to FRAP 24(a)(3) was approved in substance at the Committee's April 1999 meeting. At the Committee's request, the Reporter drafted language to implement the change to FRAP 24(a)(3).

A member moved that the amendment and Committee Note be approved. The motion was seconded. The motion carried.

C. **Item No. 98-11 (FRAP 5(c) — clarify application of FRAP 32(a) to petitions for permission to appeal)**

The Reporter introduced the following proposed amendment and Committee Note:

Rule 5. Appeal by Permission

(c) **Form of Papers; Number of Copies.** All papers must conform to Rule ~~32(a)(1)~~ 32(c)(2). An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

Committee Note

Subdivision (c). A petition for permission to appeal, a cross-petition for permission to appeal, and an answer to a petition or cross-petition for permission to appeal are all "other papers" for purposes of Rule 32(c)(2), and all of the requirements of Rule 32(a) apply to those papers, except as provided in Rule 32(c)(2). During the 1998 restyling of the Federal Rules of Appellate Procedure, Rule 5(c) was inadvertently changed to suggest that only the requirements of Rule 32(a)(1) apply to such papers. Rule 5(c) has been amended to correct that error.

The Reporter explained that this amendment was designed to correct a typographical error that arose during the restyling of the appellate rules. The substance of this change to FRAP 5(c) was approved by the Committee at its April 1999 meeting. The Reporter was asked to draft an amendment and Committee Note to implement the change.

A member moved that the amendment and Committee Note be approved. The motion was seconded. The motion carried.

D. **Item Nos. 97-31 & 98-01 (FRAP 47 — uniform effective date for local rules/require filing with AO)**

Judge Garwood introduced the following proposed amendment and Committee Note:

Rule 47. Local Rules by Courts of Appeals

(a) Local Rules.

(1) **Adoption and Amendment.**

(A) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order. A local rule must be consistent with — but not duplicative of — Acts of Congress and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

(B) Each circuit clerk must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is ~~promulgated~~ adopted or amended. A local rule must not be enforced before it is received by the Administrative Office of the United States Courts.

(C) An amendment to the local rules of a court of appeals must take effect on the December 1 following its adoption, unless a majority of the court's judges in regular active service determines that there is an immediate need for the amendment.

Committee Note

Subdivision (a)(1). Rule 47(a)(1) has been divided into subparts. Former Rule 47(a)(1), with the exception of the final sentence, now appears as Rule 47(a)(1)(A). The final sentence of former Rule 47(a)(1) has become the first sentence of Rule 47(a)(1)(B).

Two substantive changes have been made to Rule 47(a)(1). First, the second sentence of Rule 47(a)(1)(B) has been added to bar the enforcement of any local rule — or any change to any local rule — prior to the time that it is received by the Administrative Office of the United States Courts. Second, Rule 47(a)(1)(C) has been added to provide a uniform effective date for changes to local rules. Such changes will take effect on December 1 of each year, absent exigent circumstances.

The changes to Rule 47(a)(1) are prompted by the continuing concern of the bench and bar over the proliferation of local rules. That proliferation creates a hardship for attorneys who practice in more than one court of appeals. Not only do those attorneys have to become familiar

with several sets of local rules, they also must be continually on guard for changes to the local rules. In addition, although Rule 47(a)(1) requires that local rules be sent to the Administrative Office, compliance with that directive has been inconsistent. By barring enforcement of any rule that has not been received by the Administrative Office, the Committee hopes to increase compliance with Rule 47(a)(1) and to ensure that current local rules of all of the courts of appeals are available from a single source.

Judge Garwood said that this amendment would do two things: First, it would bar the enforcement of any local rule that had not been filed with the Administrative Office ("AO"). Second, it would require that any change to a local rule must take effect on December 1, barring an emergency.

Judge Garwood reminded the Committee that it had approved this amendment and Committee Note at its April 1998 meeting. Judge Garwood apologized for asking the Committee to reconsider the amendment, but said that he was uncomfortable presenting it to the Standing Committee without further discussion. Judge Garwood said that he has a couple of concerns.

First, at a recent Standing Committee meeting, Judge Paul Niemeyer (the Chair of the Civil Rules Committee) and Prof. Edward Cooper (the Reporter to the Civil Rules Committee) pointed out that amending any of the rules of practice and procedure to prescribe a uniform effective date for changes to local rules might violate 28 U.S.C. § 2071(b), which provides that a local rule "shall take effect upon the date specified by the prescribing court." Judge Garwood asked the Standing Committee for guidance on this problem, but none was forthcoming.

Second, the AO has expressed concern that conditioning the enforcement of local rules upon their receipt by the AO would trigger a flood of inquiries to the AO, as nervous attorneys who were about to try a case or argue an appeal would want to make certain that the local rules had not recently changed.

Judge Garwood asked the Committee for guidance. Does the Committee want him to present the amendment and Committee Note to the Standing Committee in January, as planned? Should he present only one of the two changes? Should we just drop the whole topic?

Mr. Rabiej encouraged the Committee not to drop the proposal altogether, but instead to postpone presenting it to the Standing Committee until after the other Advisory Committees had considered similar amendments to their rules. Prof. Coquillette agreed. He said that the proliferation of local rules was far less of a problem in the appellate courts than in the trial courts. Both the Civil Rules Committee and the Criminal Rules Committee are working on similar proposals, and this Committee should wait for them to act before going forward with the proposed amendment to FRAP 47(a)(1). If § 2071(b) proves to be a problem, the Judicial Conference can seek help from Congress.

Some members agreed with Mr. Rabiej and Prof. Coquillette. One member said that, until the problem with § 2071(b) was resolved, we should not propose any type of a uniform effective date. Another member said that, putting aside the § 2071(b) problem, he did not think

that the uniform effective date would do much good. Many judges are stubbornly independent, and they will use the "immediate need" loophole to enact changes in local rules whenever they want. A third member pointed out that even if all judges acted in good faith, the uniform effective date would not help practitioners much, as they would still need to monitor the local rules for changes that were prompted by legitimate "immediate need."

Other members disagreed. They argued, in essence, that "every little bit helps." Even if some judges would abuse the "immediate need" loophole, others would not. The fewer rules that take effect on a date other than December 1, the easier life will be for practitioners. Indeed, these members said, they would favor the amendment even if it were watered down to establish only a *presumptive* effective date of December 1. That would eliminate the conflict with § 2071(b) and would hopefully encourage courts to make changes to local rules effective on December 1.

As to the filing requirement, Mr. Rabiej stressed that the AO did not object to the *concept* that local rules should not be enforced until they are readily available to the bar. District courts are presently required to provide the AO with copies of all local rules, but many district courts ignore this requirement. At present, there is no single repository for all current local rules — and, at present, an attorney has no alternative but to call the clerk's office if he or she wants to be certain that there have been no recent changes to the local rules.

According to Mr. Rabiej, the AO's objection is solely to the *means* of implementing this concept. The AO does not want to condition the effectiveness of a local rule on its receipt by the AO. Rather, the AO would prefer to condition the effectiveness of a local rule on its being posted by the court on a website — or even upon its being provided to the AO *and* posted on the AO's website. The AO simply wants the event upon which the effectiveness of a local rule depends to be an event that can be verified by attorneys without calling the AO.

A member moved that the amendment to FRAP 47(a)(1) not be presented to the Standing Committee in January and that this Committee postpone any further action on this matter until the Civil Rules Committee and Criminal Rules Committee have acted upon the similar proposals now pending before them. The motion was seconded. The motion carried.

E. Final review of all items to be submitted to Standing Committee in January 2000

At Judge Garwood's request, the Reporter included in the agenda book copies of all of the amendments and Committee Notes that this Committee has previously approved for presentation to the Standing Committee in January 2000, with the exception of the amendment to FRAP 47(a)(1) just discussed. Judge Garwood pointed out that the Committee Note to the amendment to FRAP 31(b) that appeared in the agenda book failed to reflect two changes that had been made to the Note. First, the heading should be "Committee Note," not "Advisory Committee Note." Second, the final two sentences in the Note should be deleted.

Judge Garwood said that he was prepared to entertain a motion that all of the amendments and Committee Notes be presented to the Standing Committee at its January 2000

meeting. A member said that he wanted to propose a change to the amendment to FRAP 32(d), which, as approved by the Committee, reads:

> (d) **Signature.** Every brief, motion, or other paper filed with the court must be signed by the party filing the paper or, if the party is represented, by one of the party's attorneys. The party or attorney who signs the paper must also state the signer's address and telephone number (if any).

The member said that he wanted to amend the second sentence of proposed FRAP 32(d) so that a party would have to state, in addition to its address and telephone number, its fax number and e-mail address. Mr. Fulbruge said that such a requirement would be helpful to the clerks. Other members objected to the proposal, arguing, inter alia, that attorneys should not be required to disclose e-mail addresses and open themselves up to unwanted electronic communications.

A member pointed out that the second sentence of proposed FRAP 32(d) was actually superfluous. Current FRAP 32(a)(2) requires that the cover of every brief contain "the name, office address, and telephone number of counsel representing the party for whom the brief is filed," and current FRAP 32(c)(2) requires that "other papers" must "contain the information required by Rule 32(a)(2)." In light of that fact, the second sentence of proposed FRAP 32(d) is unnecessary.

A member moved that the second sentence of proposed FRAP 32(d) be deleted. The motion was seconded. The motion carried.

A member moved that all amendments and Committee Notes be approved for presentation to the Standing Committee at its January 2000 meeting. The motion was seconded. The motion carried.

V. Discussion Items

A. Item No. 97-14 (FRAP 46(b)(1)(B) — attorney conduct) (Prof. Coquillette)

Prof. Coquillette gave the Committee an update on the Standing Committee's efforts to draft "Federal Rules of Attorney Conduct" or "FRAC."

Prof. Coquillette began by stressing that he and everyone involved in the FRAC project recognized that the appellate courts were not experiencing a problem in this area. FRAP 46(b)(1)(B) establishes a single national standard — "conduct unbecoming" — and, although this standard is vague, there is no evidence that it is creating a problem for the bench or bar. Attorneys simply do not misbehave much in the courts of appeals. The Subcommittee on Attorney Conduct — which is composed of representatives of the Standing Committee and each of the Advisory Committees (including Judge Alito and Mr. Thomas) — is focusing its efforts on the many conflicting local rules governing attorney conduct in the *district* courts.

Prof. Coquillette reported that a "FRAC 1," drafted by Prof. Cooper, was currently being circulated for comments. Draft FRAC 1 is a "dynamic conformity" rule. It essentially provides that state rules of professional responsibility will govern the conduct of attorneys in federal court, except that valid federal procedural rules would still apply and "trump" any state rules of professional responsibility to the contrary. Federal courts would be put out of the business of regulating attorney conduct. At the same time, a mechanism would exist for protecting important federal interests. Conduct expressly authorized by court order could not be the basis of state disciplinary action — and, of course, a "FRAC 2" or "FRAC 3" could always be promulgated to protect specific federal interests.

Prof. Coquillette said that this general topic — and Prof. Cooper's draft FRAC 1 — continue to be the subject of much controversy. Prof. Coquillette briefly reviewed the latest efforts on Capitol Hill to undo the "McDade Amendment," under which federal prosecutors are required to comply with both state rules and local federal rules (even though the two sets of rules often conflict).

Prof. Coquillette said that he did not think that any of the Advisory Committees would be asked to take formal action on proposed rules of attorney conduct for another year. During the next year, it is likely that the Subcommittee on Attorney Conduct will host at least one conference to get the widest input possible on this general issue and on draft FRAC 1.

Prof. Coquillette said that he would be happy to answer questions.

One member noted that the dispute over the application of Model Rule 4.2 to federal prosecutors is a substantial part of the motivation to come up with federal rules governing attorney conduct. His concern with draft FRAC 1 is that it does not address the Rule 4.2 problem. Rather, it simply leaves the problem for another day. The member urged that the Justice Department be asked to draft a rule that would address its concerns and that the rule be voted upon. The issue should be resolved, one way or another.

Several members said that district court judges will never agree to a rule that deprives them of authority to discipline misconduct that occurs in the course of litigation pending before them, even if that conduct does not violate a federal statute or rule of practice or procedure. A district judge may sit in a state in which a certain type of conduct is not addressed by the rules of professional responsibility — or is specifically *authorized* by the rules of professional responsibility — and yet, if the district judge views the conduct as unacceptable in his or her courtroom, the district judge should be able to sanction attorneys for engaging in it.

Prof. Coquillette said that the view of these members is widely shared. Everyone agrees that district courts will retain the power to decide who may appear before them. The concern is to make it clear that district courts cannot suspend or disbar an attorney from the *practice of law* for conduct that does not violate state standards. The district courts will remain free to sanction conduct in other ways, such as under FRCP 11.

Mr. Letter said that the Department of Justice is not just concerned about Rule 4.2, but also "outlier" states that might implement rules or interpretations of rules that are radically out of

step with the mainstream. For example, the State of Oregon takes the position that an Assistant United States Attorney commits "fraud or deception" in violation of the rules of professional conduct when he or she participates in an undercover FBI sting operation. Federal law enforcement interests are seriously threatened by the McDade Amendment.

A member said that he sympathized with the Department of Justice. He also pointed out that the Department is bearing the brunt of this problem only because it has the largest national practice. However, with national practices becoming more and more common, the types of problems now experienced by federal prosecutors will increasingly be experienced by private practitioners. The Standing Committee needs to work diligently on this problem and recognize that the tradition of local autonomy in norms of attorney conduct may have to give way to the reality of growing national practices.

A member said that he was disturbed by the complicated choice-of-law provisions in the Cooper draft. In particular, he did not understand why, in an appeal from a district court in "State A" in which one of the parties hires appellate counsel from "State B" to argue the case in a court of appeals that sits in "State C," the professional responsibility rules in "State A" should govern the attorney's conduct before the court of appeals. The attorney may never have stepped foot in "State A," and any misconduct that he commits will occur in "State C."

Prof. Coquillette thanked the Committee for their helpful comments.

B. Item No. 98-03 (FRAP 29(e) & 31(a)(1) — timing of amicus briefs)

Mr. Letter introduced this item. Mr. Letter said that when the appellate rules were restylized, FRAP 29 was amended so that, instead of an amicus brief being due at the same time as the principal brief of the party being supported, an amicus brief is now due seven days after the filing of the principal brief of the party being supported. Public Citizen Litigation Group has raised two concerns about this change: First, an appellant might have to file a reply brief before being able to read the brief of an amicus supporting the appellee. Second, an amicus supporting an appellee might not be able to see the appellee's brief until just before the amicus's brief is due, and thus the amicus might not be able to take account of the arguments made by the appellee in its brief.

Mr. Letter said that he wrote to several organizations that frequently file amicus briefs in the courts of appeals to solicit their suggestions about how FRAP 29 might be amended to fix these problems. He received virtually no response to his letter. He also talked to several appellate attorneys in the Department of Justice. None of them had experienced the problems feared by Public Citizen Litigation Group.

Mr. Letter urged that Item No. 98-03 be removed from the Committee's study agenda. If these problems materialize in the future, the Committee can address them at that time. For the present, though, no action was necessary.

A member moved that Item No. 98-03 be removed from the Committee's study agenda. The motion was seconded. The motion carried.

C. Item No. 98-06 (FRAP 4(b)(3)(A) — effect of filing of FRCrP 35(c) motion on time to appeal)

Mr. Letter introduced the following proposed amendment and Committee Note:

Rule 4. Appeal as of Right — When Taken

(b) Appeal in a Criminal Case.

(5) **Jurisdiction.** The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(c), nor does the filing of a motion under 35(c) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(c) does not suspend the time for filing a notice of appeal from a judgment of conviction.

Committee Note

Subdivision (b)(5). Federal Rule of Criminal Procedure 35(c) permits a district court, acting within seven days after the imposition of sentence, to correct an erroneous sentence in a criminal case. Some courts have held that the filing of a motion for correction of a sentence suspends the time for filing a notice of appeal from the judgment of conviction. *See, e.g., United States v. Carmouche*, 138 F.3d 1014, 1016 (5th Cir. 1998) (per curiam); *United States v. Morillo*, 8 F.3d 864, 869 (1st Cir. 1993). Those courts establish conflicting timetables for appealing a judgment of conviction after the filing of a motion to correct a sentence. In the First Circuit, the time to appeal is suspended only for the period provided by Fed. R. Crim. P. 35(c) for the district court to correct a sentence; the time to appeal begins to run again once seven days have passed after sentencing, even if the motion is still pending. By contrast, in the Fifth Circuit, the time to appeal does not begin to run again until the district court actually issues an order disposing of the motion.

Rule 4(b)(5) has been amended to eliminate the inconsistency concerning the effect of a motion to correct a sentence on the time for filing a notice of appeal. The amended rule makes clear that the time to appeal continues to run, even if a motion to correct a sentence is filed. The amendment is consistent with Rule 4(b)(3)(A), which lists the motions that toll the time to appeal, and notably omits any mention of a Fed. R. Crim. P. 35(c) motion. The amendment also should promote certainty and minimize the likelihood of confusion concerning the time to appeal a judgment of conviction.

If a district court corrects a sentence pursuant to Fed. R. Crim. P. 35(c), the time for filing a notice of appeal of the corrected sentence under Rule 4(b)(1) would begin to run when the court enters a new judgment reflecting the corrected sentence.

Mr. Letter said that the Committee had approved the substance of this amendment at its April 1999 meeting, subject to one concern: The Committee wondered what would happen if the *government* brought a FRCrP 35(c) motion and then on, say, the sixth day after imposing sentence, the district court granted the motion. If a new judgment was not entered, the defendant might have only a couple of days to file a notice of appeal.

Mr. Letter said that he had investigated the matter and learned that when a FRCrP 35(c) motion is granted, a new judgment is always entered, and either party then has 10 days to appeal the new judgment. He said that the proposed Committee Note confirms this understanding in the final sentence, although he asked whether the Committee might want to remove that sentence, given that it really addresses an issue of criminal rather than appellate procedure. A couple of members expressed support for leaving the sentence in the Note, as the sentence makes clear the assumption upon which the Committee acted in approving the amendment.

A member moved that the amendment and Committee Note be approved. The motion was seconded. The motion carried.

D. Item No. 98-07 (FRAP 22(a) — permit circuit judges to deny habeas applications)

FRAP 22(a) requires that a habeas petition be filed in the district court and that, if it is erroneously presented to a circuit judge, it be transferred to the district court. Judge Kenneth F. Ripple has suggested that FRAP 22(a) be amended to permit circuit judges to deny habeas petitions. At the Committee's October 1998 meeting, Judge Garwood asked the Department of Justice to study this issue and make a recommendation to the Committee.

Mr. Letter said that the Justice Department has been working on this issue, but the issue is a complicated one, and the Department will not be prepared to present a formal proposal until at least the April 2000 meeting.

A member moved that further discussion of this matter be postponed until the April 2000 meeting. The motion was seconded. The motion carried.

The Committee adjourned for lunch at 11:55 a.m. and reconvened at 1:30 p.m.

E. Item No. 97-32 (FRAP 12(a) — require caption to identify only the parties to the appeal)

Mr. Fulbruge introduced this item. Mr. Fulbruge discussed at length the manner in which appellate cases are docketed and otherwise processed by clerks' offices. He highlighted three key events:

(a) Promptly after the notice of appeal is received from the district clerk, the appellate clerk's office dockets the case. In the Fifth Circuit, the clerk's office tries to docket every case within 24 hours after receipt of the notice of appeal. The appellate clerk's office is required by FRAP 12(a) to "docket the appeal under the title of the district-court action." Under FRCP 10(a), the title to the district court action includes every one of the parties to that action.

(b) No later than 10 days after the notice of appeal is filed, the attorney who filed the appeal must file a representation statement under FRAP 12(b). Only the attorney who files the notice of appeal must file a representation statement, and that attorney is required to identify only "the parties that the attorney represents on appeal."

(c) Several weeks later, the appellant files its brief. Often it is not until this point that the appellate clerk's office and the parties are able to identify which parties to the district court action are parties to the appeal.

Mr. Fulbruge said that Item No. 97-32 focuses only on the first step — the docketing of the appeal by the clerks' offices. The requirement that appeals be docketed "under the title of the district-court action" causes considerable inconvenience for the clerks' offices, which are trying to handle more and more cases with less and less resources. Often, there may be dozens or even hundreds of parties to a district court action. Someone in the clerk's office has to manually enter the names of all of these parties, even though only a few of them may be parties to the appeal In order to avoid this waste of resources, the appellate clerks have proposed that FRAP 12(a) be amended so that titles would identify only the parties to the appeal.

Mr. Fulbruge answered a number of questions from the Committee about the mechanics of docketing appeals. For example, Mr. Fulbruge clarified the difference between *docketing* an appeal and *captioning* an appeal. Although FRAP 3(c)(1)(A) permits a "short title" to be used in the *caption* — e.g., "Smith, et al. v. Jones, et al." — FRAP 12(a) requires that a "full title" be used in *docketing* the case — that is, that every party to the district court action be entered into the appellate court's computer. Mr. Fulbruge conceded, however, that some of the clerks' offices do not enter the names of all parties to the district court action when docketing an appeal.

In the course of the discussion, members of the Committee raised three concerns about the proposed amendment to FRAP 12(a):

1. Under the amendment, the clerks, when docketing a case, would need only to "identify in the title the appellant or appellants and the appellee or appellees." However, at the time a case

is docketed, no one — including the party who filed the notice of appeal — may *know* who will be the "appellants," who will be the "appellees," and who will not be involved in the appeal at all. In some cases, the parties do not know whether they will participate in the appeal — and, if so, in what capacity — until the appellant's brief is filed and it becomes clear what is being challenged and on what grounds.

A member pointed out that the appellate clerks' proposal is, in some respects, a reflection of a broader problem. It is sometimes difficult to know who is a "party" to an appeal. For example, a district court case may involve 12 plaintiffs, only one of whom appeals. The other 11 plaintiffs may not want to file appeals, but they may want to play some role in the appeal, depending upon what arguments are made by the appellees. Can those 11 plaintiffs be considered "parties" to the appeal, even though they have not filed notices of appeal, and even though they are not adverse to the one plaintiff who has appealed? Supreme Court Rule 12.6 provides that "[a]ll parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court" and that "[a]ll parties other than the petitioner are considered respondents." Perhaps a similar provision should be incorporated into FRAP.

2. In some cases, the court of appeals is required to take action before the appellant's brief is filed. For example, the court may have to rule upon a motion. This makes it necessary for judges to be able to determine whether they should be recused from a case before the appellant's brief is filed — that is, before it is clear who will be participating in the appeal. Because all of the parties to the district court action are *potential* parties to the appeal, all of those parties must be identified so that the appropriate recusal check can be run. In some courts, computers are used to assist judges with their recusal obligations. Thus, even if FRAP 12(a) was changed as the circuit clerks request, the names of all of the parties to the district court action would *still* have to be entered in the court of appeals' computer so that recusal checks could be run early in the case.

For this reason, an option suggested by one member — entering the name of the appellant and *some* of the potential appellees, and then adding names as parties make appearances — will not work. If a motion is filed three or four days after a case is filed, judges must be able to determine if they need to recuse themselves from ruling on the motion. To do that, judges need to know *all* of those who were parties in the district court.

3. This entire problem will disappear once the computers of the district courts are able to "talk" to the computers of the circuit courts. When that happens, it will no longer be necessary for appellate clerks manually to enter the names of all parties to the district court action. Rather, those names will be transmitted electronically with the touch of a button. The AO is presently working on this issue and expects that, within the next couple years, the technological problem will be solved. That being the case, any amendment to FRAP 12(a) would probably not take effect until after the problem that gave rise to the amendment had disappeared.

The Committee reached a consensus that no action should be taken on the clerks' proposal. A member moved that Item No. 97-32 be removed from the Committee's study

agenda without prejudice to the clerks raising the proposal again if the software promised by the AO does not materialize. The motion was seconded. The motion carried.

F. Item No. 97-33 (FRAP 3(c) or 12(b) — require filing of statement identifying all parties and counsel)

Mr. Fulbruge introduced this item.

FRAP 12(b) presently requires only the attorney who files a notice of appeal to submit a representation statement and requires that attorney to identify only himself and his clients. The appellant's attorney is not asked to identify the appellees or their attorneys, and no other party is required to file a representation statement. This lack of information sometimes makes it difficult for the clerks to identify all of the parties and attorneys. To remedy this problem, the clerks have proposed amending FRAP 3(c)(1)(A) to require a party filing a notice of appeal to simultaneously submit "a separate statement listing all parties to the appeal, the last known counsel, and the last known addresses for counsel and unrepresented parties."

At the Committee's April 1999 meeting, some members suggested that, instead of amending FRAP 3(c) (which specifies the contents of the notice of appeal), the Committee should consider amending FRAP 12(b) (which specifies the contents of the representation statement). FRAP 12(b) could be amended to require that the representation statement identify the likely appellees and their counsel.

Mr. Fulbruge said that changing the contents of the representation statement will not help the appellate clerks. The clerks need help figuring out who the parties and counsel are at the time of docketing. The representation statement is often not filed until several days after the case is docketed.

Members responded in a couple of ways. First, several members expressed strong reservations about amending FRAP 3(c). The Supreme Court has repeatedly held that the requirements of FRAP 3 are "mandatory and jurisdictional"; routine information-gathering provisions should appear somewhere else in FRAP. One member pointed out that the representation statement provision was intentionally put in FRAP 12 rather than FRAP 3 precisely so that the provision would not be considered "mandatory and jurisdictional." Second, FRAP 12(b) could be changed not only to expand the information that must be contained in the representation statement, but also to require the statement to be filed with the notice of appeal. One member said that the local rules of some courts — including the Ninth Circuit — require "civil docketing statements" or similar forms to be filed at the time of the notice of appeal.

Some members questioned whether an expanded representation statement filed at the time of the notice of appeal would be helpful, given that it is sometimes impossible to identify who will be appellees until the appellant's brief is filed. An appellant who is required to identify likely appellees and their counsel might have to engage in a lot of guesswork. Mr. Fulbruge responded that the appellate clerks will "take what we can get." Someone has to do guesswork at the time the appeal is docketed, and the appellant is in a better position to guess than the clerks.

The Reporter volunteered to work with Mr. Fulbruge to draft an appropriate amendment to FRAP 12(b). By consensus, the Committee agreed to postpone further consideration of Item No. 97-33 until April 2000.

G. Items Awaiting Initial Discussion

1. Item No. 99-04 (FRAP 32(a)(7) — Microsoft Word counting glitch)

FRAP 32(a)(7)(B) sets forth the type-volume limitations on briefs, requiring, for example, that a principal brief not exceed 14,000 words. FRAP 32(a)(7)(C) specifically provides that the parties may "rely on the word or line count of the word-processing system used to prepare the brief" in certifying that the brief meets the type-volume limitations.

In *DeSilva v. DiLeonardi*, 185 F.3d 815 (7th Cir. 1999) (per curiam), the Seventh Circuit issued an opinion warning practitioners of a glitch in the Microsoft Word 97 program. Apparently, when text within a document is "selected" and the program is asked to count the words within the selected text, the program does not count words in footnotes unless the user specifically instructs the program to do so. As a result, parties may unintentionally file briefs that exceed the type-volume limitations.

The Reporter said that he did not think this glitch or any other glitches in particular versions of particular software should be addressed through amendments to FRAP. By the time an amendment can take effect, the particular version of the particular software will likely be obsolete. A better solution is to do what the Seventh Circuit did in this case: warn the bar of the glitch and ask the manufacturer of the software to fix it. A member said that he has been told that Microsoft has already corrected the problem described by the Seventh Circuit.

The Reporter said that other glitches had been brought to his attention. For example, if a "hard space" is used between two words, some word processing programs will count the two words as one. In theory, a party could put hard spaces between all words and file a "one word" brief. The Reporter said that, if glitches continue to cause problems, the Committee may want to consider eliminating the provision in FRAP 32(a)(7)(C) that authorizes reliance on the word count of word processing programs. Parties could still *use* that feature in assessing whether their briefs met the type-volume limitations — and, indeed, parties would have an incentive to make certain that they got as accurate a count as possible. But, at the end of the day, parties would have to bear responsibility for meeting the type-volume limitation. A member pointed out that the standard certificate of compliance that this Committee approved in April 1998 requires parties to state the exact number of words in their briefs. As long as that is true, the member said, parties should be able to rely on their word processing programs to count words.

A member moved that Item No. 99-04 be removed from the study agenda. The motion was seconded. The motion carried.

2. Item No. 99-05 (FRAP 3(c) — failure explicitly to name court to which appeal taken)

FRAP 3(c)(1)(C) provides that a notice of appeal must "name the court to which the appeal is taken." Suppose that a notice of appeal does not *explicitly* "name the court to which the appeal is taken." However, it is clear that only one court of appeals has jurisdiction over the appeal. Must the appeal be dismissed for failure to comply with FRAP 3(c)(1)(C)?

The Sixth Circuit divided over this question in *Dillon v. United States*, 184 F.3d 556 (6th Cir. 1999) (en banc). The majority, citing the admonition in FRAP 3(c)(4) that "[a]n appeal must not be dismissed for informality of form or title of the notice of appeal," held that such a notice of appeal "name[d] the court to which the appeal is taken" as a *practical* matter, as there was only one appellate court to which an appeal could lie. The dissenters, citing Supreme Court decisions characterizing the requirements of FRAP 3 as "mandatory and jurisdictional," argued that the problem with such a notice of appeal is not *informality*, but rather that it does not "name the court to which the appeal is taken" *at all*.

The Reporter suggested that this item be removed from the study agenda. The Sixth Circuit's decision was reasonable. To the Reporter's knowledge, the decision does not conflict with any decision of any court of appeals, and it is consistent with at least one other decision that addressed the same issue. The Reporter recommended postponing any action on this issue unless and until a circuit split develops.

Mr. Letter disagreed. He said that he thought the issue was at least worthy of further study. He offered to have the Department of Justice look at the issue and report back to the Committee at its April 2000 meeting. By consensus, the Committee agreed to postpone further action on Item No. 99-05 until April 2000.

3. Item No. 99-07 (FRAP 26.1 — broaden financial disclosure obligations)

Prof. Coquillette introduced this item.

The *Kansas City Star* and the *Washington Post* recently published articles identifying cases in which federal judges neglected to recuse themselves even though they had a financial interest in one of the parties or in a parent company of one of the parties. In response, the Judicial Conference's Committee on Codes of Conduct asked the Standing Committee to examine whether the rules of practice and procedure should be amended to ensure better compliance with recusal standards. The Standing Committee, in turn, has asked the Civil Rules Committee, the Criminal Rules Committee, and the Bankruptcy Rules Committee to consider whether a provision patterned on FRAP 26.1 should be incorporated in their respective rules.

The Civil Rules Committee considered this issue at its meeting last week. Some members of that Committee argued that a rule *broader* than FRAP 26.1 should be added to the FRCP; these members said that FRAP 26.1 required too little information from the parties and

encouraged too much local rulemaking. Other members disagreed and said that they would object to financial disclosure obligations broader than those imposed under FRAP 26.1. Still other members said that *no* rule regarding financial disclosure should be included in the FRCP; rather, this matter should be left to the local rules, which are more flexible and can be changed more quickly. These members also pointed out that including a "FRAP 26.1" in the FRCP would have done nothing to prevent the errors that were the subject of the *Kansas City Star* and *Washington Post* articles.

Prof. Coquillette agreed with this latter point. In virtually all of the cases identified by the *Kansas City Star* and *Washington Post*, the problem was not that the judges had insufficient information about the parties; the problem was that the judges failed to act upon the information that had been provided to them. Amendments to the rules of practice and procedure cannot force judges to be more diligent in meeting their recusal obligations. Rather, this is a problem that should be addressed through better administrative support — such as better software.

In any event, Prof. Coquillette said, although there was a lot of disagreement among members of the Civil Rules Committee about FRAP 26.1, the notion of incorporating a provision based upon FRAP 26.1 into the FRCP was not rejected, and no one proposed a specific alternative. Prof. Coquillette warned, though, that it is possible that one of the other Advisory Committees might approve a financial disclosure rule that is broader than FRAP 26.1, in which case this Committee might be asked to approve conforming amendments to FRAP 26.1.

Ms. Krafka spoke next. She said that, at the request of the Standing Committee, the Federal Judicial Center ("FJC") had collected and analyzed all of the local rules that addressed financial disclosure. The FJC found that 9 of the 13 courts of appeals require parties to disclose more information than is required by FRAP 26.1, although in some cases the differences were minimal. The district courts have a dizzying array of local rules addressing financial disclosure. Ms. Krafka referred the Committee to the FJC's report for a detailed description of the local rules.

Ms. Krafka agreed with Prof. Coquillette that judges who fail to recuse themselves when they should almost always do so inadvertently. The problem is rarely that judges do not have information that they need to make an informed decision. Rather, the problem is almost always that, for one reason or another, judges neglect to act upon information that has already been provided to them. The AO recently released enhanced software that is designed to help judges meet their recusal obligations.

Mr. Rabiej said that, at the Standing Committee's January 2000 meeting, the Reporters will be asked to try to draft a financial disclosure rule that may or may not be patterned after FRAP 26.1. If the Reporters can come up with such a rule, that rule might be presented to all of the Advisory Committees at their spring meetings. Mr. Rabiej said that one of the most controversial issues is the extent to which courts should be able to use local rules to require disclosure beyond that required by FRAP 26.1. Some have argued that the many current local rules are unnecessary, create a substantial burden to the parties, and result in too many recusals.

A member said that this Committee had considered a version of FRAP 26.1 that would have precluded local rulemaking, but dropped the idea in the face of strong opposition from the chief judges. Another member said that he would object to any attempt to preclude local rulemaking unless the national rules require parties to provide all of the information that judges need to meet their recusal obligations. If judges are required to recuse themselves for "x" reason, but the national rules don't require the parties to tell judges whether "x" reason exists, then local rulemaking is necessary.

Mr. Rabiej and Ms. Krafka said that another alternative being considered is to amend all of the rules of practice and procedure to require that the parties submit a financial disclosure form approved by the Judicial Conference. In this way, the Judicial Conference could "fine tune" financial disclosure obligations without going through the time-consuming Rules Enabling Act process.

One member said that this problem could be solved if judges would simply make public their investments. The burden could then be placed on the parties to identify the judges who should be recused. Judge Garwood responded that, several years ago, the Judicial Conference soundly defeated a proposal to make information about the investments of judges more readily available. A member also pointed out that, in the courts of appeals, such a system would be difficult to implement, given that parties often don't know which judges will hear their cases until the day of argument, and given the widespread use of visiting and district judges on panels.

Prof. Coquillette thanked the Committee for its helpful input.

The Committee adjourned for the day at 3:45 p.m.

The Committee reconvened on Friday, October 22, at 8:30 a.m. Judge Garwood announced that, with respect to Item No. 98-02, the subcommittee had agreed that it was not possible to draft a shorter Committee Note in the limited time that was available. The subcommittee will continue to work on the issue and possibly present a shorter Note to the Committee in the future.

Judge Garwood then recognized Mr. Meehan, who introduced Mr. Marty Steinberg, CEO of Pubnetics, and Mr. Dennis Haserot, Pubnetics' Director of Publishing Services. Mr. Steinberg and Mr. Haserot gave the Committee a demonstration of technology developed by Pubnetics that allows parties to file their briefs and the entire record on a single "interactive" CD-ROM. Mr. Meehan distributed copies of Fed. Cir. R. 32, which specifically authorizes the filing of briefs on CD-ROM in the Federal Circuit. Mr. Meehan said that, in the near future, this Committee should consider incorporating a similar provision into FRAP. Judge Garwood thanked Mr. Steinberg and Mr. Haserot for their interesting presentation and Mr. Meehan for bringing this issue to the Committee's attention.

VI. Additional Old Business and New Business

There was no additional old business or new business.

VII. Scheduling of Dates and Location of Spring 2000 Meeting

The Committee agreed that it will meet in Washington, D.C., on April 13 and 14, 2000.

VIII. Adjournment

By unanimous consent, the Advisory Committee adjourned at 9:45 a.m.

Respectfully submitted,

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Patrick J. Schiltz
Reporter

Reporter's Note: Attached as an appendix to these minutes are copies of all amendments and Committee Notes approved by the Committee at this meeting.

APPENDIX

To the Minutes of the Fall 1999 Meeting of the Advisory Committee on Appellate Rules

Reporter's Note: This appendix contains copies of all amendments to the Federal Rules of Appellate Procedure and Committee Notes approved by the Advisory Committee on Appellate Rules at its October 1999 meeting.

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(7) Entry Defined.

(A) A judgment or order is entered for purposes of this Rule 4(a)

(i) when it is entered in the civil docket in compliance with Rules ~~58 and~~ 79(a) of the Federal Rules of Civil Procedure and,

(ii) if entry on a separate document is required by Rules 54(a) and 58 of the Federal Rules of Civil Procedure,

- when it is set forth on a separate document as required by Rules 54(a) and 58 of the Federal Rules of Civil Procedure, or
- 150 days after it is entered in the civil docket in compliance with Rule 79(a) of the Federal Rules of Civil Procedure,

whichever comes first.

(B) The failure to set forth a judgment or order on a separate document when required by Rules 54(a) and 58 of the Federal Rules of Civil Procedure does not invalidate an appeal from that judgment or order.

Committee Note

Subdivision (a)(7). Several circuit splits have arisen out of uncertainties about how Rule 4(a)(7)'s definition of when a judgment or order is "entered" interacts with the requirement in Fed. R. Civ. P. 58 that, to be "effective," a judgment must be set forth on a separate document. Rule 4(a)(7) has been amended to address those circuit splits.

1. The first circuit split addressed by the amendment concerns the extent to which orders that dispose of post-judgment motions must be set forth on separate documents. Under Rule 4(a)(4)(A), the filing of certain post-judgment motions tolls the time to appeal the underlying judgment until "entry" of the order disposing of the last such remaining motion. Rule 4(a)(7)

provides that a judgment or order is "entered" for purposes of Rule 4(a) "when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure." Fed. R. Civ. P. 58, in turn, provides that a "judgment" is not "effective" until it is "set forth on a separate document," and Fed. R. Civ. P. 54(a) defines "judgement" as including "any order from which an appeal lies."

Courts have taken at least four approaches in deciding whether an order that disposes of a post-judgment motion must be set forth on a separate document before it is considered entered under Rule 4(a)(7):

First, some courts seem to interpret Rule 4(a)(7) to incorporate the separate document requirement as it exists in the Federal Rules of Civil Procedure. *See, e.g., United States v. Haynes*, 158 F.3d 1327, 1329 (D.C. Cir. 1998); *Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 229, 232-33 (1st Cir. 1992) (en banc); *RR Village Ass'n v. Denver Sewer Corp.*, 826 F.2d 1197, 1200-01 (2d Cir. 1987). Read in this manner, Rule 4(a)(7) does not itself impose a separate document requirement. Rather, it simply provides that when — and only when — Fed. R. Civ. P. 54(a) and 58 impose a separate document requirement, a judgment or order will not be treated as entered for purposes of Rule 4(a) until it is set forth on a separate document. Under this approach, then, whether an order disposing of a Rule 4(a)(4)(A) motion must be set forth on a separate document depends entirely on whether the order is one "from which an appeal lies." If it is, then the order is not entered under Rule 4(a)(7) until it is set forth on a separate document; if it is not, then the order is entered under Rule 4(a)(7) as soon as it is entered in the civil docket in compliance with Fed. R. Civ. P. 79(a).

Second, some courts seem to interpret Rule 4(a)(7) *independently* to impose a separate document requirement, and not just when Fed. R. Civ. P. 54(a) and 58 would, but on *all* judgments and orders whose entry is of consequence under Rule 4(a). *See, e.g., Hard v. Burlington N. R.R. Co.*, 870 F.2d 1454, 1457-58 (9th Cir. 1989); *Allen ex rel. Allen v. Horinek*, 827 F.2d 672, 673 (10th Cir. 1987); *Stern v. Shouldice*, 706 F.2d 742, 746 (6th Cir. 1983); *Calhoun v. United States*, 647 F.2d 6, 8-10 (9th Cir. 1981). Under this approach, all orders disposing of Rule 4(a)(4)(A) motions must be set forth on separate documents before they are considered entered under Rule 4(a)(7). Whether an appeal lies from such an order is irrelevant.

Third, some courts hold that the separate document requirement applies to orders that *grant* post-judgment motions, but not to orders that *deny* post-judgment motions. *See, e.g., Copper v. City of Fargo*, No. 98-2144, 1999 WL 516758, at *3 (8th Cir. July 22, 1999) (per curiam); *Marré v. United States*, 38 F.3d 823, 825 (5th Cir. 1994); *Hollywood v. City of Santa Maria*, 886 F.2d 1228, 1231-32 (9th Cir. 1989); *Charles v. Daley*, 799 F.2d 343, 346-47 (7th Cir. 1986). These courts reason that, when a post-judgment motion is denied, the original judgment remains in effect, and therefore entry of the order denying the motion on a separate document is unnecessary. When a post-judgment motion is granted, the original judgment is generally altered or amended, and the altered or amended judgment should be set forth on a separate document.

Finally, the Eleventh Circuit holds that the separate document requirement does not apply to *any* order that grants or denies a post-judgment motion, whether or not the order is one from

which an appeal lies. Indeed, according to the Eleventh Circuit, the separate document requirement does not even apply to an altered or amended judgment. *See Wright v. Preferred Research, Inc.*, 937 F.2d 1556, 1560-61 (11th Cir. 1991).

Rule 4(a)(7) has been amended to adopt the first of these four approaches. Under the amended rule, a judgment or order is treated as entered under Rule 4(a)(7) when it is entered in the civil docket in compliance with Fed. R. Civ. P. 79(a), with one exception: If *Fed. R. Civ. P. 54(a) and 58* require that a particular judgment or order must be set forth on a separate document, then that judgment or order will not be treated as entered for purposes of Rule 4(a)(7) until it is so set forth (or, as explained below, until 150 days after its entry in the civil docket). Thus, whether an order disposing of a post-judgment motion must be set forth on a separate document before it is treated as entered depends entirely on whether the order is one "from which an appeal lies" under the law of the relevant circuit. If it is, then Fed. R. Civ. P. 54(a) and 58 require that it be set forth on a separate document, and it will not be treated as entered for purposes of Rule 4(a)(7) until it is so set forth (or until 150 days after its entry in the civil docket). If it is not, then it will be treated as entered for purposes of Rule 4(a)(7) as soon as it is entered in the civil docket, whether or not it is also set forth on a separate document.

2. The second circuit split addressed by the amendment concerns the following question: When a judgment or order is required to be set forth on a separate document under Fed. R. Civ. P. 54(a) and 58 but is not, does the time to appeal the judgment or order ever begin to run? According to every circuit except the First Circuit, the answer is "no." "A party safely may defer the appeal until Judgment Day if that is how long it takes to enter [the judgment or order on] the [separate] document." *In re Kilgus*, 811 F.2d 1112, 1117 (7th Cir. 1987). The First Circuit, fearing that "long dormant cases could be revived years after the parties had considered them to be over" if Fed. R. Civ. P. 54(a) and 58 and Rule 4(a)(7) were applied literally, holds that parties will be deemed to have waived their right to have a judgment or order set forth on a separate document three months after the judgment or order is entered in the civil docket. *Fiore*, 960 F.2d at 236. Other circuits have rejected this three month cap as contrary to the relevant rules, *see, e.g.*, *Haynes*, 158 F.3d at 1331; *Hammack v. Baroid Corp.*, 142 F.3d 266, 270 (5th Cir. 1998); *Pack v. Burns Int'l Sec. Serv.*, 130 F.3d 1071, 1072-73 (D.C. Cir. 1997); *Rubin v. Schottenstein, Zox & Dunn*, 110 F.3d 1247, 1253 n.4 (6th Cir. 1997), *vacated on other grounds* 143 F.3d 263 (6th Cir. 1998) (en banc), although no court has questioned the wisdom of imposing such a cap as a matter of policy.

Rule 4(a)(7) has been amended to impose such a cap. As noted above, a judgment or order is treated as entered for purposes of Rule 4(a)(7) when it is entered in the civil docket, unless Fed. R. Civ. P. 54(a) and 58 require the judgment or order to be set forth on a separate document, in which case the judgment or order will not be treated as entered for purposes of Rule 4(a)(7) until it is so set forth. There is one exception: A judgment or order will be treated as entered *for purposes of Rule 4(a)(7)* — notwithstanding anything to the contrary in Federal Rules of Civil Procedure — 150 days after the judgment or order is entered in the civil docket in compliance with Fed. R. Civ. P. 79(a). On the 150th day, the time to appeal the judgment or order will begin to run, even if the judgment or order is one that must otherwise be set forth on a

separate document under Fed. R. Civ. P. 54(a) and 58, and even if the judgment or order has not been so set forth.

This cap will ensure that parties will not be given forever to appeal a judgment or order that should have been set forth on a separate document but was not. In the words of the First Circuit, "When a party allows a case to become dormant for such a prolonged period of time, it is reasonable to presume that it views the case as over. A party wishing to pursue an appeal and awaiting the separate document of judgment from the trial court can, and should, within that period file a motion for entry of judgment. This approach will guard against the loss of review for those actually desiring a timely appeal while preventing resurrection of litigation long treated as dead by the parties." *Fiore*, 960 F.2d at 236.

3. The third circuit split addressed by the amendment concerns whether the appellant may waive the separate document requirement over the objection of the appellee. In *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387 (1978) (per curiam), the Supreme Court held that the "parties to an appeal may waive the separate-judgment requirement of Rule 58." Specifically, the Supreme Court held that when a district court enters an order and "clearly evidence[s] its intent that the . . . order . . . represent[s] the final decision in the case," the order is a "final decision" for purposes of 28 U.S.C. § 1291, even if the order has not been set forth on a separate document for purposes of Fed. R. Civ. P. 58. *Id.* Such an order would not be "effective" — that is, the time to appeal the order would not begin to run, and thus a potential appellant would not *have* to appeal. However, such an order would be a "final decision" — and thus, a potential appellant *could* appeal if it wanted to.

Courts have disagreed about whether the consent of all parties is necessary to waive the separate document requirement. Some circuits permit appellees to object to attempted *Mallis* waivers and to force appellants to return to the trial court, request entry of judgment on a separate document, and appeal a second time. *See, e.g., Selletti v. Carey*, 173 F.3d 104, 109-10 (2d Cir. 1999); *Williams v. Borg*, 139 F.3d 737, 739-40 (9th Cir.), *cert. denied*, 119 S. Ct. 353 (1998); *Silver Star Enters., Inc. v. M/V Saramacca*, 19 F.3d 1008, 1013 (5th Cir. 1994); *Whittington v. Milby*, 928 F.2d 188, 192 (6th Cir. 1991); *Wang Labs., Inc. v. Applied Computer Sciences, Inc.*, 926 F.2d 92, 96 (1st Cir. 1991); *Anoka Orthopaedic Assocs., P.A. v. Lechner*, 910 F.2d 514, 515 n.2 (8th Cir. 1990); *Long Island Lighting Co. v. Town of Brookhaven*, 889 F.2d 428, 430 (2d Cir. 1989). Other courts disagree and permit *Mallis* waivers even if the appellee objects. *See, e.g., Haynes*, 158 F.3d at 1331; *Miller v. Artistic Cleaners*, 153 F.3d 781, 783-84 (7th Cir. 1998); *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1006 n.8 (3d Cir. 1994); *Mitchell v. Idaho*, 814 F.2d 1404, 1405 (9th Cir. 1987).

New Rule 4(a)(7)(B) is intended both to codify the Supreme Court's holding in *Mallis* and to make clear that the decision whether to waive entry of a judgment or order on a separate document is the appellant's alone. It is, after all, the appellant who needs a clear signal as to when the time to file a notice of appeal has begun to run. If the appellant chooses to bring an appeal without awaiting entry of the judgment or order on a separate document, then there is no reason why the appellee should be able to object. All that would result from honoring the appellee's objection would be delay. The appellant would return to the trial court, ask the court

to enter the judgment or order on a separate document, and appeal again. "Wheels would spin for no practical purpose." *Mallis*, 435 U.S. at 385.

4. The final circuit split addressed by the amendment concerns the question whether an appellant who chooses to waive the separate document requirement must appeal within 30 days (60 days if the government is a party) from the entry in the civil docket of the judgment or order that should have been set forth on a separate document but was not. In *Townsend v. Lucas*, 745 F.2d 933 (5th Cir. 1984), the district court dismissed a 28 U.S.C. § 2254 action on May 6, 1983, but failed to enter judgment on a separate document. The plaintiff appealed on January 10, 1984. The Fifth Circuit held that the appeal was premature, in that the time to appeal the May 6 order had never begun to run because the May 6 order had not been set forth on a separate document. However, the Fifth Circuit said that it had to dismiss the appeal, rather than consider it on the merits, even though the parties were willing to waive the separate document requirement. The Fifth Circuit reasoned that, if the plaintiff waived the separate document requirement, then his appeal would be from the May 6 order, and if his appeal was from the May 6 order, then it was untimely under Rule 4(a)(1). By dismissing the appeal, the Fifth Circuit said, it was giving the plaintiff the opportunity to return to the district court, move for entry of judgment on a separate document, and appeal from that judgment within 30 days. *Id.* at 934. Several other cases have embraced the *Townsend* approach. *See, e.g., Armstrong v. Ahitow*, 36 F.3d 574, 575 (7th Cir. 1994); *Hughes v. Halifax County Sch. Bd.*, 823 F.2d 832, 835-36 (4th Cir. 1987); *Harris v. McCarthy*, 790 F.2d 753, 756 n.1 (9th Cir. 1986).

Those cases are in the distinct minority. There are numerous cases in which courts have heard appeals that were not filed within 30 days (60 days if the government was a party) from the judgment or order that should have been set forth on a separate document but was not. *See, e.g., Haynes*, 158 F.3d at 1330-31; *Pack*, 130 F.3d at 1073; *Rubin*, 110 F.3d at 1253; *Clough v. Rush*, 959 F.2d 182, 186 (10th Cir. 1992); *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1218-19 (9th Cir. 1990); *Allah v. Superior Court*, 871 F.2d 887, 890 (9th Cir. 1989); *Gregson & Assocs. Architects v. Virgin Islands*, 675 F.2d 589, 593 (3d Cir. 1982) (per curiam). In the view of these courts, the remand in *Townsend* was "precisely the purposeless spinning of wheels abjured by the Court in the [*Mallis*] case." 15B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3915, at 259 n.8 (3d ed. 1992).

The Advisory Committee agrees with the majority of courts that have rejected the *Townsend* approach. In drafting new Rule 4(a)(7)(B), the Advisory Committee has been careful to avoid phrases such as "otherwise timely appeal" that might imply an endorsement of *Townsend*.

Rule 4. Appeal as of Right — When Taken

(b) Appeal in a Criminal Case.

(5) **Jurisdiction.** The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(c), nor does the filing of a motion under 35(c) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(c) does not suspend the time for filing a notice of appeal from a judgment of conviction.

Committee Note

Subdivision (b)(5). Federal Rule of Criminal Procedure 35(c) permits a district court, acting within seven days after the imposition of sentence, to correct an erroneous sentence in a criminal case. Some courts have held that the filing of a motion for correction of a sentence suspends the time for filing a notice of appeal from the judgment of conviction. *See, e.g.*, *United States v. Carmouche*, 138 F.3d 1014, 1016 (5th Cir. 1998) (per curiam); *United States v. Morillo*, 8 F.3d 864, 869 (1st Cir. 1993). Those courts establish conflicting timetables for appealing a judgment of conviction after the filing of a motion to correct a sentence. In the First Circuit, the time to appeal is suspended only for the period provided by Fed. R. Crim. P. 35(c) for the district court to correct a sentence; the time to appeal begins to run again once seven days have passed after sentencing, even if the motion is still pending. By contrast, in the Fifth Circuit, the time to appeal does not begin to run again until the district court actually issues an order disposing of the motion.

Rule 4(b)(5) has been amended to eliminate the inconsistency concerning the effect of a motion to correct a sentence on the time for filing a notice of appeal. The amended rule makes clear that the time to appeal continues to run, even if a motion to correct a sentence is filed. The amendment is consistent with Rule 4(b)(3)(A), which lists the motions that toll the time to appeal, and notably omits any mention of a Fed. R. Crim. P. 35(c) motion. The amendment also should promote certainty and minimize the likelihood of confusion concerning the time to appeal a judgment of conviction.

If a district court corrects a sentence pursuant to Fed. R. Crim. P. 35(c), the time for filing a notice of appeal of the corrected sentence under Rule 4(b)(1) would begin to run when the court enters a new judgment reflecting the corrected sentence.

Rule 5. Appeal by Permission

(c) Form of Papers; Number of Copies. All papers must conform to Rule ~~32(a)(1)~~ 32(c)(2). An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

Committee Note

Subdivision (c). A petition for permission to appeal, a cross-petition for permission to appeal, and an answer to a petition or cross-petition for permission to appeal are all "other papers" for purposes of Rule 32(c)(2), and all of the requirements of Rule 32(a) apply to those papers, except as provided in Rule 32(c)(2). During the 1998 restyling of the Federal Rules of Appellate Procedure, Rule 5(c) was inadvertently changed to suggest that only the requirements of Rule 32(a)(1) apply to such papers. Rule 5(c) has been amended to correct that error.

Rule 24. Proceeding in Forma Pauperis

(a) Leave to Proceed in Forma Pauperis.

(1) **Motion in the District Court.** Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that:

(A) shows in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay or to give security for fees and costs;

(B) claims an entitlement to redress; and

(C) states the issues that the party intends to present on appeal.

(2) **Action on the Motion.** If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and costs, unless the law requires otherwise. If the district court denies the motion, it must state its reasons in writing.

(3) **Prior Approval.** A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless

(A) the district court — before or after the notice of appeal is filed — certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis. ~~In that event, the district court must~~ and states in writing its reasons for the certification or finding; or

(B) the law requires otherwise.

Committee Note

Subdivision (a)(2). Section 804 of the Prison Litigation Reform Act of 1995 ("PLRA") amended 28 U.S.C. § 1915 to require that prisoners who bring civil actions or appeals from civil actions must "pay the full amount of a filing fee." 28 U.S.C. § 1915(b)(1). Prisoners who are unable to pay the full amount of the filing fee at the time that their actions or appeals are filed are generally required to pay part of the fee and then to pay the remainder of the fee in installments. 28 U.S.C. § 1915(b). By contrast, Rule 24(a)(2) provides that, after the district court grants a litigant's motion to proceed on appeal in forma pauperis, the litigant may proceed "without prepaying or giving security for fees and costs." Thus, the PLRA and Rule 24(a)(2) appear to be in conflict.

Rule 24(a)(2) has been amended to resolve this conflict. Recognizing that future legislation regarding prisoner litigation is likely, the Committee has not attempted to incorporate into Rule 24 all of the requirements of the current version of 28 U.S.C. § 1915. Rather, the Committee has amended Rule 24(a)(2) to clarify that the rule is not meant to conflict with anything required by the PLRA or any other law.

Subdivision (a)(3). Rule 24(a)(3) has also been amended to eliminate an apparent conflict with the PLRA. Rule 24(a)(3) provides that a party who was permitted to proceed in forma pauperis in the district court may continue to proceed in forma pauperis in the court of appeals without further authorization, subject to certain conditions. The PLRA, by contrast, provides that a prisoner who was permitted to proceed in forma pauperis in the district court and who wishes to continue to proceed in forma pauperis on appeal may not do so "automatically," but must seek permission. *See, e.g., Morgan v. Haro*, 112 F.3d 788, 789 (5th Cir. 1997) ("A prisoner who seeks to proceed IFP on appeal must obtain leave to so proceed despite proceeding IFP in the district court.").

Rule 24(a)(3) has been amended to resolve this conflict. Again, recognizing that future legislation regarding prisoner litigation is likely, the Committee has not attempted to incorporate into Rule 24 all of the requirements of the current version of 28 U.S.C. § 1915. Rather, the Committee has amended Rule 24(a)(3) to clarify that the rule is not meant to conflict with anything required by the PLRA or any other law.

Rule 32. Form of Briefs, Appendices, and Other Papers

(d) **Signature.** Every brief, motion, or other paper filed with the court must be signed by the party filing the paper or, if the party is represented, by one of the party's attorneys.

(de) **Local Variation.** Every court of appeals must accept documents that comply with the form requirements of this rule. By local rule or order in a particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule.

Committee Note

Subdivisions (d) and (e). Former subdivision (d) has been redesignated as subdivision (e), and a new subdivision (d) has been added. The new subdivision (d) requires that every brief, motion, or other paper filed with the court be signed by the attorney or unrepresented party who files it, much as Fed. R. Civ. P. 11(a) imposes a signature requirement on papers filed in district court. (An appendix filed with the court does not have to be signed.) By requiring a signature, subdivision (d) ensures that a readily identifiable attorney or party takes responsibility for every paper. The courts of appeals already have authority to sanction attorneys and parties who file papers that contain misleading or frivolous assertions, *see, e.g.*, 28 U.S.C. § 1912, Fed. R. App. P. 38 & 46(b)(1)(B), and thus subdivision (d) has not been amended to incorporate provisions similar to those found in Fed. R. Civ. P. 11(b) and 11(c).

Advisory Committee on Appellate Rules
Table of Agenda Items — Revised November 1999

FRAP Item	Proposal	Source	Current Status
95-03	Amend FRAP 15(f) to conform to new FRAP 4(a)(4)(B)(i).	Hon. Stephen F. Williams (CADC)	Awaiting initial discussion Retained in part on agenda with medium priority 09/97 Draft approved 10/98 for submission to Standing Committee in 01/00
95-04	Amend computation of time to conform to Civil Rules method. (Related to Nos. 97-01 and 98-12.)	James B. Doyle, Esq.	Awaiting initial discussion Retained on agenda with medium priority 09/97 Discussed and retained on agenda 04/98 Draft approved 10/98 for submission to Standing Committee in 01/00
95-07	Amend FRAP 4(a)(5) to make it clear that a "good cause" extension is available after expiration of original period.	Luther T. Munford, Esq.	Awaiting initial discussion Retained on agenda with low priority 09/97 Draft approved 10/98 for submission to Standing Committee in 01/00
97-01	Amend FRAP 26(a) so that time computation is consistent with FRCP 6(a). (Related to Nos. 95-04 and 98-12.)	Advisory Committee & Los Angeles County Bar Ass'n	Awaiting initial discussion Retained on agenda with medium priority 09/97 Discussed and retained on agenda 04/98 Draft approved 10/98 for submission to Standing Committee in 01/00
97-05	Amend FRAP 24(a)(2) in light of Prisoner Litigation Reform Act.	Advisory Committee	Awaiting initial discussion Retained on agenda with high priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00
97-07	Amend FRAP 28(j) to allow brief explanation.	Jack Goodman, Esq.	Awaiting initial discussion Retained on agenda with low priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00
97-09	Amend FRAP 32 — cover color for petition for rehearing/rehearing en banc, response to either, and supplemental brief.	Paul Alan Levy, Esq. Public Citizen Litigation Group	Awaiting initial discussion Retained on agenda with low priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00
97-12	Amend FRAP 44 to apply to constitutional challenges to state laws.	Advisory Committee	Awaiting initial discussion Retained on agenda with low priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00

FRAP Item	Proposal	Source	Current Status
97-14	Amend FRAP 46(b)(1)(B) to replace the general "conduct unbecoming" standard with a more specific standard or, alternatively, supplement FRAP 46(b)(1)(B) by recommending a model local rule governing attorney conduct.	Standing Committee	Awaiting initial discussion Retained on agenda with low priority 09/97 Discussed and retained on agenda 04/98 Discussed and retained on agenda 10/99
97-18	Amend or delete FRAP 1(b)'s assertion that the "rules do not extend or limit the jurisdiction of the courts of appeals."	Hon. Frank H. Easterbrook (CA7)	Awaiting initial discussion Retained on agenda with high priority 09/97 Draft approved 10/98 for submission to Standing Committee in 01/00
97-21	Amend FRAP 31(b) to clarify that briefs must be served on unrepresented parties, as well as on "counsel for each separately represented party."	Advisory Committee	Awaiting initial discussion Draft approved 09/97 for submission to Standing Committee in 01/00
97-30	Amend FRAP 32(a)(7)(C) to require use of a standard certificate of compliance with type-volume limitation.	Luther T. Munford, Esq.	Awaiting initial discussion Retained on agenda with high priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00
97-31	Amend FRAP 47(a)(1) to require that all new and amended local rules take effect on December 1. (Related to No. 98-01.)	Luther T. Munford, Esq.	Awaiting initial discussion Retained on agenda with medium priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 04/98 draft withdrawn; discussed further and retained on agenda 10/99; will await action by other Advisory Committees on similar proposals
97-33	Amend FRAP 3(c) to require that an appellant file with the notice of appeal a statement identifying all appellants, all appellees, and counsel for all represented parties.	Methods Analysis Program	Awaiting initial discussion Discussed and retained on agenda 10/98; awaiting specific proposal from appellate clerks Discussed and retained on agenda 04/99 Discussed and retained on agenda 10/99
97-41	Amend FRAP 4 to specify time for appeal of order granting or denying writ of coram nobis.	Solicitor General Waxman	Awaiting initial discussion Draft approved 04/98 for submission to Standing Committee in 01/00
98-01	Amend FRAP 47(a) to provide that local rules do not become effective until filed with the Administrative Office. (Related to No. 97-31.)	Standing Committee	Awaiting initial discussion Draft approved 04/98 for submission to Standing Committee in 01/00 04/98 draft withdrawn; discussed further and retained ager /99; wait h by Adv Committees on similar proposals

FRAP Item	Proposal	Source	Current Status
98-02	Amend FRAP 4 to clarify the application of FRAP 4(a)(7) to orders granting or denying the motions for post-judgment relief listed in FRAP 4(a)(4)(A).	Hon. Will Garwood (CA5) Luther T. Munford, Esq.	Awaiting initial discussion Discussed and retained on agenda 04/98 Draft approved 10/98 for submission to Standing Committee in 01/00 10/98 draft withdrawn; discussed further and retained on agenda 04/99 Revised draft approved 10/99 for submission to Standing Committee in 01/00
98-06	Amend FRAP 4(b)(3)(A) to clarify whether and to extent the filing of a FRCrP 35(c) motion for correction of sentence tolls the time to file appeal.	Hon. Will Garwood (CA5)	Awaiting initial discussion Discussed and retained on agenda 10/98; awaiting specific proposal from Department of Justice Discussed and retained on agenda 04/99; awaiting draft amendment and Committee Note Draft approved 10/99 for submission to Standing Committee in 01/00
98-07	Amend FRAP 22(a) to permit circuit judges to deny applications for writs of habeas corpus.	Hon. Kenneth F. Ripple (CA7)	Awaiting initial discussion Discussed and retained on agenda 10/98; awaiting specific proposal from Department of Justice Discussed and retained on agenda 04/99; continue to await specific proposal from Department Discussed and retained on agenda 10/99; continue to await specific proposal from Department
98-11	Amend FRAP 5(c) to clarify application of FRAP 32(a) to petitions for permission to appeal.	Christopher A. Goelz (CA9 Circuit Mediator)	Awaiting initial discussion Discussed and retained on agenda 04/99 Draft approved 10/99 for submission to Standing Committee in 01/00
98-12	Amend FRAP 4(a)(4)(A)(vi), 27(a)(3)(A), 27(a)(4) & 41(b) to account for amendment to FRAP 26(a) regarding calculating time. (Related to Nos. 95-04 and 97-01.)	Advisory Committee	Awaiting initial discussion Discussed and retained on agenda 10/98 Draft approved 04/99 for submission to Standing Committee in 01/00
99-01	Amend FRAP 24(a)(3) & 24(a)(5) to address potential conflicts with Prisoner Litigation Reform Act.	Hon. Will Garwood (CA5)	Awaiting initial discussion Discussed and retained on agenda 04/99 Draft approved 10/99 for submission to Standing Committee in 01/00

FRAP Item	Proposal	Source	Current Status
99-02	Amend FRAP 32 to require that briefs, written motions, rehearing petitions, etc. be signed.	Hon. Will Garwood (CA5)	Awaiting initial discussion Draft approved 04/99 for submission to Standing Committee in 01/00 Revised draft approved 10/99 for submission to Standing Committee in 01/00
99-03	Amend unspecified rules to permit electronic filing and service.	Subcommittee on Technology	Awaiting initial discussion Discussed and retained on agenda 04/99
99-05	Amend FRAP 3(c) to address failure of party explicitly to name court to which appeal taken.	Hon. Kenneth F. Ripple (CA7)	Awaiting initial discussion Discussed and retained on agenda 10/99; awaiting specific proposal from Department of Justice
99-06	Amend FRAP 33 to incorporate notice provisions of FRBP 7041 and 9019.	Hon. L. Edward Friend II (Bankr. N.D. W. Va.)	Awaiting initial discussion
99-07	Amend FRAP 26.1 to broaden financial disclosure obligations.	Standing Committee	Awaiting initial discussion Discussed and retained on agenda 10/99

Item 6

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

TO: Anthony J. Scirica, Chair
Committee on Rules of Practice and Procedure

FROM: Adrian G. Duplantier, Chair
Advisory Committee on Bankruptcy Rules

DATE: December 3, 1999

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on September 28-29, 1999, in Jackson Hole, Wyoming.

II Action Items

The Advisory Committee on Bankruptcy Rules will not be presenting any matters for action at the Standing Committee's meeting in Coral Gables, Florida on January 7-8, 2000.

III. Information Items

A. *Publication of Proposed Rule Amendments*

At its June 1999 meeting, the Standing Committee authorized the publication of a preliminary draft of proposed amendments to the Bankruptcy Rules. There are nine proposed amendments that would affect eight separate rules. Two separate amendments contain revisions of subdivisions of Rule 2002.

The preliminary draft was published in August 1999 for comment by the bench and bar. The deadline for submitting written comments on the amendments is February 15, 2000. A public hearing is scheduled for January 18, 2000, in Washington, D.C. To date, no requests for personal appearances have been received. Moreover, no one has yet submitted any written comments on the proposed amendments. Any comments that may be received will be considered by the Advisory Committee at its March 2000 meeting. The Advisory Committee

expects to present these Proposed Rules Amendments for approval by the Standing Committee at its June 2000 meeting.

B. *Proposed Bankruptcy Legislation*

Congress has continued to consider substantial reform of the Bankruptcy Code. The House of Representatives passed H.R. 833 by a significant majority, but the Senate did not act on its version of the bill prior to the close of legislative session on November 19, 1999. As with prior versions of these bills, there are a number of provisions that would require amendments and additions to the Bankruptcy Rules and Official Bankruptcy Forms. Indeed, some provisions actually direct the Advisory Committee to propose rules changes.

The Senate is scheduled to take up the bankruptcy reform legislation when it reconvenes in January, 2000. The Advisory Committee continues to monitor these legislative developments closely.

C. *Financial Disclosure Rules*

The Advisory Committee on Bankruptcy Rules also considered a proposal to adopt a uniform rule requiring the disclosure of financial interests patterned on Appellate Rule 26.1. The Committee approved in principle the adoption of a rule that would require additional disclosure of corporate parents and partnership members. The Committee identified concerns about the application of such a rule given the potential for many thousands of parties in interest in a bankruptcy case, and noted that these issues may be similar to those presented in the context of class action litigation. The Committee's communication to the Committee on Codes of Conduct is attached to this report.

D. *Compromise and Settlement of Bankruptcy Appeals*

At the request of the Advisory Committee on Appellate Rules, and Bankruptcy Judge L. Edward Friend, the Advisory Committee on Bankruptcy Rules considered whether it would be appropriate to amend the Appellate Rules to include a reference in those rules to Bankruptcy Rules 1019 and 7014 that govern compromise and settlement of matters in bankruptcy cases. The Committee concluded that incorporating a reference to those Bankruptcy Rules in Rule 6 of the Federal Rules of Appellate Procedure would be of benefit to parties to appeals who intend to settle or compromise their disputes. A copy of the Committee's communication to the Advisory Committee on Appellate Rules is attached to this report.

Attachments:

Communication to Committee on Codes of Conduct setting out the position of the Advisory Committee on Bankruptcy Rules regarding the disclosure of financial information

Communication to Advisory Committee on Appellate Rules conveying the position of the Advisory Committee on Bankruptcy Rules regarding the amendment of Rule 6 of the Federal Rules of Appellate Procedure to refer parties to the rules governing compromise and settlement in bankruptcy cases

Draft of Minutes of the Advisory Committee meeting of September 28-29, 1999.

MEMORANDUM

TO: Committee on Codes of Conduct

FROM: Adrian G. Duplantier, Chair
Advisory Committee on Bankruptcy Rules

RE: Financial Disclosure

DATE: December 1, 1999

At its meeting on September 28-29, 1999, the Advisory Committee on Bankruptcy Rules, considered the proposal that a uniform rule be adopted requiring disclosure of financial interests patterned on Appellate Rule 26.1. The Advisory Committee concluded that a uniform rule would be appropriate, but cautioned that the nature of bankruptcy cases could present particular problems in the administration of such a rule.

The Committee considered that the disclosure requirements generally would operate well in the context of adversary proceedings and contested matters within a bankruptcy case. These proceedings are essentially the same as other civil litigation in the district courts. Extending the disclosure requirements to the bankruptcy case (as opposed to proceedings in the case), however, may cause potentially significant problems. For example, disclosure of the parent corporations of creditors could be extremely burdensome in cases with hundreds or even thousands of creditors. Furthermore, there may also be a significant number of corporate or partnership entities who are parties to executory contracts or unexpired leases with the debtor, and the final resolution of the case will impact these entities as well. The debtor may not know whether the parties with whom it has dealt are subsidiaries or partners of other entities. Consequently, there could be problems simply identifying the related entities. While the proof of claim form could require the identification of the related entities, in Chapter 11 cases creditors must file a proof of

claim only if their claim is listed as disputed, contingent, or unliquidated. *See* 11 U.S.C. § 1111(a). Parties to executory contracts and unexpired leases also need not file proof of a claim. Therefore, filings by the debtor are the only source for the information, and that information generally would not be available to the debtor. Thus, it may be difficult, to implement a rule such as Rule 26.1 of the Federal Rules of Appellate Procedure for all interested parties in a bankruptcy case.

The Advisory Committee on Bankruptcy Rules believes that a uniform rule is appropriate, but suggests that any such rule be sensitive to these problems. In some ways, the problems in the bankruptcy courts are similar to the disqualification based on a judge's financial interest in class action case. The resolution of the financial disclosure problem in that context may be very instructive to the Advisory Committee on Bankruptcy Rules. We welcome any direction either from the Committee on Codes of Conduct or the Advisory Committee on Civil Rules on these issues.

MEMORANDUM

TO: Advisory Committee on Appellate Rules

FROM: Adrian G. Duplantier, Chair
Advisory Committee on Bankruptcy Rules

RE: Compromise and Settlement of Bankruptcy Appeals

DATE: December 1, 1999

The Advisory Committee on Appellate Rules, has asked whether the Advisory Committee on Bankruptcy Rules would recommend that amendment(s) be proposed to set out the proper treatment of Rule 9019 which governs generally the compromise and settlement of matters in bankruptcy cases. Settlement of adversary proceedings involving objections to discharge are governed by Bankruptcy Rule 7041. Both of these rules recognize that the settlement or compromise of matters can have a profound impact on entities that are not parties to the proceeding and would not be parties to any appeal. FRAP 33, on the other hand, authorizes the entry of any necessary order to dispose of an appeal. Local appellate rules may take this authority even further by extending the power to enters necessary orders even to mediators. (*See, e.g.,* 4th Cir. Local Rule 33.)

The Advisory Committee on Bankruptcy Rules considered this issue at its meeting on September 28-29, 1999, for the purpose of offering its views to the Advisory Committee on Appellate Rules. After deliberation, the Advisory Committee on Bankruptcy Rules concluded that it is both appropriate and desirable to incorporate a reference to Bankruptcy Rules 9019 and 7014 into Rule 6 of the Federal Rules of Appellate Procedure. Including such a reference would inform counsel to these appeals that they still must comply with Bankruptcy Rules 9019 and

7014, as appropriate.

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of September 27 -28, 1999
Jackson Lake Lodge, Moran Junction WY

Draft Minutes

The following members attended the meeting:
District Judge Adrian G. Duplantier, Chairman
District Judge Robert W. Gettleman
District Judge Bernice B. Donald
District Judge Norman C. Roettger, Jr.
Bankruptcy Judge Robert J. Kressel
Bankruptcy Judge Donald E. Cordova
Bankruptcy Judge A. Jay Cristol
Bankruptcy Judge A. Thomas Small
Professor Kenneth N. Klee
Professor Mary Jo Wiggins
Gerald K. Smith, Esquire
Eric L. Frank, Esquire
J. Christopher Kohn, Esquire, United States Department of Justice
Professor Alan N. Resnick, Reporter

District Judge Eduardo C. Robreno, Leonard M. Rosen, Esquire, and R. Neal Batson, Esquire, were unable to attend the meeting. Circuit Judge A. Wallace Tashima, liaison to this Committee from the Committee on Rules of Practice and Procedure ("Standing Committee"), Bankruptcy Judge Frank W. Koger, a member of the Committee on the Administration of the Bankruptcy System ("Bankruptcy Committee"), and Peter G. McCabe, Secretary to the Standing Committee and Assistant Director of the Administrative Office of the United States Courts ("Administrative Office"), also attended the meeting. Bankruptcy Judge James D. Walker, Jr., and Howard L. Adelman, Esquire, appointed to the Committee for terms beginning October 1, 1999, also attended the meeting.

The following additional persons attended the meeting: Joseph G. Patchan, Esquire, Director of the Executive Office for United States Trustees; Richard G. Heltzel, Clerk, United States Bankruptcy Court for the Eastern District of California; Professor Jeffrey W. Morris, University of Dayton Law School, Consultant to the Committee; Patricia S. Ketchum, Bankruptcy Judges Division, Administrative Office; Mark D. Shapiro, Rules Committee Support Office, Administrative Office; and Robert Niemic, Research Division, Federal Judicial Center ("FJC"). In addition, David M. Poitras, Esquire, a member of the American Bar Association's General Practice, Solo and Small Firm Section, attended part of the meeting.

The following summary of matters discussed at the meeting should be read in conjunction with the various memoranda and other written materials referred to, all of which are on file in the office of the Secretary to the Standing Committee. Votes and other action taken by the Committee and assignments by the Chairman appear in **bold.**

Introductory Items

The Committee approved the minutes of the March 1999 meeting.

The Chairman welcomed Judge Walker and Mr. Adelman, newly appointed members, the guests present, and noted with thanks the service of the members whose terms were expiring: Judge Robreno, Judge Small, Mr.Smith, and Mr.Batson. He also informed the Committee that Professor Resnick, the Committee's Reporter, would be retiring as Reporter and joining the Committee as a member. He announced that Professor Morris, a consultant to the Committee for the past year, would be the new Reporter.

The Chairman and Professor Resnick reported on the actions taken at the June 1999 meeting of the Standing Committee. The proposed amendments submitted by the Committee were approved for transmittal to the Judicial Conference. The draft amendments which the Committee requested permission to publish for comment also were approved for that purpose. Amendments to Rule 5 of the Federal Rules of Civil Procedure (Civil Rules) to permit service of papers after the initial complaint by electronic means, which the Committee had discussed at the March 1999 meeting, also were approved for publication. If adopted, they would permit similar electronic service in adversary proceedings. There was a division of opinion among the advisory committees over whether to afford parties who receive service electronically the additional three days for response currently available when service is made by mail. Accordingly, The proposed amendments to Civil Rule 6(a) and Bankruptcy Rule 9006, as published, are not consistent.

The Standing Committee also approved and forwarded to the Judicial Conference proposed amendments to the Civil Rules on discovery. Under the proposed amendments the mandatory disclosure requirement of Rule 26(a) would become the national rule, although a court could order otherwise in a particular case. The current provision allowing a district to opt out of mandatory disclosure by local rule would be deleted. The Reporter noted that Rule 9014 makes Rule 26 applicable in contested matters unless the court orders otherwise and suggested that the Committee may want to address Rule 9014 in connection with this issue. The amendments to the Civil Rules were approved by the Judicial Conference in mid-September, with the exception of a proposed amendment to Rule 26(b)(2) which would have allowed the shifting of the cost of "burdensome" discovery to the requesting party.

Judge Kressel said the Committee should consider promptly the matter of mandatory disclosure, both as an amendment to Rule 9014 and in adversary proceedings, because of the time issues that pervade bankruptcy cases. Professor Resnick noted that Bankruptcy Judge Louise DeCarl Adler had written a letter stating that mandatory disclosure should not apply in adversary proceedings involving less than a certain dollar amount.

The Chairman reported that the Standing Committee had approved a resolution of appreciation for Professor Resnick and his extraordinary contributions to the rules and the work of the rules committees over his 12 years as Reporter. Judge Duplantier presented Professor Resnick with an illuminated rendering of the resolution. Professor Resnick expressed thanks for the opportunity to work with four chairmen of the Committee and with the more than 40 Committee members whose terms had coincided with his service as Reporter. He said he also was grateful to the chairs and members of the Standing Committee, to its Reporter, Professor Coquillette, and to the reporters for the other advisory committees whom he had gotten to know. He also thanked the Administrative Office staff for their support and congratulated Professor Morris on having accepted a rewarding post.

The Chairman said the Standing Committee had asked the various advisory committees to study the issue of judicial conflicts of interest and divestiture/recusal requirements, a subject which had received extensive press coverage over the prior year. He said that public interest groups had paid to obtain the financial disclosure statements of many district judges. Rule 26.1 of the Federal Rules of Appellate Procedure (Appellate Rules) requires any nongovernmental corporate party to an appeal to list all its parent corporations and any publicly held company that owns ten percent or more of the party's stock. The Standing Committee had asked the advisory committees to consider specifically whether a similar rule should be in all the federal rules, he said. Professor Resnick said the reporters already are scheduled to meet at the January 2000 Standing Committee meeting to prepare a common draft.

Professor Klee said the difficulty in bankruptcy will be similar to that in a civil class action: too many parties all making disclosures that must be checked. Judge Duplantier said that is part of judging, and the judge must read them all. Professor Resnick said that the bankruptcy rule probably could limit the duty to disclose to parties involved in adversary proceedings and contested matters. The proof of claim form could be modified to require the disclosures, but this approach might not be effective, as judges normally do not see the proofs of claim. Judge Cordova said the filing of a proof of claim generally is too broad a test, that conflict-checking should await the filing of an objection to a claim. Professor Klee said Rule 3001 also should be amended to require a claims purchaser to disclose its corporate parents, because claims purchasing can be used strategically to disqualify a judge.

Judge Cristol said there should be carve-outs for holdings of entities like Blue Cross and public utilities, but Judge Duplantier said the rule could not change the statute which disqualifies a judge from sitting in a case if the judge holds a single share of stock in a party. Judge Kressel said that Appellate Rule 26.1 would not pick up partnerships and other important connections. Judge Duplantier said he believed any new rule would be broader than the current one. Professor Klee said Rule 26.1 would not create a problem because it is very narrow; his concern, rather, would be with a broader sweep. Judge Gettleman said the simple solution for a judge is to sell

the stock in question when a conflict is discovered. He noted that the frequency of conflicts is increasing with corporate fluctuations and that partnerships which include corporate partners are particularly difficult to monitor for conflicts. He said he would like to see a conflict-checking software program combined with electronic filing.

Judge Tashima said that judges need software similar to that used by law firms to perform conflicts checks and an entity should only become a party to which the disclosure requirement would apply when the party makes an appearance or takes action in the bankruptcy case. Mr. McCabe described a judicial conflict-checking software program originally developed by the district court in Maine and now being distributed by the Administrative Office to any court that requests it. The program runs overnight to check against new filings, but depends ultimately on up-to-date information from judges about their holdings to be fully effective. A conflict-checking function will be included in the Case Management/Electronic Case Files systems now being developed for the federal courts.

Judge Duplantier said that disclosure is all that is being discussed, and it is very simple. What happens after the disclosures are filed is not a concern of the rules, he said. Mr. Smith and Professor Klee pointed out that in a chapter 11 case scheduled claims are allowed and that, if any rule were too broadly stated, the debtor might be required to make the disclosures but not have the information.

The Chairman said he would inform the Standing Committee that the Committee approves in principle the adoption of a general rule to require disclosure of corporate parents and partnership members. He said any bankruptcy problems seem to resemble the ones in civil cases and are not insurmountable. He said the Committee should plan on responding to a proposed common draft at its next meeting and could include any special bankruptcy considerations at that time.

Mr. Smith reported on the activities of the Ad Hoc Committee on Attorney Conduct of the Standing Committee. He said the group is still considering whether to propose any federal rule or rules governing attorney conduct, but appears to be moving toward a rule that would expressly make applicable the rules of the state in which the trial court is located, subject to some exceptions. He said the group appeared ready to allow the Committee some leeway in determining the exceptions that would apply in bankruptcy representation. He said it is important for the Committee to continue grappling with the core issues: defining what is an adverse interest in the bankruptcy context, and establishing when a chapter 11 debtor's counsel may become adverse. The Ad Hoc Committee had a meeting scheduled for the day after the Committee meeting, he said, and there would be further developments to report at the March 2000 meeting.

Judge Kressel reported on his attendance at the June 1999 meeting of the Bankruptcy Committee. He said the Bankruptcy Committee members were impressed that the Committee had been willing to change its mind about the effort to nationalize motion practice. The

Bankruptcy Committee discussed a proposal to amend the bankruptcy judge recall service regulations to permit recalled judges who serve on bankruptcy appellate panels (BAPs) to hear cases from the districts in which they formerly served, he said. The Bankruptcy Committee, however, determined that considering appeals from a district the recalled judge formerly served in would be inappropriate, even though the statute (28 U.S.C. § 155(b)) seems not to prohibit it. The Bankruptcy Committee also approved changing the bankruptcy appellate structure to add a method for direct appeal to the circuit, bypassing the district court or BAP, at the option of the circuit and on certification from the district court or BAP that the matter presents an important question of law.
At its September 1999 session, the Judicial Conference also had approved the proposal to add the direct appeal option, he said.

The Reporter discussed the pending bankruptcy reform legislation, which could be enacted either before this session of Congress ends or early in the next session. Both the House and the Senate bills contain provisions requiring new official forms in small business chapter 11 cases, including monthly operating reports, disclosure statements, and plans, he said. Mr. Patchan had offered to assist in developing these, and three United States trustees had met with Professor Resnick in New York in anticipation of the enactment of legislation. The trustees had provided Professor Resnick with copies of existing disclosure statement forms used, or proposed to be used, in five United States trustee regions. Mr. Patchan's office also has copies of operating report forms currently in use, he said, and all of these can be used as the basis for any statutorily-mandated forms. Mr. Patchan said his office had prepared a draft set of proposed national forms derived from various local forms, that copies had been sent to the meeting, and that he would welcome any reactions and comments from Committee members.

Action Items

Rules 9013 and 9014. The Reporter introduced the proposed amendments to Rule 9013 and reviewed their history. The Committee's intent in publishing a draft amendment in 1998 had been to provide guidance to the courts and the bar on matters that usually are routine and uncontested but require a court order and to specify a procedure by which the court could consider and act on such matters ex parte. This proposal had been generally well received, but did not go forward because it was part of a larger package of amendments which the Committee had withdrawn for further study.

Professor Resnick said that Mr. Rosen, who could not attend the meeting, had made a style suggestion concerning line 3 of the draft that would change the first two words from "when an application is authorized" to "made in an application authorized." The Reporter's suggested changes to the existing Rule 9013(a), he said, are all stylistic except in line 6 where the Reporter had inserted "and a hearing" so that a motion generally would be considered "after notice and a hearing" as that phrase is defined in § 102 of the Bankruptcy Code. Proposed Rule 9013(b), he

said, contains a list of matters that could be decided with no prior notice to other parties, matters that would be relatively easy for a court to undo in the event a party were to file a motion to reconsider or vacate.

Concerning the proposed amendments to Rule 9014, the Reporter explained that the purpose of referring to Civil Rule 5 rather than Bankruptcy Rule 7005 is to make it clear that the methods of service authorized, including the proposed authorization of electronic service, apply only to the serving of papers filed after the initiating motion. Rule 9014(d) addresses the use of affidavits, and Rule 9014(e) requires the court to provide notice procedures concerning whether to bring witnesses to a hearing, he said.

A member asked whether the Committee should eliminate the word "application" from the rules, so that every request for court action would be a motion. Another member observed that once "and a hearing" is added to Rule 9013, there really is no difference between Rule 9013 and Rule 9014. The Reporter acknowledged that the terminology is inconsistent and agreed that the inconsistencies make distinguishing between the two rules more difficult. Judge Duplantier suggested changing the phrase to "an opportunity for a hearing" as in Rule 9014. The Reporter said "notice and a hearing" is defined in § 102 of the Code to mean an opportunity for a hearing. Judge Kressel said the phrase should be deleted from Rule 9014 . Professor Klee said the use of the word "service" also is used inconsistently in Rules 9013(a) and (b) and 9014. In addition, he said, the list of matters in Rule 9013(b) is non-exclusive, and judges might be encouraged to determine more and more matters ex parte. The Reporter said the Committee could simply leave Rule 9013 as it is, so that whether a matter could be determined ex parte would be in each court's discretion. He noted that Rule 9013 as published did not have a list of ex parte matters, that the list was an idea that had come up at the March 1999 meeting, and that perhaps the Committee was again falling into the trap of trying to micro-manage procedure. **A motion not to amend Rule 9013, but leave it as it presently is, passed by a vote of 9 to 3.**

Judge Tashima said that proposed Rule 9014(d) should state explicitly that direct testimony of a witness can be in an affidavit so long as the witness is available for cross examination, but if the Committee disagrees, that the Committee Note should mention that direct testimony by affidavit is permitted in some circuits, citing In re Adair, 965 F.2d 777 (9th Cir. 1992). Judge Duplantier said he opposed the suggestion, and that affidavits should not be admitted as testimony at trial. With respect to proposed Rule 9014(e), Professor Klee said the bracketed language on line 26 should be included so that any notice of an evidentiary hearing would go to the witnesses as well as the attorneys. Judge Cristol suggested simply stating that any notice of a hearing must inform the recipients whether the hearing will be an evidentiary one.

A motion to accept Rule 9014 as drafted, including subdivisions (d) and (e) but without the bracketed language in line 26, passed with no opposition.

Mr. Frank observed that there remains a gap in the rule concerning who must be served and asked whether that is intentional. The Reporter said the draft is deliberately silent in response to public comment criticizing the service list in the previously published draft. There was no consensus to delete the phrase "opportunity for hearing" from subdivision (a). A member suggested that a sentence be added at the end of subdivision (a) permitting the movant to request a response to a motion. Judge Duplantier suggested deleting "under this rule" from line 4 as a matter of style. Professor Klee questioned the phrase "the court directs" rather than "the court orders," and the Reporter said he had used "directs" so that a court could use a local rule to require a response to a motion, rather than having to order a response in every instance.

Rule 1006. The proposed amendments had been approved for publication previously and were published in 1998, although they were unrelated to the amendments to Rules 9013 and 9014. A member questioned the provision in the rule that forbids paying an attorney until the filing fee has been paid in full and said the provision appears to be substantive. The Reporter agreed that the provision is substantive, although it has been in the rule for a long time. He added that Henry Sommer, a former member of the Committee, often had said a debtor should not have to apply to the court, as the right to pay in installments is granted by statute in 28 U.S.C. § 1930. After discussion, **the Committee determined not to forward the proposed amendments to the Standing Committee and requested the Reporter to prepare a memorandum concerning the rule generally.** The memorandum would cover the following points: whether the provision forbidding payment to an attorney is substantive and, therefore, violative of the Rules Enabling Act, whether the present rule actually favors petition preparers and encourages debtors to use them, the regulation of petition preparers under § 110 of the Code, and ways to safeguard debtors against being punished for using a petition preparer. Mr. Patchan suggested amending the form to require disclosure of the amount paid to a petition preparer and added that the United States trustee program is preparing to issue guidelines on petition preparer fees.

Rule 2004. The amendment to Rule 2004(c), previously approved by the Committee and published for comment, makes it clear that an examination under the rule can be held outside the district where the case is pending. Mr. Kohn suggested that it would be useful to add to the Committee Note the language concerning the issuance of a subpoena by an attorney admitted pro hac vice from the Committee Note to the 1991 amendments to Civil Rule 45. **A motion to include the suggested language in the Committee Note to Rule 2004 carried unopposed.**

Rules 1004 and 1004.1. Professor Morris had prepared draft amendments and a memorandum on the capacity of infants, incompetent persons, and corporate and partnership entities to file bankruptcy for the March 1999 meeting. The Committee considered these briefly at that meeting and postponed further consideration. The Committee also had requested Professor Morris to consider the question of making Civil Rule 17 applicable throughout the Bankruptcy Rules, rather than only in adversary proceedings as it currently is under Rule 7017.

He said it is important in working with Civil Rule 17 to avoid drafting a substantive rule that could be construed as conferring a right or capacity to file a bankruptcy petition by an entity -- a corporation, for example.

Professor Resnick said that if the bankruptcy rules were to make Civil Rule 17(b) applicable beyond adversary proceedings, some states likely would pass laws making corporations bankruptcy-proof, and there is no evidence before the Committee that corporations are encountering challenges to their right to file bankruptcy petitions. Professor Klee said various problems, such as deadlocked boards of directors and bankruptcy-remote state laws, do not currently raise rules questions but would do so under the draft amendments concerning corporations. He also said it does not make sense for the rules to treat partnerships without also treating corporations, limited liability corporations, and limited liability partnerships. **The Committee determined not to go forward with a rule on filing by a corporation and asked the Reporter to study whether to delete existing Rule 1004(a), filing by a partnership, with a Committee Note stating that the question is left to substantive law** (which could be either the Bankruptcy Code or state law).

The Committee discussed redrafting proposed Rule 1004.1, concerning filing a petition for an infant or incompetent person, to track the language of Civil Rule 17(c) more closely, keeping the changes only to those necessary to replace the word "sue" in Rule 17(c) by "file a voluntary petition," and stating in the Committee Note that the bankruptcy rule merely tracks the existing civil rule. **A motion to alter the draft as discussed was not opposed.** On the second day of the meeting, the **Committee agreed to add the words "not otherwise represented" at the end of the draft rule.**

Rule 2014. Mr. Smith introduced the proposed amendments recommended by the Subcommittee on Attorney Conduct, including Rule 2014 Disclosure Requirements. He noted that the amendments specify that a professional seeking approval of employment must disclose any interest, representation, or relationship that bears on whether the applicant has an interest adverse to the estate or on whether the applicant is disinterested. The proposed amendments also substitute "interest or relationship relevant" to determining disinterestedness for the existing "connections." The proposed amendments, however, still fail to provided guidance concerning what is a disqualifying interest or relationship, he said. Mr. Smith said there is no definition of "adverse interest" in the Bankruptcy Code or the Bankruptcy Rules and the unmodified word "connections" is too broad. The bar needs guidance on what to disclose, he said. Mr. Smith said he would like the rule to provide this kind of guidance, but that it probably would take several more years to develop a workable rule.

Professor Resnick said the proposals to amend Rule 2014 began after In re Leslie Fay Companies, Inc. , 175 B.R. 525 (Bankr. S.D.N.Y. 1994). Several courts have indicated that lawyers must disclose all connections without screening out those that the lawyers believe are irrelevant, he said. Thus, it is not the lawyer but the judge who determines what is disqualifying. The new draft would change "setting forth the person's connections" with no limitations to

"relevant to a determination that the person is disinterested," which would allow the lawyer to screen out connections that are obviously irrelevant. The judge could still disagree and rule that a particular connection is relevant, but the initial disclosure decisions would be made by the lawyer, he said.

Mr. Adelman commented that as the word "connection" is used in § 101(14) of the Bankruptcy Code, it is only connections with the debtor or an investment banker of the debtor that taint prospective counsel. In his view, he said, it also is important to know that counsel had been retained by a prior board of directors or had brought in the same accounting firm in prior cases, yet such disclosures are not required now. Mr. Smith said there might be ways to avoid an adverse interest problem if debtor's counsel and the debtor were to agree to engage special counsel to determine whether to sue the creditor that debtor's counsel's firm represents in unrelated matters. In response to questions concerning the reason for requiring in the rule a broader range of disclosures than seems to be required by the Bankruptcy Code, Mr. Smith agreed that an admirable principle can be impossible to carry out in practice. As examples, he said a debtor's law firm must conflict-check more than every creditor; it must also check every ongoing contractor of the debtor, relationships anyone in the firm may have with attorneys and accountants for every creditor, and relationships anyone in the firm may have with any landlord of any of a retail debtor's 400 stores. Mr. Patchan said that at the time the rule originally was drafted there were major ethical problems in bankruptcy practice. Also, at that time, he said the bankruptcy practice mostly was confined to small, boutique firms, rather than the large, full service firms that are active in bankruptcy now.

The Chairman noted that Mr. Smith's term on the Committee would be ending and thanked him for his thoughtful work as subcommittee chairman. The Chairman said the subcommittee should continue its work under a new chairman to be appointed.

Rule 2002(h). Professor Resnick said the proposed amendment had been suggested by Bankruptcy Judge Arthur J. Spector and he reviewed the Reporter's memorandum in which he pointed out that adopting the suggestion to automatically discontinue notices to creditors who miss the claims filing deadline could be ill-advised. The memorandum notes that creditors entitled to priority under § 507 can be paid regardless of whether they file their claims before the deadline, and in certain circumstances general unsecured creditors can be paid if they file a claim before distribution begins. The Reporter suggested that if the Committee wants to amend the rule to save noticing costs, a better approach would be to amend Rule 2002(h) to automatically cut off notices to creditors who miss the deadline, unless the court orders otherwise. **By consensus, the Committee decided to take no action.**

Judge Gettleman noted a second issue contained in Judge Spector's letter, that of restricting the time periods in the rules to 7, 14, and 21 days, so that the time for taking action always would expire on the same day of the week as the filing or ruling to which the party would be responding. The Reporter said the Committee had discussed the idea previously, so he had not written a memorandum on it for this meeting. Judge Gettleman said many courts' local rules

are using the uniform one-week, two-week, approach and that he would like to revisit the matter. **The Chairman asked the Reporter to prepare a report on what the time limits are now in the various rules, although the Committee has no immediate plans to amend Rule 9006.**

Rule 9027. Bankruptcy Judge Christopher M. Klein had suggested that the rule should provide for notifying the nonbankruptcy court from which an action was removed of the entry of a remand order. In addition, Judge Klein had pointed out that the rules do not establish any time limit for removal of an action that may be filed after a bankruptcy case is closed. The Reporter had drafted an amendment to Rule 9027 that would direct the clerk, after the ten-day period to appeal had expired, to mail a certified copy of the order of remand to the clerk of the court from which the claim or cause of action was removed. The proposed amendment also included a sentence stating that the action then could proceed in the court from which it was removed except as otherwise directed by the court issuing the order of remand. Judge Kressel said that if the debtor is a party to the removed action, the sentence authorizing the court from which the matter was removed to resume the proceeding would violate the automatic stay. The Reporter suggested deleting the final sentence to remove any idea that an order of remand acts to lift the automatic stay. Judge Kressel also said he did not think the ten-day stay was necessary. The Reporter said it serves to recognize the participation of the Article III district court in the process, and that 28 U.S.C. § 1452 provides that an order of remand by a bankruptcy judge is subject to district court review. A motion to delete the ten-day stay was not acted upon. After a discussion about whether to specify or leave ambiguous which clerk -- bankruptcy court clerk or district court clerk -- should notify the court from which the action was removed, a motion to leave the word "clerk" unmodified also was not acted upon. **A motion to adopt the Reporter's draft except the final sentence passed on a voice vote.**

On the matter of removal after a case is closed, the Reporter said there appeared to be various options for amending Rule 9027(a)(3) to insert phrases such as "or is closed," "is or was pending," or "is pending or has been dismissed or closed." Professor Klee said a case might also be suspended if the bankruptcy judge has abstained under § 305 of the Bankruptcy Code. The Reporter said there might be additional considerations, such as whether the case must be reopened to address the removed action. Mr. Heltzel said that although reopening is not necessary for jurisdiction, a court probably would want to reopen the case for practical reasons such as researching the file in connection with the issues in the removed matter. Judge Kressel suggested deleting from Rule 9027(a)(3) the entire first clause, so that the rule would begin with the words "a notice of removal." This would remove both the existing "is pending" and avoid substituting other words that might not include all the possibilities. The consensus, however, was to substitute for the existing initial clause the following: "If a claim or cause of action is asserted in another court after commencement of the case,". On the second day of the meeting the Reporter offered a proposed Committee Note which, after changes suggested by the Committee, would read:

> Subdivision (a)(3) is amended to delete the words "is pending" to make it applicable when a claim or cause of action is removed under 28 U.S.C. § 1452(a)

after the commencement of the bankruptcy case, whether the bankruptcy case is pending, suspended, dismissed, or closed.

The proposed amendment and committee note will be brought back to the Committee for final approval at the March 2000 meeting.

Rule 4004. Professor Morris introduced the amendment proposed by the Executive Office for United States Trustees (EOUST) to provide for delaying the debtor's discharge whenever a motion to dismiss is made under § 707, rather than only when the motion is made under § 707(b), as in the current rule. Judge Small said he supported the change, because it is difficult, procedurally, to revoke a discharge, and the only detriment to the debtor would be a delayed discharge. Judge Kressel agreed. **The Committee approved the amendment without opposition.** The Reporter commented that line 3 of the Committee Note should read "present" rather than "prior."

Rule 2015(a)(5). The EOUST also had proposed amending Rule 2015(a)(5) to require the filing of quarterly reports by a chapter 11 trustee or debtor in possession as long as the case is pending. Professor Morris noted that the pending bankruptcy reform legislation contained a provision that would amend 28 U.S.C. § 1930(a)(6) to provide that quarterly fees to the United States Trustee System Fund are no longer payable after confirmation of a plan or conversion of a case. The amount of any quarterly fee is based on information in the quarterly report. If the amending legislation is enacted, it would be unnecessary to file the reports after confirmation of a plan. **The Committee deferred consideration of the proposed amendment until the March 2000 meeting and instructed Professor Morris to add to the draft to be discussed the closing of the case as one of the events that would end the obligation to file reports.**

Rule 2010(b). The EOUST had proposed amending the rule to cover bonds other than the trustee's bond. **The Committee declined to amend the rule to expand its scope.**

Rule 9019. The Reporter introduced the problem, raised initially by Bankruptcy Judge L. Edward Friend, that it is unclear whether the Bankruptcy Rules continue to apply when a bankruptcy matter has been appealed to the court of appeals. Rule 1001 states that the rules apply to all cases under title 11 of the United States Code, and it is well understood that they govern in both the bankruptcy court and the district court. Rule 9019 requires that any settlement be approved by the bankruptcy judge after notice to all creditors. A settlement between the debtor and one creditor, or between two creditors, may adversely affect other creditors of the bankruptcy estate who are entitled to equality of treatment. The purpose of the Rule 9019 is to permit any creditor that may be affected to object and be heard by the bankruptcy judge before the settlement takes effect. If a matter is appealed to a court of appeals and a settlement reached at that point, however, the applicability of Rule 9019 is less clear, and at least one circuit has a local rule that permits a mediator "upon agreement of the parties, [to] dispose of the case."

Accordingly, Judge Friend had suggested that the Appellate Rules should be amended to assure that the notice and approval procedures required under Rule 9019 are observed when a matter is settled at that point.

The Committee discussed what the procedure should be when a settlement is reached at the court of appeals level and how the two courts should coordinate. Judge Duplantier said the party benefitting is going to want to know that the settlement will be approved before the court of appeals dismisses the appeal or otherwise terminates its role. He said that minors and incompetent persons also require delay procedures, so that a state court can approve, when a settlement is involved, and the settlement is not binding on the minor or incompetent person if the approval is not obtained. Judge Walker said many lawyers seem unaware of Rule 9019's continued applicability in an appeal situation, even at the district court level. He recalled one matter in which it was the district judge who brought the attorneys' attention to the rule. **A motion to recommend to the Advisory Committee on Appellate Rules that Appellate Rule 6 be amended to add Rules 9019 and 7041 to the list of bankruptcy rules that apply in the court of appeals passed with one member objecting.**

Official Forms. The Reporter presented several letters commenting on various forms and suggesting amendments to them. Bankruptcy Judge Susan Pierson Sonderby wrote that Official Form 20B seems to require a party to whose claim an objection has been filed both to file a written response and appear in court. Judge Sonderby stated that either a response or an appearance should be sufficient. Members discussed whether the form actually requires both a written response and an appearance or, rather, is ambiguous. The Reporter said the flexibility Judge Sonderby supports should be written in to the form.

A. Thomas DeWoskin, Esquire, a chapter 7 trustee, had written to suggest that Form 9, the Notice of Commencement of Case, etc. (§ 341 Notice) be amended to clarify that the trustee does not represent the debtor. The Reporter noted that the sample notice attached to Mr. DeWoskin's letter is not consistent with the official form. Joel L. Tabas, also a bankruptcy trustee, had written a letter commenting that Form 10, the Proof of Claim, is confusing for unsecured nonpriority creditors, who often mistakenly check the box labeled "Unsecured Priority Claim." This mistake results in the filing by the trustee of many otherwise unnecessary objections to claims. The consensus was that, as the form was amended in 1997, it is too soon to amend it again. Bankruptcy Judge Paul Mannes had forwarded several suggestions to improve the grammar and style of the new Reaffirmation Agreement form, which was adopted in 1999 as a "Director's Form," but is intended to be published for comment and adopted as an Official Form after Congress acts on the pending bankruptcy legislation. **The Committee referred all of these suggestions to the Forms Subcommittee.**

Mr. Patchan said that the copies of the proposed forms package for reporting by small businesses the EOUST had drafted to implement the pending bankruptcy reform legislation had arrived and were available for review by the Committee members. He said his office is prepared to assist the Committee with any official forms that may be required once the legislation is

enacted. Professor Klee asked whether the draft forms had been reviewed by an accountant, and Mr. Patchan replied that his staff includes analysts who are certified public accountants. The Reporter mentioned that the Committee also could request that a consultant be engaged to provide any expert review of proposed official forms that might be needed, and Mr. Smith suggested that help also might be available from other private sources, such as from an ad hoc group that could be formed by the Insolvency Institute.

Official Form 7. Judge Kressel reported that the Forms Subcommittee had considered the suggestions referred to it at the March 1999 meeting: 1) to separate the business-related questions from those to be answered by all debtors, and 2) to make it clear that individual consumer debtors can skip the business-related questions entirely. He said the subcommittee had decided not to make two separate forms, despite the extra paper that is generated in cases filed by individual consumer debtors, at least as long as the courts still use paper. Mr. Heltzel reiterated his observations about the file space required for the blank pages of the form and the disk space occupied when the documents are scanned, but added that a solution to the storage problem may have to await the next major revision of the forms. Judge Kressel commented that most individual consumer debtors also file several blank schedules, as well. Judge Gettleman asked whether a court could be permitted to dispose of unneeded items after ascertaining that the filing was complete. Professor Resnick suggested that the business questions could become an exhibit to Form 7, similar to Exhibit "A" to Form 1, the Voluntary Petition, with directions to attach the exhibit if the debtor is in business. Professor Morris said that the environmental authorities might not be satisfied with the transfer to an exhibit of the environmental question now Question 25 in the business section. It would be too easy for a debtor to evade answering the question by saying, "I didn't notice the exhibit," he said. Professor Klee observed that the new sentence that had been inserted at the beginning of the business questions starts with the phrase "An individual or joint debtor" rather than "A debtor" as in the current form; he questioned whether an individual debtor should be exempted from answering the environmental question. Professor Resnick suggested that the Committee could move Question 25 forward to the part of the form to be answered by all debtors. Mr. Kohn said he is concerned that Form 7 not be further delayed and noted that the substance of the changes, the new questions, already had been published for comment. **The consensus was to approve the new instructional sentence, move Question 25 to make it answerable by all debtors, and issue the form without republication.**

Rule 2002(f)(7). This rule requires that notice of the entry of an order confirming a plan in a chapter 9, 11, or 12 case be mailed to all creditors, but does not require that any notice be sent when a chapter 13 plan is confirmed. Bankruptcy Judge Paul Mannes had suggested that the Committee consider amending the rule to include sending notice when a chapter 13 plan is confirmed. Judge Mannes had noted the 1994 increase in the debt limit for eligibility for chapter 13 to more than $1 million and suggested that the higher limit should entitle creditors to notice. Mr. Frank said he did not think the increased debt limit justified requiring notice. He added that many unsecured creditors do not begin receiving payments immediately in chapter 13. He said it is uncertain whether notice would be helpful or would simply lead to unrealistic expectations of prompt payment. Professor Klee noted that, unlike chapter 11, most plans in chapter 13 cases are

confirmed. He suggested that any need for notice could be satisfied by including in the notice of the confirmation hearing a sentence that directs creditors to assume confirmation unless they receive notice otherwise.

Judge Walker said that formerly, when notice was given, it included other information that was useful to the parties. Judge Small said that chapter 13 plans change before confirmation and that bare notice may not be useful. Professor Wiggins said the Committee needs more empirical information before deciding what to do. Judge Cordova said that in Colorado the chapter 13 trustee sends every creditor a copy of the order confirming the plan, even though not required by the rules. The court has found that a copy of the order gives creditors the information they need and stops phone calls to the court and the trustee. The Reporter noted that the Committee had a chapter 13 subcommittee in the early 1990s which had found that every court handles chapter 13 cases differently. Professor Morris said that in the Southern District of Ohio, each division has separate local rules governing chapter 13 procedure.

There was no support for a bare notice of confirmation. The Committee preferred either a rule specifying that certain information must be provided upon confirmation or leaving the matter to the local legal culture. Mr. Patchan said the EOUST has general policies on the subject, but that chapter 13 administration is the most local of operations. He said the EOUST could encourage trustees to provide information upon confirmation but that a statement in the national rules would be helpful. Judge Walker suggested asking a sample of chapter 13 trustees what information they can conveniently generate from their existing software and include in a confirmation report to creditors. He said the bankruptcy system faces an integrity issue, because the world at large does not know what the courts and trustees are doing. This lack of information, he said, may be part of what is driving the bankruptcy reform legislation. Mr. Patchan said the EOUST can conduct a survey of current practices and report at the next meeting.

Rule 7004. Bankruptcy Judge David H. Adams had suggested that it would be appropriate to state in one location in the rules that service on a corporation, partnership, or unincorporated association must comply with Rule 7004(b)(3). Judge Kressel said the rule appears to be ambiguous, because people address service to "ABC Corp., Attention: officer, managing or general agent." The Reporter pointed out that Rule 7004 tracks the language of Civil Rule 4, and that if the Committee were to change Rule 7004 -- perhaps to require that a name be used -- the Standing Committee would want the Committee to coordinate the proposed amendment with the Advisory Committee on Civil Rules. Judge Walker said he has seen a name challenged on the basis there was no proof that the person named had the capacity to receive service on behalf of the corporation. He said the rule is sufficient as it is, and Judge Gettleman agreed. Judge Donald said requiring parties to name an officer, director, or managing agent would create more problems than it would solve. **The Committee determined to take no action on the rule.**

Civil Rule 4.1. Scott William Dales, Esquire, had recommended that the Bankruptcy Rules be amended to incorporate Civil Rule 4.1(a) or to include a similar rule to provide

bankruptcy judges with express authority to direct the United States marshal, or some other person specially appointed, to serve writs of execution and process other than a summons or subpoena. Committee members, however, said bankruptcy judges use United States marshals to dispossess debtors from property of the estate, to apprehend debtors who fail to appear, and to aid the trustee in taking possession of bankruptcy estate property, and that there does not appear to be a problem. **The Committee determined to take no action.**

Attorney Fees in Chapter 13 Cases. Wayne R. Bodow, Esquire, had recommended that the Bankruptcy Rules be amended so that attorneys for chapter 13 debtors would receive higher fees, thereby increasing the incentive for attorneys to channel consumer debtors into chapter 13 instead of chapter 7. The consensus was that the suggestion is substantive and not a matter that can be addressed in the Bankruptcy Rules. **A motion to take no action in the Bankruptcy Rules but to inform Mr. Bodow that he should direct his letter to Congress passed without opposition.**

Rule 2003. A proposal to amend the rule was withdrawn, because a similar amendment had been prescribed by the Supreme Court and was due to take effect December 1, 1999.

Subcommittees

Technology Subcommittee. Judge Duplantier reported that Judge Cristol and Mr. Heltzel had attended all the meetings of the Standing Committee's Technology Subcommittee and had represented the Committee very ably. Mr. McCabe said the major new technology-related issue arises from the posting of documents on the Internet by the courts that are the prototypes for the electronic filing system. Other courts, he said, are imaging paper documents and posting them on the Internet. Section 107 of the Bankruptcy Code also states that every document filed in a bankruptcy case is a public record, he said, and the clerks have traditionally thought that they have no right to restrict access to documents filed with the court. Many judges agree with this view, he said. Others, including some judges, are concerned that unrestricted Internet access to court files may be an unwarranted invasion of the privacy of the parties. This tension between the right of public access and the right of privacy can be resolved only by a combination of statutory and policy actions, he said. The consensus is that the Judicial Conference should provide national guidance in this area, and that it is not for individual courts to decide, he said.

Among the possibilities for regulation of electronic access, he said, are both rules amendments and the granting of statutory authority to the Judicial Conference. Judge Duplantier asked if courts can image documents without putting them on the Internet. Mr. Heltzel said a court can do that but that practitioners eagerly await the easy access from their offices to the court's files. In addition, Mr. Heltzel said, anyone can visit the courthouse, obtain documents, and put them on the Internet, so that it is impossible to keep the material from reaching the Internet. Judge Small said the three years that would be required to achieve a rules solution is too slow, that the problem needs an immediate solution. Professor Resnick noted that the

unrestricted access offered by the Internet negates many of the protections that other statutes such as the Fair Consumer Credit Reporting Act provide. Of course, he added, stringers go to the courthouse to obtain the information, which they then sell to their clients. Mr. Patchan said he was disturbed to learn recently that one of the trustee organizations has set up a corporation for the purpose of selling information collected by trustees in the course of their duties. Mr. McCabe said the Committee on Court Administration and Case Management has been given the lead on the privacy issue and had set up a subcommittee to develop policy recommendations for the Judicial Conference. He said that liaisons had been appointed from various other interested committees, and that Gene Lafitte, Esquire, chairman of the Standing Committee's Technology Subcommittee, had been appointed as liaison from the Standing Committee.

Respectfully Submitted,

Patricia S. Ketchum

Item 7

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

To: **Honorable Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure**

From: **Paul V. Niemeyer, Chair, Advisory Committee on the Federal Rules of Civil Procedure**

Date: **December 8, 1999**

Re: **Report of the Civil Rules Advisory Committee**

Introduction

The Civil Rules Advisory Committee met on October 14 and 15, 1999, in Kennebunkport, Maine. The meeting did not lead to any proposals for action by the Standing Committee on Rules of Practice and Procedure at its January 2000 meeting. This Report is divided into four parts. The first recounts, very briefly, the Judicial Conference's action on the Civil Rules and Supplemental Admiralty Rules amendments that the Standing Committee recommended for adoption. The second addresses a discovery question that was submitted to the Advisory Committee by the Standing Committee for report. The third part summarizes the Advisory Committee's deliberations on two ongoing Standing Committee projects — the Federal Rules of Attorney Conduct proposal and corporate disclosure issues. The fourth summarizes the major ongoing projects that occupy center stage on the Advisory Committee agenda.

I Amendments Proposed to the Judicial Conference

At the June 1999 meeting, the Standing Committee approved several changes in the Civil Rules and Supplemental Admiralty Rules and recommended the changes to the Judicial Conference. The Judicial Conference sent all but one of these proposals on to the Supreme Court. The proposals were divided into three packages. There was no controversy as to two of the packages. The first involved changes to Civil Rules 4 and 12 for actions brought against an officer or employee of the United States in an individual capacity for acts occurring in connection with the performance of duties on behalf of the United States. The second involved changes in the Admiralty Rules designed primarily to accommodate changes earlier made in Civil Rule 4 and to adjust for developments in civil forfeiture jurisdiction and practice.

The third Civil Rules package proposed changes for disclosure and discovery practice. National uniformity would be restored by eliminating the opportunity to adopt local rules opting out of some disclosure and discovery practices. The scope of initial disclosures would be narrowed to reach only witnesses and documents that a party "may use to support" its claims or defenses. The scope of discovery set by Civil Rule 26(b)(1) would be preserved, but divided between attorney-

managed discovery and court-controlled discovery. A presumptive time limit of one day of seven hours would be set for depositions. These changes were discussed at length and in detail. They, and less dramatic changes, were all approved. One final proposal, however, was not approved. This proposal would have added to Civil Rule 26(b)(2) an express recognition of the existing power to allow specified discovery only

on condition that the requesting party pay all or part of the costs of responding. This proposal was found to add too little to the present rules to justify the fears and controversies that is has stirred up.

II (Proposed) Amended Rule 5(d): Access and Privilege

At the June 1999 meeting the Standing Committee recommended approval by the Judicial Conference of amended Civil Rule 5(d) provisions that prohibit the filing of initial disclosures and discovery materials "until they are used in the proceeding or the court orders filing." At the same time, the Standing Committee asked the Advisory Committee to report on the effects of the amended rule on defamation privileges and on public access to discovery materials. The Judicial Conference has submitted the proposed amendment to the Supreme Court. The Advisory Committee considered the questions identified by the Standing Committee on the basis of a report prepared by the Special Reporter for discovery, Professor Richard L. Marcus. The discussion is reported at pages 17 to 19 of the draft October Minutes.

The defamation privilege question involves two separate privileges. One is a privilege for statements made in the course of litigating conduct, as in pleading, responding to discovery requests, making motions, and so on. This privilege does not appear to turn on filing. The other is a privilege to make public comment on matters occurring in litigation. It has proved difficult to find much useful information about this privilege with respect either to materials that have been filed or to materials that have not been filed. There is no indication that federal courts are prepared to create a federal common-law privilege for comments on matters occurring in federal litigation. The only apparent way to affect state privilege law through the rulemaking process would be to assume that filing makes a difference, and to require filing. An amendment that requires filing would undo not only the recently approved Rule 5(d) amendment, but also undo the current practice in most districts which — under the direction of many local district rules that probably are invalid as inconsistent with present Rule 5(d) — bars filing of discovery materials. This present practice has not generated any observable effects on whatever privileges may be created by the several state laws of defamation. The Advisory Committee concluded that there is no present need to consider these privilege questions further.

The public access question is one that has much occupied the Advisory Committee in recent years. Two proposals to amend protective order practice were published for comment. The proposals would have established procedures for nonparty review of protective orders. After extensive comment and consideration that went to the Judicial Conference, it was concluded that there is no need to undertake modification of current practices. Particularly in light of the lack of any indication of special public-access problems in the many districts that today bar the filing of discovery materials, the Advisory Committee concluded that there is no occasion to explore these issues again.

Federal Rules of Attorney Conduct. The Advisory Committee discussion of the project to consider adoption of Federal Rules of Attorney Conduct is described at pages 8 to 17 of the draft October Minutes. The conclusion of the discussion was simple: the subcommittee process for considering these questions is working well, and should continue to work through the problems that have been identified.

Corporate Disclosure. The Advisory Committee discussion of corporate disclosure is summarized at pages 28 to 36 of the draft October Minutes.

Three basic alternative approaches were considered. One, which did not receive much discussion, would involve drafting a uniform federal rule that would require extensive disclosure of information bearing on recusal of a judge. A uniform national rule would provide substantial benefit to litigants who appear in federal courts with some frequency. The difficulty with this proposal is that substantial time and work will be required to craft a good rule. Unless special good fortune should smile on the project, moreover, the need to adapt an extensive-disclosure rule to the lessons of experience could prove difficult to accommodate in the protracted Enabling Act process.

A second alternative is to seek the advantages of national uniformity, detailed disclosure, and flexible response to the lessons of experience by delegating to some other body the responsibility of formulating and adjusting disclosure requirements. One obvious approach would be to adopt a national rule that requires all courts to utilize a disclosure form developed by the Judicial Conference. The Judicial Conference would draw from the experience of its several committees and the Administrative Office of the United States Courts to determine what information is important, what information can be utilized effectively in court computer systems, and how best to gather and use this information. Adjustments could be made quickly in response to developing experience with the kinds of information that are important and with the ability to utilize information.

A third alternative is to adopt a uniform national rule that establishes a very low base line of disclosure and that invites adoption of local rules that require additional disclosure. The likely starting point for this approach would be Appellate Rule 26.1, adapted to the district court circumstances that require variations with respect to such matters as the time for filing and the number of copies. The invitation to adopt local rules could be extended either in the text of the national rule or in the Committee Note. Hints might be given as to the provisions that might be included in local rules, but such suggestions should be approached with reserve. Extensive suggestions would encounter the difficulties that stand in the way of drafting an elaborate national disclosure rule. In addition, turning the matter over to local rulemaking may lead to a period of experimentation in which a wide variety of local rules — developing riffs on the extensive variations already found in local rules — may generate a better foundation for eventual adoption of a uniform national rule. (Of course the prospect of adopting a uniform national rule must encounter entrenched affections for the local rules, as demonstrated by the recent resistance to adoption of a uniform national discovery-disclosure rule.)

Faced with these possibilities, the Advisory Committee asked that a number of drafts be prepared to illustrate the various approaches that might be taken short of attempting a uniform national rule that would require sufficient disclosure. These drafts will, it is hoped, be considered

by the Reporters for the several advisory committees and by the Standing Committee, along with any other drafts that may be proposed.

IV Continuing Projects

The Advisory Committee has three major continuing projects that focus on class actions, discovery, and special masters. The jury-instruction provisions of Civil Rule 51 continue to await consideration. A new project has been launched to consider adoption of simplified procedure rules for some cases. These matters can be summarized briefly.

Class Actions. Civil Rule 23 has been considered since the Judicial Conference, reacting to the report of the ad hoc committee on asbestos litigation, requested the Standing Committee to study the role of class actions in mass-tort litigation. Advisory Committee deliberations have included a complete review of Rule 23, going so far as a draft that would dissolve the familiar categories of "(b)(1)," "(b)(2)," and "(b)(3)" classes. A number of the more modest proposals were published for comment in August 1996. The fruits of these efforts are preserved in the four-volume set of Working Papers published in May 1997. The only rule amendment that so far has emerged from this process is the interlocutory appeal provision, Rule 23(f), which took effect on December 1, 1998. Further work was deferred while the Ad Hoc Working Group on Mass Torts held conferences, considered proposals, and prepared its Report. The Report, delivered punctually on February 15, 1999, recommended creation of an ad hoc Judicial Conference committee that would draw together representatives of the several committees whose experience and competence would bear on development of integrated legislative and rulemaking approaches to mass tort litigation. Because no ad hoc committee has been created, the Advisory Committee plans to renew its consideration of Rule 23. A Rule 23 subcommittee has been formed, charged with considering all aspects of class-action practice that might be approached through rules amendments without complementary legislation. The landscape of class-action practice continues to change in some important respects, but the earlier work will provide a solid beginning.

Discovery. The Discovery Subcommittee continues to work on possible discovery proposals, recognizing that the extensive work that developed the amendments now transmitted to the Supreme Court has identified topics that merit further attention. Discussion of its report is summarized at pages 19 to 28 of the draft October Minutes. The Advisory Committee concluded that the Discovery Subcommittee need not consider further a proposal made during its earlier work that a presumptive age limit be set for production of documents. But the Advisory Committee recommended that the Subcommittee hold open the prospect of adopting a rule protecting against inadvertent waiver of privileges during discovery, in part because of the connection between this problem and the many questions raised by discovery of information preserved in electronic form. There was an extensive discussion of emerging experience with discovery of electronically preserved information. Representatives of the Federal Judicial Center described the development of a project in this area. That project may help to show whether the time has come to consider development of new rules for this area, or whether the most profitable course for the time being is to develop programs to educate judges and lawyers about the possibilities and problems of "electronic discovery." One of the reasons for exercising great caution is that software and hardware continue to evolve at a pace that far outstrips the capacity of the rulemaking process to generate court rules. There is an intimidating

prospect that any rule would be as obsolete at the time of taking effect as the hardware that would have been purchased as state-of-the-art at the time the rule was first developed.

Special Masters. Civil Rule 53 has been on the Advisory Committee agenda for several years. This project was sparked by suggestions from local Civil Justice Reform Act committees, who observed that special masters have come to be used for many purposes that are not contemplated by Rule 53. A detailed draft Rule 53 has been prepared, and served as one source of direction for a two-phase study being conducted by the Federal Judicial Center. A report was made on the first phase of the study. The Advisory Committee concluded that the Rule 53 subcommittee should continue its work, as it will be informed by completion of the FJC study. This discussion is summarized at pages 36 to 39 of the draft October Minutes.

Rule 51. The Criminal Rules Advisory Committee has published a proposal that would authorize a district court to require submission of proposed jury instructions before trial. Consideration of a parallel suggestion for Civil Rule 51 led to the question whether other changes should be made in Rule 51 to express clearly the practices that have grown up without finding any clear expression in the rule. This project has been deferred in the press of other business, but continues to hold a place on the discussion agenda.

Simplified Rules. The October meeting was the first occasion to discuss a new project to develop a set of simplified rules for some categories of cases. The motive for the project is simple. The Civil Rules seem to work well for a wide range of litigation. Great efforts have been made over the years to find ways to improve the rules for the unusually complex or contentious actions in which the many procedural opportunities created by the rules are utilized to impose enormous burdens on the parties and courts. Little attention has been paid to the question whether the rules provide "too much" procedure for simpler actions. The question is whether simplified rules can provide a better procedure for some of these actions.

The core questions posed by a simplified procedure project are daunting. Perhaps the central question is whether it is possible to identify categories of actions in which the simplified rules can be made mandatory. It would be easier — and perhaps much easier — to draft rules that are available only with the consent of all parties. If the rules are made mandatory for some categories of actions, the categories chosen are likely to affect the specific content of the rules. A related question is whether simplified rules would do no more than improve the disposition of actions that would be brought to federal court in any event, or whether they would draw new cases that otherwise would be filed in state court. If the rules would attract new work for the federal courts, an effort must be made to determine whether the new actions are better handled in federal courts than in state courts.

The package of draft rules prepared to illustrate the questions that must be addressed resolved the question of coverage by making application of the rules mandatory for actions seeking only money damages up to $50,000. A surprising number of federal actions would fit into this category. But the amount also would fence out diversity cases, an effect that occasioned extensive discussion.

The illustrative draft assumed that the most promising area for simplifying procedure is in a package of pleading, disclosure, and discovery amendments. The basic approach involves fact

pleading, expanded disclosure, and restricted discovery. Many different approaches might be taken. Many alternative questions were identified, and many more will be uncovered as the project unfolds.

The Advisory Committee discussion of the simplified rules project appears at pages 39 to 45 of the draft October Minutes. There was great enthusiasm for the undertaking, recognizing the difficulties that must be surmounted. Several members urged that many lawyers would find simplified procedures attractive for cases involving hundreds of thousands of dollars. Although the draft would apply the rules to cases demanding specific relief only with party consent, this question will deserve further consideration. It does not seem likely that a fully considered draft can be prepared in time for action at the April 2000 meeting, but the work will be pursued as vigorously as possible. One of the Federal Judicial Center participants suggested that because "we cannot research the future," it might be desirable to develop a pilot project to test such rules as might emerge. This possibility will be evaluated.

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

October 14 and 15, 1999

The Civil Rules Advisory Committee met on October 14 and 15, 1999, at Kennebunkport, Maine. The meeting was attended by Judge Paul V. Niemeyer, Chair; Sheila Birnbaum, Esq.; Judge John L. Carroll; Justice Christine M. Durham; Mark O. Kasanin, Esq.; Judge David F. Levi; Myles V. Lynk, Esq.; Judge John R. Padova; Acting Assistant Attorney General David W. Ogden; Judge Lee H. Rosenthal; Judge Shira Ann Scheindlin; and Andrew M. Scherffius, Esq.. Chief Judge C. Roger Vinson and Professor Thomas D. Rowe, Jr., attended this meeting as the first meeting following conclusion of their two terms as Committee members. Professor Richard L. Marcus was present as Special Reporter for the Discovery Subcommittee; Professor Edward H. Cooper attended by telephone as Reporter. Judge Anthony J. Scirica attended as Chair of the Standing Committee on Rules of Practice and Procedure, and Professor Daniel R. Coquillette attended as Standing Committee Reporter. Judge Adrian G. Duplantier attended as liaison member from the Bankruptcy Rules Advisory Committee. Peter G. McCabe and John K. Rabiej represented the Administrative Office of the United States Courts. Thomas Willging, Judith McKenna, and Carol Krafka represented the Federal Judicial Center; Kenneth Withers also attended for the Judicial Center. Observers included Scott J. Atlas (American Bar Association Litigation Section); Alfred W. Cortese, Jr.; and Fred Souk.

Judge Niemeyer introduced Judge Padova as one of the two new members of the committee. Professor John C. Jeffries, Jr., the other new member, was unable to attend because of commitments made before appointment to the committee.

Judge Niemeyer expressed the thanks of the committee to Chief Judge Vinson and Professor Rowe for six years of valuable contributions to committee deliberations. Each responded that the privilege of working with the committee had provided great professional and personal rewards.

Introduction

Judge Niemeyer began the meeting by summarizing the discovery proposals that emerged from the committee's April meeting and describing the progress of those proposals through the next steps of the Enabling Act process. The April debates in this committee were at the highest level. Committee members were arguing ideas. If the ideas are inevitably influenced by personal experience, the discussion was enriched by the experiential foundation. It is difficult to imagine a better culmination of the painstaking process that led up to the April meeting. During those debates the disclosure amendments were shaped to win acceptance despite the strong resistance from many district judges who did not want to

have local practices disrupted by national rules. The decision to reallocate the present scope of discovery between lawyer-managed discovery and court-directed discovery met the question whether the result would be to increase abuses by hiding information and would lead to increased motion practice. The committee concluded that any initial increase of motion practice would be likely to subside quickly, and that the result would be the same level of useful information exchange. The committee also decided to recommend an explicit cost-bearing provision, notwithstanding the belief that this power exists already. The opposing motion made by committee member Lynk proved prophetic, as his arguments proved persuasive to the Judicial Conference. The seven-hour deposition limit also provoked much discussion, and significant additions to the Committee Note, before it was approved.

The responsibility of presenting the multi-tiered advisory committee debates and recommendations to the Standing Committee was heavy. The Standing Committee, however, provided a full opportunity to explore all the issues. The carefulness of the advisory committee inquiry, the deep study, and the broad knowledge brought to bear persuaded the Standing Committee to approve the recommendations by wide margins.

The Standing Committee recommendations then were carried to the Judicial Conference, where the central discovery proposals were moved to the discussion calendar. Because all members of the Judicial Conference are judges, there were no practicing lawyer members to reflect the concerns of the bar with issues like national uniformity of procedural requirements and the desire to win greater involvement of judges in policing discovery practices. Some of the district judge members were presented resolutions of district judges in their circuits, and felt bound to adopt the positions urged by the resolutions. Practicing lawyers sent letters. The Attorney General wrote a letter expressing the opposition of the Department of Justice to the discovery scope provisions of Rule 26(b)(1).

With this level of interest and opposition, the margin of resolution seemed likely to be close. Judge Scirica and Judge Niemeyer were allowed considerably more time for their initial presentations than called for by the schedule, and then sufficient time for each individual proposal.

Discussion of the disclosure proposals began with a motion to vote on two separate issues — elimination of the right to opt out of the national rule by local rule, and elimination of the requirement to find and disclose unfavorable information that the disclosing party would not itself seek out or present at trial. The proposal to restore national uniformity was approved by a divided vote.

The proposal to divide the present scope of discovery between attorney-managed discovery and court-directed discovery was discussed before the lunch break, while the vote came after the break. This vote too was divided, but the proposal was approved. The discussion mirrored, in compressed form, the debates in the

advisory committee. Professor Rowe's motion to defeat the proposal was familiar to the Conference members, who explored the concern that the proposal might lead to suppression of important information.

The presentation of the cost-bearing proposal was not long. It was noted that the advisory committee believes courts already have the power to allow marginal discovery only on condition that the demanding party bear the cost of responding. Although the purpose is only to make explicit a power that now exists, several Conference members feared that public perceptions would be different. Again, the views expressed in advisory committee debates on Myles Lynks's motion to reject cost-bearing were reviewed by the Conference. The Conference rejected the proposal.

The presumptive seven-hour limit on depositions met a much easier reception; it was quickly approved.

The next step for the discovery amendments lies with the Supreme Court. There may well be some presentations by members of the public to the Court. If the Court approves, the proposals should be sent to Congress by the end of April, to take effect — barring negative action by Congress — on December 1, 2000.

In the end, the discovery proposals were accepted not only because the content seems balanced and modest, but also because of the extraordinarily careful and thorough process that generated the amendments. The Discovery Subcommittee's work was a model. It is to be hoped that a detailed account of this work will be prepared for a broader audience, as an inspiration for important future Enabling Act efforts.

Judge Scirica underscored the observations that the debate on the discovery proposals was very close. The debate, with the help of Judge Niemeyer's excellent presentation, mirrored the discussions in the advisory committee. Conference members know a lot about these issues. They came prepared; some had called either Judge Scirica or Judge Niemeyer before the meeting to ask for additional background information. All of the arguments were put forth; nothing was overlooked.

Assistant Attorney General Ogden noted that the Department of Justice appreciated the efforts that were made to explain the advisory committee proposals to Department leaders. Although official Department support was not won on all issues, the Department supports ninety percent of the proposals. The Department, moreover, recognizes that its views were given full consideration. For that matter, there are differences of view within the Department itself. Opposition to the proposed changes in the scope-of-discovery provision, however, was strongly held by some in the enforcement divisions. From this point on, it is important that the Enabling Act process work through to its own conclusion.

Judge Niemeyer responded that it is important that the advisory committee maintain a full dialogue with the Department of Justice. The Department works with the interests of the whole system in mind.

Judge Duplantier reported that he had observed the Standing Committee debate. The written materials submitted by the advisory committee were read by district judges, and they recognized that the advisory committee had worked hard on close issues. This recognition played an important role in winning approval of the proposals.

Judge Niemeyer observed that the questions that arise from local affection for local rules will continue to face the advisory committee.

Scott Atlas expressed appreciation for the efforts of the advisory committee to keep the ABA Litigation Section informed of committee work. The Section will continue to support the discovery proposals.

It also was noted that the Judicial Conference considered on its consent calendar the packages of proposals to amend Civil Rules 4 and 12, and to amend Admiralty Rules B, C, and E with a conforming change to Civil Rule 14. These proposals were approved and sent on to the Supreme Court.

In June, the Standing Committee approved for publication a proposal to amend Rule 5(b) to provide for electronic service of papers other than the initial summons and like process, along with alternatives that would — or would not — amend Rule 6(e) to allow an additional 3 days to respond following service of a paper by any means that requires consent of the person served. A modest change in Rule 77(d) would be made to parallel the Rule 5(b) change. Publication occurred in August, in tandem with the proposal to repeal the Copyright Rules of Practice, along with parallel changes in Rule 65 and 81; these proposals were approved by the Standing Committee last January.

Judge Niemeyer noted that the admiralty rules proposals grew from an enormous behind-the-scenes effort by Mark Kasanin, the Maritime Law Association, the Department of Justice, and the Admiralty Rules Subcommittee. The package was so well done and presented that it has not drawn any adverse reaction.

Appointment of Subcommittees

Judge Niemeyer announced that changes in advisory committee membership and new projects require revisions in the subcommittee assignments and creation of a new subcommittee.

The Admiralty Rules Subcommittee will continue to be chaired by Mark Kasanin. The two new members are Judge Padova and Myles Lynk, replacing Chief Judge Vinson and Professor Rowe.

The Agenda Subcommittee will continue to be chaired by Justice Durham. The new members are Judges Carroll and Kyle, and Professor Jeffries.

The Discovery Subcommittee will continue without change.

The delegates to the Mass Torts Working Group were Judge Rosenthal and Sheila Birnbaum. The Working Group delivered its Report to the Chief Justice exactly on time, last February 15. The Chief Justice directed that the Report be printed and distributed to the public, but has not acted either way on the Working Group recommendation to create a new Judicial Conference Mass Torts Committee. A new committee, drawing from several established Judicial Conference committees, could build on the work begun by the advisory committee's extensive study of class actions, and at the same time draw from the knowledge of the other committees in a project considering legislative as well as rulemaking solutions. A project of this kind, on the other hand, would interject the judiciary into a very controversial area. The risk of becoming entangled with highly politicized matters may, in the end, seem to outweigh the opportunities for constructive contributions. Rather than postpone further advisory committee action indefinitely, it is desirable to begin to revisit the questions whether Rule 23 can be revised. Rule 23 revisions might aim at mass torts, but also might aim at other questions — the entire Rule 23 project was put on hold pending completion of the Mass Torts Working Group project. The delegates to the Working Group will be reconstituted as part of a new Rule 23 Subcommittee, chaired by Judge Rosenthal and including also Sheila Birnbaum and Assistant Attorney General Ogden.

The work of the class-action subcommittee will be considerable. The four volumes of working papers provide a solid, if rather formidable, foundation. The work of the advisory committee that built on that foundation will help to provide some focus. But there are many key class-action issues that remain to be explored further and brought to a conclusion. Settlement classes have never been brought to rest, and the Supreme Court has emphasized that its two recent decisions in settlement-class cases have rested on present Rule 23 rather than any final view whether Rule 23 should be revised to provide new answers. Settlement classes inject the courts deep into social ordering. And the advisory committee has never fully resolved the question whether to establish a new "opt-in" class procedure. The advantage of an opt-in class is that it provides a strong reassurance of genuine consent by class members in a way that an opt-out class cannot match.

The most imminent class-action event is the November mass-torts symposium at the University of Pennsylvania Law School. This symposium has been designated as an official advisory committee activity. Although the symposium has been designed in part as a ground for exploring issues peculiar to mass torts, aiming either at any new committee that may be created or at Congress, it also

will provide much food for thought about Rule 23. The fact that legislative proposals will be addressed does not detract from the value of the rules proposals that also will be advanced. The mass tort landscape changes so rapidly, moreover, that it is important to renew our acquaintance. The lessons learned even one or two years ago are now partly out-of-date.

The Rule 23 Subcommittee should work toward presenting materials for deliberation and debate at the next advisory committee meeting.

The Rule 53 Special Masters Subcommittee will have a new chair, Judge Scheindlin, to replace Chief Judge Vinson. A first draft of a thoroughly revised Rule 53 was prepared for the committee a few years ago. The Federal Judicial Center has launched a study to explore the premises that underlie the draft; an interim progress report will be provided at this meeting, and it is expected that the project will be completed in time for a subcommittee report at the next advisory committee meeting.

The Technology Subcommittee will have one new member, Professor Jeffries, to replace Professor Rowe. The subcommittee has worked on electronic filing, and particularly the Rule 5 amendments and Rule 6(e) alternatives that were published for comment last August. Other issues are certain to arise. Many courts are now making docket sheets available electronically, generating privacy issues that were not, in any realistic way, the same when access to docket documents required a personal visit to the courthouse. The Court Administration and Case Management Committee has appointed a special committee to study these issues, chaired by Chief Judge Hornby. They have invited a number of experts to help them explore the policy issues that arise from posting court documents on the internet. By fortunate coincidence, Professor Jeffries will be one of their experts. Judge Carroll observed that the Subcommittee is not yet seeking to take the lead on these issues.

In an accurate forecast of the advisory committee's later decision to pursue the question whether it is possible to adopt simplified rules of procedure for some cases, a Simplified Procedures Subcommittee was appointed. Judge Padova will chair the Subcommittee. Its members tentatively will include Judge Levi, Assistant Attorney General Ogden, and Professor Jeffries. Professor Marcus was asked to work with the Subcommittee in his capacity as Special Reporter.

The advisory committee delegates to the ad hoc subcommittee on Federal Rules of Attorney Conduct will continue to be Judge Rosenthal and Myles Lynk. They also will be charged with helping to formulate the advisory committee's advice to the Standing Committee on development of a uniform rule for financial disclosure.

Legislation Report

John Rabiej made the Administrative Office report on legislative activity on matters of interest to the advisory committee.

Legislation was introduced earlier this year that would federalize all class actions asserting a "Y2K" claim. The Administrative Office's Director wrote on behalf of the Judicial Conference to the chairs of the Congressional Committees opposing the bill. The letter had been coordinated with Judges Niemeyer and Scirica and reflected their concern that the judiciary's opposition should not be interpreted to reject all future efforts to extend federal jurisdiction over peculiarly national class actions or mass torts under suitable conditions. Despite the judiciary's opposition, the legislation was enacted into law. The House later passed a separate bill that would federalize state class actions with the exception of a small number of essentially intra-state actions. Judge Niemeyer expressed his hope to the Judicial Conference's Executive Committee that the judiciary might defer opposing the bill at this time and maintain a flexible negotiating position. He noted that the bill was unlikely to proceed much further in Congress this year.

In responding to the bills that would essentially federalize most state-court class actions, the Judicial Conference Executive Committee was importuned by the Federal-State Jurisdiction Committee to take a position flatly opposed to any transfer of class-action jurisdiction from state courts to federal courts. Based on experience growing out of the advisory committee's class-action conferences, studies, and hearings, and particularly on the conferences held by the Mass Torts Working Group, representatives of this committee sought to persuade the Executive Committee to adopt a more nuanced view. Since 1995, and perhaps earlier, the Judicial Conference has been on record in support of some role for federal courts in class actions that sweep across many states or the entire country. The advisory committee and Working Group heard much concern with the opportunity to frame national class actions in any state that seems most hospitable to the party choosing the forum, and particular concern with the prospect that a collusive class-action settlement may be shopped from one state to another until an agreeable court is found. With the able assistance of Administrative Office staff, the Judicial Conference response to the pending bills was framed in terms that leave the way open to support mass-tort legislation if it proves desirable to develop federal subject-matter jurisdiction in this area. It will be most important to continue to work with the Federal-State Jurisdiction Committee in this area, whether through a new Mass Torts Committee or through other means of cooperation. The future of the class-action bill that passed the House is uncertain in the Senate, and President Clinton has threatened a veto. The prospect that there will be more activity in this area remains open. There are strong and competing federal and state interests in these areas, and all involved must be sensitive to the competition and cautious in

developing solutions.

S. 353, the Class-Action Fairness Act of 1999, includes a provision that would eliminate judicial discretion from Civil Rule 11(c), restoring the 1983 provision that made sanctions mandatory. Similar provisions have appeared in other bills since the 1993 Rule 11 amendments. The opposition of the judiciary to this incursion on the rulemaking process has been communicated to Congress.

Minutes Approved

The draft minutes for the April 1999 meeting were approved as circulated.

Federal Rules of Attorney Conduct

Judge Niemeyer introduced the background of the Federal Rules of Attorney Conduct. States comprehensively regulate matters of professional responsibility. But problems arise when, for example, a Pennsylvania attorney with a Virginia client appears in proceedings in the United States District Court for the District of Columbia. Choosing the applicable law is not easy — and different enforcing bodies may make different choices. Professor Coquillette, as Reporter for the Standing Committee, created a 10-Rule model for consideration of an approach that would adopt state law for most issues but establish specific Federal Rules of Attorney Conduct for the issues that most frequently arise in federal courts. At about the same time that the Standing Committee launched its project, the Department of Justice began to encounter difficulties with expansive interpretations of professional responsibility rules in some states, most notably Model Rule 4.2 or its analogues dealing with contacts with represented persons. A three-way dialogue has emerged between the Department of Justice, the American Bar Association, and the Conference of Chief Justices. The role of the advisory committee is to act as one of the several advisory committees offering advice to the Standing Committee. The report presented by Professor Coquillette today is one that calls only for discussion.

Professor Coquillette began by expressing appreciation for the many warm gestures of support extended by advisory committee members after the automobile accident that prevented him from attending the May 4 meeting of the Attorney Conduct Rules Subcommittee.

The history of the Federal Rules of Attorney Conduct project has been surrounded with controversy. Much of the controversy arises from misinformation about the origins and purposes of the project. It is essential that everyone involved have a clear understanding of the project — and a great many bodies outside the Judicial Conference structure are involved.

The major concern of the Standing Committee, cutting across all of the advisory committees, is to promote consistency in the rules process and to advance justice. Ordinarily the Standing Committee discharges its responsibilities by relying on the advisory committees as the initiating agencies for rule activities within their respective competencies. But it is not feasible to rely on the advisory committee structure to originate proposals that cut across the several different areas of practice allocated to those committees. The Standing Committee at times is forced to take the lead. Issues of technology are a continuing example. Questions of attorney conduct are another example.

In 1988 Congress asked that the proliferation of local district court rules be slowed down. The Local Rules Project was established. The Project in fact made a lot of progress in trimming the number of local rules. And in the process, the Project identified local rules that seemed worthy of emulation. Many of the Federal Rules of Appellate Procedure and other national rules derive from local rules that the Project submitted to the advisory committees for consideration.

Attorney conduct matters are governed by many different local rules. The local rules often are inconsistent with the district's home state rules. Some of the local rules are unique — they are not consistent with the rules of any state or with any national model set of rules. The Federal Judicial Center has helped the Standing Committee catalogue the many district rules. It is important to remember that this project did not originate with the concerns the Department of Justice is now expressing. To the contrary, it began with the Local Rules Project. The Project initially identified the attorney conduct rules problem, but concluded that the problem was too big to be fit in with its other work. Attorney conduct local rules were put aside for separate consideration after the initial work of the Project could be concluded in other areas. Now the topic has come back.

The most important point to emphasize is that the Standing Committee is not trying to increase federal regulation of attorneys. Its purpose is quite the opposite. Today we have extensive federal regulation of attorney conduct through local rules. Many of the local rules purport to address topics that lie at the core of state interests and that involve little or no independent federal interest. The purpose of the present effort is to rein in this extensive federal control, limiting any federal control to matters that implicate important federal interests.

The Standing Committee has concluded that despite the questions that might be raised at the margins of Enabling Act authority, there surely must be centralized authority to deal with the situation created by the proliferation of local rules. If local rulemaking cannot properly deal with any of these issues, then the challenge is to find a way to set aside all the invalid local rules. But if indeed there are important federal interests,

derived from the need to ensure federal control of federal procedure, then the challenge is to find a way to cede back to the states the areas of primary state interest while retaining a core of federal control over the issues that matter most to the federal courts.

In preparing to address these issues, the Standing Committee arranged two conferences constituted of representatives from all the different groups interested in these questions. Four options emerged from the work of these conferences.

One option is to do nothing. The present situation would continue. As described in more detail below, the present situation is even more confused than would appear from a mere survey of the local rules.

A second option would be to adopt a complete and independent set of attorney conduct rules for the federal courts. Implementation of this approach most likely would involve adoption of the most current version of the ABA Model Rules.

A third option would be to adopt one national rule that mandates dynamic conformity to state law, together with a choice-of-law rule for the appellate courts. This model would leave no room for federal law. There is substantial controversy about this approach. Some have urged that although the federal rules should incorporate the text of the local state rules, federal courts should remain free to interpret the text in ways at variance with local state interpretations. The result would be a semblance of conformity, but substantial federal independence in fact. Others urge that there is no point in a mere pretense of conformity, and substantial damage when lawyers innocently but mistakenly believe that conformity to state law provides clear answers that can be relied upon in resolving dilemmas of professional responsibility.

The fourth option would begin with dynamic conformity to state law, but add a core of express federal rules addressing matters of particular interest to federal courts. This approach was illustrated by the "ten-rules" model drafted for the Standing Committee. Although there were nine independent rules for federal courts, this model achieved substantial conformity to much state practice because it was based on the ABA Model Rules, relying on the variations of the Model Rules that are adopted more frequently than any others.

The invitational conferences offered no support for the "do nothing" approach. The conferees believed that the local rules present a substantial problem; the problem is reduced in the districts that seem to routinely ignore their own local rules, but there are costs even in the appearance of federal rules that in fact have no meaning. Neither was there any support for adopting a complete and independent body of federal rules.

These consensus views left two choices open — dynamic

conformity to state law as to all matters, or dynamic conformity coupled with a limited number of independent federal rules addressing matters of special federal interest. Because these issues cut across the interests of all the advisory committees, an ad hoc subcommittee was appointed. The subcommittee includes representatives from each of the advisory committees, and has advisers from other Judicial Conference committees. The subcommittee met in May and in September. Its work has shifted attention to a fifth option, embodied in the draft Federal Rule of Attorney Conduct 1 submitted with the agenda materials for the fall advisory committee meetings.

This fifth approach is styled as a Federal Rule of Attorney Conduct for two reasons. First, it cuts across all federal courts and the interests of each advisory committee and each separate body of present Federal Rules. Second, it is anticipated that there well may be additional FRAC — a likely FRAC 2, for example, would be designed to deal separately with the unique issues that confront bankruptcy practice. The Bankruptcy Code has its own definition of conflicts of interest, and adjustments also may prove appropriate for other issues.

The FRAC 1 draft combines the dynamic state conformity approach with continued federal independence in matters of federal procedure. The dynamic state conformity is clearly designed to incorporate the interpretation of local state rules by state bodies that have authority to establish definitive state law. Although federal courts retain power to control the right to appear in federal court by admitting, suspending, and revoking federal practice privileges, disciplinary enforcement as such would remain with state authorities. No one is eager to establish a federal disciplinary bureaucracy, nor to establish general federal disciplinary authority. Continued federal independence in matters of procedure, on the other hand, is based on recognition that many issues of attorney conduct involve both compelling procedural interests of the courts and important matters of professional responsibility. The FRAC 1 draft seeks to ensure federal control over federal procedure by protecting attorneys against state discipline or civil liability for acts done in compliance with federal procedure or a federal court order.

State enforcers recognize that this draft confirms state authority in many areas in which state authority has seemed to be challenged by local federal court rules. They remain apprehensive, however, about the continuing role of federal procedure as a protection against state authority. It will be important to ensure that the provision for federal regulation of federal procedure be drafted as clearly as may be to reduce the unavoidable ambiguities that arise from the broad overlap between procedure and professional responsibility. The broad overlap, however, will make it impossible to avoid all ambiguity. Residual ambiguity need not defeat the enterprise. Similar ambiguities occur regularly in making adjustments between procedure and substance. Common sense

and sensitivity in application generally work well. The present structure is one that supports many imaginary situations of horrible conflict, but for the most part these situations remain imaginary. Federal courts do not in fact undertake to usurp state licensing and discipline functions, and state disciplinary bodies do not in fact seek to interfere with the procedural interests of federal courts. The difficulties arise because careful lawyers sensibly seek authoritative assurance about proper courses of conduct and are unable to find assurance in the crazy maze of local federal rules.

The Department of Justice has specific concerns about specific issues that confront its national practice. It is engaged as a national law firm; it has investigatory and enforcement roles that are quite different from anything done by other national law firms; and it frequently is involved in work that may come to affect any of a great many different states. One of the most pressing sets of problems arises from the "Model Rule 4.2" question of contacts with represented persons. The Department initially took the position, through the "Thornburgh" Memorandum, that its attorneys were exempt from state regulation. The Eighth Circuit found that the Department lacked authority to establish its own independence. The "McDade Amendment," 28 U.S.C. § 530B, has now confirmed that Department attorneys are subject both to state regulation and also to local federal court rules. Bills have been introduced in Congress to undo the McDade Amendment. Senator Leahy has introduced S. 855, which would essentially remit the Department's issues to the Judicial Conference for proposals within one year on the Rule 4.2 issue, and within two years on other matters of special concern to government lawyers. If the bill were enacted and Judicial Conference recommendations were made, it is not clear whether the next step would be promulgation of the recommendations through the regular Enabling Act process or instead would be direct consideration and adoption by Congress. One outcome might be a FRAC 3, dealing with federal government attorneys.

The subcommittee voted to send the draft FRAC 1 forward to the advisory committees for discussion at the fall meetings. Only the Department of Justice representative voted against sending the draft forward, acting on the view that the draft does not sufficiently protect the needs of government attorneys. The draft is presented for discussion only. A workable federal answer will emerge only if it takes a form that proves acceptable to the American Bar Association (which is involved both through its "Ethics 2000" Committee and its standing committee), the Conference of Chief Justices, and the Department of Justice. The issues and pressures are intricate and important.

Discussion began with the observation that this is a complicated area with two points to be remembered. First, the clarity of the FRAC 1 draft points to the Standing Committee as the appropriate place to focus the issues — the issues are defined as arising from reconciliation of the federal interest in federal

procedure with state interests. Federal procedure is peculiarly a matter within the province of the Standing Committee. Second, the arguments for and against the draft focus on the need to draw lines between procedure and responsibility, and on the need to cabin local federal rules. Professor Coquillette observed that the Local Rules Project will continue in any event, as it has been newly reinstituted, no matter what comes of the FRAC initiative. And the advisory committee was reminded that the Standing Committee has been asked to consider alternative draft revisions of Civil Rule 83 that seek to regularize the local rulemaking process.

The District of Colorado was offered as a good illustration of the problems that can arise from local federal rules on professional responsibility. D.Colo.Local Rule 83.6 adopts the Colorado Rules of Professional Responsibility. But after the Colorado Supreme Court revised three of the professional responsibility rules — including Rule 4.2 — and its own Rule 11, the federal court adopted an "administrative order" that excepted these four matters from its adoption of state practice. The administrative order is not as easily available to lawyers as the local rule. The result is an opportunity for serious confusion. Draft FRAC 1 would supersede such local rule contretemps. Enforcement likely would be straightforward — the Local Rules Project experience has been that when a local rule is plainly inconsistent with a national rule, the districts are willing to rescind the local rule. The Project undertakes to compile all local rules. Simple persuasion is effective in most cases of inconsistency. The circuit councils provide enforcement authority when needed. But the process will not always be easy. It was noted that in the Northern District of California, there was no particular concern to repeal local rules inconsistent with the national rules until the Ninth Circuit Judicial Council got interested in the subject for all courts in the Circuit.

Another committee member stated that the FRAC effort is very useful. The draft FRAC 1 approach would give attorneys clear notice of governing law and would get the district courts out of the process of enforcing local rules. The federal courts have found ways to stay out of disciplinary enforcement as it is; their efforts focus on regulating their own procedure and the right to practice in federal court. There is no apparent federal court interest in conduct that occurs outside federal court, unless it be connected to the right to practice in federal court. When federal courts do undertake to address matters of professional responsibility, moreover, they tend to be more strict than state authorities because there is so little federal experience with the realities of evolving practice. There is a tendency to adhere to more traditional views that states are less likely to hold. The draft should go forward for further development.

The Department of Justice interest was expressed in strong terms. Department lawyers engage almost exclusively in federal proceedings. The governing rules are very important to them.

Concern does not much focus on the issues that arise in typical civil litigation. The rules that apply to Department lawyers in civil litigation are the rules that apply to other lawyers with other clients, and do not present many problems. But criminal litigation involves a different process. The Department's role is different from the roles played by private lawyers, and also different from the roles played by state attorneys. State regulation of some aspects of the federal enforcement system can defeat the system. Rule 4.2 is not the only problem, but it is an easily understood illustration. There are many different interpretations of Rule 4.2 among the several states. Most of the interpretations do not cause problems. But the stricter interpretations do cause problems. One response is that Department investigators who are not lawyers make contacts without consulting Department lawyers; this is a perverse consequence, because the rights of the persons contacted will be better protected if any contact is authorized and regulated by a Department lawyer.

In the Department's view, the draft FRAC 1 makes a start by recognizing the importance of federal procedure. But it is not clear that reservation of matters of "procedure" for federal regulation goes far enough to protect behavior before filing a proceeding in federal court. It will be important to the Department to develop a "FRAC 3" to give clear guidance on the issues that are central to the Department's operations.

Another committee member expressed an initial reaction that these problems are not as complicated as the discussion made them appear. Motions to disqualify attorneys, for example, arise regularly; regularly the federal court applies state rules of conduct. When a question of contact with a represented person arises, the United States Attorney can ask the court to order a hearing, a process that will protect all important rights. If federal rules are to be adopted, moreover, it may be better to adopt separate rules for district courts (both criminal and civil), for bankruptcy courts, and for appellate courts. These rules could be adopted as parts of the Civil Rules, Criminal Rules, and so on. Attorneys would not pay as much attention to a separate set of rules.

Discussion turned to the part of draft FRAC 1(b) that would authorize a federal court to refer a question of attorney conduct to state authorities without investigation, or instead to undertake an investigation before making a referral. It was asked whether there is any need that justifies even thinking about a federal investigation — why not just refer the question directly? Is it because of a recognition that referral itself carries significant consequences for an attorney, and a hope that a discreet federal investigation that leads to no referral will reduce the risk of untoward consequences? Could this need be served as well by providing that referral to state authorities may be made only for good cause, leaving open the procedure by which a federal court determines whether there is good cause to refer? It was noted that

state-court judges experience similar problems. Commonly a state judge is obliged to refer an attorney to disciplinary authorities if there is an appearance of a professional responsibility problem. Federal judges will be in a similar position under draft FRAC 1 if they believe it appropriate to explore discipline that goes beyond determination of the right to practice in federal court.

The procedure of the District Court for the District of Columbia was described as one that enables a judge who observes possible violations to refer the question to a committee. The committee investigates and reports back to the judge. In response to a question whether this procedure was advisable, it was responded that it works well, in part because there is a strong relationship between the federal court committee and the bar counsel.

The Committee on Grievances of the Southern District of New York launches an investigation only if it believes there is a federal interest. When an investigation is pursued, the Committee decides whether to impose discipline at the federal level, and also decides whether to refer the matter to state disciplinary authorities. It is important that the federal court retain control of the decision whether to investigate.

This discussion led to a defense of draft FRAC 1(b) by a committee member who observed that now there is no specific way to get from federal court to state procedures. As a federal judge, this member observed flagrant misconduct and took the matter to state disciplinary authorities. He was told that the only way the state disciplinary authorities could act would be on a complaint filed by the judge. Filing the complaint brought the judge into an adversary state grievance process, including deposition, defensive efforts to impugn the judge, and a personal involvement that was not at all desirable. An explicit procedure that averts these consequences is all to the good.

It was noted that federal courts also have undertaken their own disciplinary proceedings after state authorities have refused to act on a referral from the federal court.

The federal courts in California have found the state disciplinary procedures unsatisfactory in the best of times. The state has a great many disciplinary complaints, and the process takes a long time. Recently the state simply closed down its grievance process for lack of state bar funding. So federal courts have had to create their own systems.

The draft FRAC 1 approach will lead to difficult questions. What is intended by federal regulation of "procedure"? Does this mean case management? Specific court orders? Anything embraced in the Federal Rules — Appellate, Bankruptcy, Civil, Criminal, and Evidence? And it is not clear that there are practical problems that justify encountering these questions. States rarely attempt to impose discipline for obeying a federal court order. If there

is a practical problem, it is the situation confronting the Department of Justice. The criminal defense bar in California is using disciplinary charges as a defense strategy, complaining about things done in criminal prosecutions. This is a serious problem. There also are serious problems in the investigation stage. United States Attorneys spend most of their time directing investigations. Often enough it is not clear at the investigation stage what federal court will be most appropriate for prosecution, and thus it is not clear what state rules may come to apply. But § 530B creates a difficult issue of Enabling Act authority — since this statute expressly invokes state law as well as local federal court rules, it is uncertain whether an Enabling Act rule can supersede either state law or local federal rules with respect to government attorneys.

Professor Coquillette stated that there is a practical problem. The problem, however, is not entirely as it may seem on the surface. Federal courts often create flexibility by ignoring their own local rules, enabling an individual judge to act wisely in an individual case. A federal court may interpret its local rule in unforeseeable ways by looking to what is done by other federal courts, without regard to the local rules that may have inspired the rulings of other federal courts. The result is that a body of federal law, independent of local rules, is gradually emerging on the most frequently encountered questions that invoke federal procedural interests. If federal courts could always be counted on to decide without regard to local rules, it might seem that the local rules are no more than a quaint set of anachronisms that present no more than an aesthetic or theoretical problem. But there are practical problems. The Department of Justice has been driven by the McDade Amendment to set up a special unit on professional responsibility; one consequence has been that the Department cannot make the most appropriate assignment of attorneys to particular tasks, but must reshuffle assignments to avoid the professional responsibility rules that attach to some attorneys. Big law firms, with increasingly multidistrict practices, are having problems. And, as witnessed by a forthcoming report from the ABA Litigation Section, the proliferation of local rules is a general problem. Attorneys cannot afford to ignore the local federal rules, no matter how often they might be reassured that the rules do not really do what they seem to do, nor mean what they seem to mean.

It was asked why Rule 4.2 problems are not experienced at the level of state prosecutions, leading to correction of the eccentric views espoused in some states. The Department of Justice response is that much depends on the particular state. In many states, the criminal investigation process is essentially exempted from Rule 4.2; in these states, neither state prosecutors nor local United States Attorneys encounter problems. But in other states, in a development that has emerged only in the last 10 years or so, new interpretations are emerging. Still, state prosecutors even in

these states do not have the same problems that the Department encounters because state investigations are less likely to be directed by attorneys. The Department prefers to involve attorneys in investigations for the greater protection of the citizenry. In addition, the Department frequently becomes involved in investigations that are more complex than most state investigations and that reach across a number of states.

Judge Scirica stated that the Standing Committee hopes that work on federal attorney-conduct rules will continue in the advisory committees along the lines followed in this discussion. All the advisory committees are being consulted this fall. The problems are important, and deserve continuing debate. There is an overlap between federal procedural interests and state interests in regulating professional responsibility; just what allocation of authority will work best remains to be determined. Attorneys in general are very concerned — they do not want state authorities to impose sanctions for acts that are proper in federal court. And corporate counsel are especially concerned. This concern extends to the counterpart of the Department of Justice concerns. Corporate counsel believe that government investigators are approaching mid-level managers to gather information that the corporation does not want to reveal and that can properly be kept confidential by the corporation.

Judge Niemeyer summarized the discussion by noting that the Rule 4.2 question involves several issues: are investigative activities so much a matter of "procedure" connected to eventual federal court proceedings as to be within the Enabling Act process? The question of investigation by a federal court of possible responsibility violations before referring matters to state authorities is another problem. The advisory committee delegates to the Attorney Conduct Subcommittee have been informed by the current discussion, and can carry these questions into continuing Subcommittee deliberations. It is clear that this advisory committee believes that the Subcommittee process should continue. We will do our best to continue to help.

Discovery

Judge Levi introduced the report of the Discovery Subcommittee, noting that it would divide into two basic parts. The first part focuses on a report by Professor Marcus on three issues that have been carried forward, including one set of issues raised by the Standing Committee in response to the pending proposal to amend Civil Rule 5(d). The second part, with help from the Federal Judicial Center, focuses on the emerging issues of discovery in the era of digital information processing. The "computer discovery" issues will be a long-range project that may, like the discovery proposals just advanced to the Supreme Court, be focused by a preliminary meeting to gather information and perhaps lead to another conference.

Professor Marcus led discussion through his Report to the Discovery Subcommittee, as set out in the Agenda materials.

Part I of the report deals with issues referred to the advisory committee after the June Standing Committee discussion of the proposal to amend Rule 5(d) to bar filing of discovery materials until used in the proceeding. The first of these issues asked whether nonfiling affects the privilege under defamation law to report on discovery information. The privilege questions in fact involve two distinct privileges. The first privilege deals with litigation conduct as such — the privilege to make assertions in pleadings, to respond to discovery demands, to advance arguments, and so on. This immunity does not depend on filing.

The second privilege deals with public reports of matters occurring in litigation. It is difficult to track down this privilege, either with respect to filed materials or with respect to materials not filed. In federal courts, most discovery materials have not been filed in recent years because of local rules or practices that forgo filing. There has not been any sign of any problem with respect to defamation privilege arising from this widespread nonfiling practice. The issues have been treated as those of state-law defamation privilege; there has not been any indication of a move to generate a federal common-law privilege for reporting on federal litigation. The only clear way to affect state-law privilege would be to abandon the proposal to amend Rule 5(d), and to substitute a uniform national rule that requires that all discovery materials be filed.

After brief discussion, the advisory committee concluded that the report to the Standing Committee should be that these privilege questions do not warrant any further action at present.

A second range of issues presented by the nonfiling amendment of Rule 5(d) arises from public access to unfiled discovery materials. A few local rules providing for nonfiling have added provisions regulating means of inquiry and access by nonparties to unfiled discovery materials. Many of the local nonfiling rules do not address the question. There is no indication that there have been any real problems under any variation of these rules. These questions are related to a number of contentious issues that the advisory committee has explored in recent years. The protective order question was considered at length, and eventually abandoned on the ground that there is no showing of need to improve on general present practices. The central question is whether discovery, and derivatively the filing of discovery materials, is designed to be part of the process of resolving particular disputes, or also is intended to make possible public access to private information that could not be forced into the public domain without the happenstance of private litigation.

Discussion of these observations began with reflection on the recent exploration of protective orders. The advisory committee

concluded then that there is no present need to enter this area. The fact that the Committee Note to the Rule 5(d) amendments does not address these issues does not reflect a lack of attention. To the contrary, the advisory committee's initial proposal was a rule that provided only that discovery materials "need not" be filed. This approach was influenced by the great concern with public access that surrounded debates about the earlier amendment of Rule 5(d) to authorize specific nonfiling orders in particular cases. The change to "must not" be filed originated in the Standing Committee; the advisory committee considered the change in relation to the question of public access and concluded that the Standing Committee was right. Any attempt to address these issues further would lead straight back to the extensive debates on protective orders — the greater the routine opportunities for public access, the greater the importance of protective-order practice.

The committee concluded that there is no need to act further on the nonfiling amendment to Rule 5(d) now pending in the Supreme Court.

Part II of the Discovery Subcommittee Report addresses the problem of privilege waiver by inadvertent disclosures in the discovery process. The committee has considered these questions as part of its ongoing discovery inquiry. The question now is whether to continue to pursue these questions. The Subcommittee wants to keep the issues alive, particularly as it approaches the problems that arise from discovery of computer information. The practical needs of "computer discovery" may introduce new dimensions to the risks of inadvertent disclosure and waiver. These issues will prove difficult. Although there are continuing questions whether any rule on this subject might need specific congressional approval under § 2074(b), those questions do not seem to present insuperable obstacles. At the most, a proposed rule would require approval by Congress.

The underlying problem is the perception that great energy is now devoted to avoiding inadvertent waiver of privilege by accidental production of privileged documents in discovery. The problem is acute because of the "subject-matter waiver" principle. Accidental production of a single document that is not obviously privileged on its face may lead to waiver of privilege with respect to all communications on the same subject, even though there are many clearly privileged and vitally important communications that have carefully and properly been withheld from production.

The technical question arises from the fact that many of the privileges involved with the waiver problem are state-law privileges. Federal discovery rules, on the other hand, clearly involve matters of federal procedure. The waiver question before the committee is how far to regulate the consequences of disclosures that are required by federal procedure. It is important to consider these consequences both for the "big document" discovery cases in which inadvertent disclosure is a

particular practical problem and also for the emerging era of discovering computer-accessed information.

A related question is whether federal rules — either of Evidence or of Civil Procedure — should undertake to address other inadvertent waiver issues. Page 25 of the memorandum describes three basic approaches that have been taken by federal courts, including a complicated approach that seeks to balance several factors. It is clear that these issues need not be addressed. It is possible to craft a rule that addresses only the specific consequences of production in response to federal discovery requests. Two first-draft models for document discovery under Rule 34 are included on page 23 of the memorandum.

It was suggested that part of the link to electronic data base discovery arises from the question whether it is possible to authorize a preliminary look to see what is in the data base without forcing a privilege waiver if anything privileged is scanned during the preliminary look.

A practical question was raised: suppose, under one of the drafts, a preliminary look is allowed without waiving privilege. The look uncovers privileged information. Will there be a "fruit-of-the-poisonous-tree" doctrine to prevent use of information derived from the preliminary look? How could such a doctrine be enforced? It was responded that there are intimations of such an approach in the California state courts. Return of the materials is a clear response — remembering that the "preliminary look" drafts do not involve actual production of documents for copying, return would be of any memorial made of the information seen but not directly copied. The alternative drafts in the materials are designed for discovery that involves very large numbers of documents. The hope is that a preliminary view can narrow down the focus to materials that the inquiring party actually wants to explore in depth. But even in the "big documents" cases, the probability that hard-core privileged communications will be revealed is low. The problem is the documents that connect to privileged communications but that are not obviously privileged on facial inspection.

Another response to the practical question was that the draft rules are based on common present practice. Parties to big-documents cases often agree to produce documents on terms that preserve privilege against inadvertent waiver. These agreements do not forestall careful privilege review before the preliminary inspection is permitted. The purpose is to protect against subject-matter waiver by production of materials that connect to privileged communications in ways that are not always apparent. The shortcoming of present practice is that, even assuming that courts will enforce these agreed orders between the parties, it is not at all clear that an agreed order can prevent waiver as against nonparties. An explicit national rule could reduce or, ideally, eliminate the uncertainty that surrounds present practice. It is

worth studying the problem to see whether still greater protection can be provided than these drafts seem to promise.

The committee was reminded that during the Boston College discovery conference several participants agreed that the burden of fully protective screening before production is enormous. And even the most careful screening may allow something to slip through.

The problem that many of the governing privileges are created by state law makes it particularly difficult to rely on any agreed order practice that may be followed now. Yet parties in big-discovery cases feel compelled to rely on these agreements by the practical needs of responding, recognizing the danger that a state court may not honor the protection intended by the federal court. There are indeed situations in which screening costs can be reduced by these orders; much depends on what the discovery is about, and what the documents are.

The problem of state reluctance to recognize a federal nonwaiver order or rule may diminish over time. If a nonwaiver procedure is adopted in the federal rules, many state rules will be amended to conform to the federal rule. The number of "rough edges" will be reduced.

A judge asked whether these problems occur with any frequency, noting that he has asked the magistrate judges in his district to look for cases where the nonwaiver preliminary look approach might be used. A response offered an example of a case in which nine million documents were reviewed for privilege.

It was asked whether the rule drafts are too modest by limiting the procedure to cases in which the parties agree. Should the court to empowered to direct preliminary inspection on motion of one party alone? Professor Marcus noted that the parties are likely to be uneasy about relying on an order entered without agreement. The court might order the preliminary inspection procedure as part of a program to expedite discovery, directing immediate access for preliminary inspection on terms that do not afford an opportunity to screen even for obviously privileged materials. Mere agreement of the parties without court order, on the other hand, is not binding on any court. The consequences of the agreement remain to be determined — and to be determined by the views of the court in which the question arises.

It was urged that if a federal rule is limited to the effects of compelled revelation in federal discovery, without addressing more general questions of inadvertent privilege waiver, state courts are likely to respect the effects of the federal rule. Still, it will be possible for litigants to question the effect of the federal order in subsequent state proceedings.

It was asked whether the concern was that a state court might attempt to enjoin a federal privilege order. The problem is not that, but rather that a state court might conclude that federal

activities had waived the privilege no matter what the federal court intended. There is no direct impact on the federal proceeding, but the attempt to ease the burdens imposed by federal discovery is thwarted by the inconsistent state ruling.

The Subcommittee has found the inadvertent waiver issues to be difficult. The hope is that a protective procedure to avoid waiver could save time and money for the parties. The real question is whether effective protection can be provided by federal rule. There are strong grounds to believe that a rule can be adopted through the Enabling Act process without need for direct approval by Congress under § 2074(b); that question of course would be identified as part of any process working toward adoption of a federal rule. All that is intended is to create a federal procedure that protects against the consequences of disclosures forced by federal procedure, in an attempt to expedite federal proceedings and reduce the financial burdens on the parties while providing better assured protection of both federal and state-created privileges.

The advisory committee concluded that these questions are important, and that the Discovery Subcommittee should continue to study them.

Part III of the memorandum addresses a proposal advanced by Alfred Cortese to establish a presumptive retrospective time limit on the backward reach of document discovery. There would be a bright line requiring a court order, based on good cause, to discover documents created or dated more than seven years before the date of the transaction or occurrence giving rise to the claims in the action. The Subcommittee seeks direction whether to pursue this suggestion. If the suggestion is to be pursued, it could be formulated in a variety of ways. The question at this stage is whether to develop the concept, not whether to adopt specific rule language. Several perspectives were suggested.

First, the underlying problem seems to be one of proportionality. The basic argument is that the effort required to identify, produce, and study ancient documents is not justified by the probability of finding useful information. The present discovery rules, however, provide many means to obtain relief from disproportionate discovery demands.

Second, the discovery amendments now being transmitted to the Supreme Court should reduce the possible problems still further. If these amendments are adopted without change, courts will become more involved in regulating the scope of discovery under Rule 26(b)(1). Discovery conferences will be required in all federal courts by elimination of the opportunity to opt out by local rule.

Third, new problems may arise from any attempt to introduce a formally rigid cut-off. The illustration in the materials involves an automobile designed in 1982, built in 1986, and involved in an accident in 1999. The 1982 design efforts built on modification of

designs first developed in 1970. Which year is the base line for the transaction or occurrence giving rise to the claims? 1970? 1982? 1986? 1999? If the draft allows presumptive discovery of documents going back to 1963, it offers little practical protection and indeed may invite more extensive inquiry than otherwise would seem appropriate.

It also was noted that the institutional litigants who are likely to favor this sort of time cut-off for document discovery are not likely to support a similar cut-off for other forms of discovery. The victim of the 1999 automobile accident, for accident, might fairly be asked about the consequences of injuries incurred in 1990, more than seven years before the transaction giving rise to the claim.

Discussion began with the suggestion that there are many ways to deal with this problem. Adoption of a 7-year cut-off would simply encourage some lawyers to go back further in time than they would without this prompting in the rule. The proposal should be abandoned.

Alfred Cortese spoke in defense of the proposal, urging that it would provide a helpful guideline. The point is that in practice, this would give some guidance to control production in response to overbroad requests, in an area of great expense. There are plenty of illustrations of court orders directing discovery that goes beyond any sensible time limit.

A committee member suggested that it is not fair to compare medical discovery to document discovery. Medical discovery is carefully focused on issues obviously relevant to the dispute, and likely to produce useful information. Document discovery requires examination of mountains of obviously useless information; careful thought about the possibility of developing some practical means of protection is warranted.

Another committee member suggested that the current proposal to divide the scope of discovery in Rule 26(b)(1), requiring court approval for some part of the discovery that now is available as a matter of course, is a major change. We should allow time for experience to develop with this proposal before undertaking further limitations. Still another member agreed. The current discovery proposals should be given time to develop before pursuing this idea.

A motion to table this proposal was adopted with one abstention.

Discussion turned to discovery of electronic data. By way of introduction, it was observed that email has transformed our methods of communicating. Many conversations that formerly were conducted in person or by telephone are now conducted by electronic exchange. Communications that never were preserved in tangible form now can be resurrected. There are replacements for the old

methods of relying on individual memory as disclosed on depositions and as supplemented by telephone logs. In addition, all sorts of information is stored, including privileged information, in media that with easily stored back-up means threaten to endure forever. A great deal of information, moreover, is "downloaded" to many dispersed systems — what once was maintained in a single central location and then purged is now replicated in many local networks or individual computers and retained, one place or another, for indefinite periods. The volume is staggering, and the search costs incredible. The question is how do we provide real discovery? And who does the search? Although the physical act of electronic retrieval may not be great, the cost of designing the search often reaches startling levels. And if the computer produces a million documents in response to the search, who bears the cost of sorting through the documents? And the magic of electronic storage creates new questions. Many computer users delete documents, intending to destroy them. Back-up systems and the operation of delete programs, however, often make it possible to retrieve deleted information. Must often expensive reconstruction efforts be undertaken, even though in earlier days there would be no possibility of retrieving physically destroyed documents? Many efforts are being undertaken to explore these problems. And the Federal Judicial Center is undertaking its own study.

It is very difficult to know how to develop discovery practice to sort through mountains of information to produce manageable discovery. Perhaps present rules are adequate to the task. If these problems are to be approached, the Discovery Subcommittee will need to design means to become better informed about the problems that have been encountered already and about the ways in which the problems have been met. The approach may follow the model used in developing the discovery proposals that have been transmitted to the Supreme Court this fall.

Judith McKenna described the Federal Judicial Center project to examine discovery of electronic information. The Center has been considering these problems for some time. Its attention was first drawn to these questins by requests addressed by judges to the Center's judicial education arm. Judges were asking for help, noting that attorneys also needed help with these issues. Educational programs were developed, including several that featured Kenneth Withers. The educational effort is continuing, but a research effort is being developed as well. A study is now being put together. The Center needs to know what the Advisory Committee needs as information. Computerization extends to everyone, not just large corporations. Small businesses and individuals are increasingly relying on computer information systems. The situation is very fluid, and a number of issues are under consideration.

Depositions generate the largest discovery costs in most cases, but there are some cases in which document discovery entails still greater costs. Rumors are increasing about the occasionally

great costs of discovering electronically stored materials. Continuing legal education courses are coming to deal with these issues, and in turn are spurring increased efforts to undertake electronic discovery. One initial research effort might be to attempt to find out how frequently electronic discovery is undertaken now. But if it were found that there is not much electronic discovery today, that information would not provide much reassurance about the potential for expansion, and perhaps very rapid expansion, in the future.

There is no basis yet for knowing whether there are issues that are unique to discovery of computerized information. It has been relatively easy to find cases that have generated problems with this sort of discovery. It is not as easy to find cases in which there are no problems, but that may be because people do not bother to comment about the non-problems.

At this point, the project seems likely to involve several components: (1) A short piece to identify the problems, perhaps looking at the cost-benefit analysis that might be used. This piece is likely to be produced soon. (2) A larger descriptive study of where the problems and successes have been, perhaps based on some sort of empirical survey or other research. (3) Additional judicial education materials. We would like to develop a typology of how these issues come before judges. It will be necessary to separate out issues that usually are lumped together in the literature.

Kenneth Withers then offered illustrations of the issues thast might be studied, based on several hypothetical problems.

One set of issues arises from information that is stored in large, undifferentiated files. This often happens with email searches. The requesting party demands all email relating to a specific topic. The responding party says there is no ready way to search the information, which exists only in a back-up medium that is not arranged in any way. Judges have to be educated about the technical issues in order to be able to make informed rulings.

Other issues arise from poor electronic records management. Electronic record management documentation — file lists — may not be producible. Deposition of the electronic records manager may show that there is no system in place to retrieve the information that has been stored. This is a very difficult situation. Information services departments often save and store <u>all</u> corporate records, but in a form without roadmap and without any individual person who knows how to search.

Data proliferation is another problem. Documents and data are regularly copied. This multiplies the documents, media, and locations subject to discovery. A request for all nonidentical copies of each document can require very extensive searching.

So a request is made for documents created years ago. The

response is that they may exist — but they are stored on hardware and media, regulated by software, that all are obsolete. Technology changes rapidly. Much of the historic material may be very difficult to retrieve. A number of cases have had to deal with these issues, beginning with disputes among the experts whether it is possible to overcome the difficulties of obsolete technology.

Email requests often seek information stored in hundreds of thousands of "pages." The responding party objects that searching the information is costly and any printout will not include system data that identify the sender, recipient, or like information. And problems arise from third-party proprietary interests in the software.

There also are problems with nonproduction. The responding party says the remaining documents were automatically destroyed. Often the process involves first a deliberate instruction to delete material, and then gradual (and unpredictable) replacement of the information, still preserved, by overwriting. The requesting party argues that the responding party negligently or even purposefully destroyed them. It is in fact likely that documents will be destroyed before discovery by operation of standard programs. Forensic experts will assert that they can be retrieved nonetheless. And the response again is in part one of burden, and in part that reconstruction will also reveal privileged or confidential information not subject to discovery. It is objected that on-site inspection is not proper. Framing an effective protective order is very difficult.

Often a party requesting information will seek the right to send its own experts to work with the computer systems that have access to the information, arguing that the design of the search is vitally important to the outcome. The questions of access to privileged and other protected information are formidable, and are not easily resolved by protective orders.

There are still other problems. One big help will be found in judicial education. But much imagination is required in anticipating future evolution of these problems. There may be room for improvement through court rules. And larger societal ideas about privacy, production, and related issues may change the perspective from which the discovery issues are approached.

A committee member observed that the most difficult issues do not arise in the "big" case that is heavily litigated with experts on all sides. Instead, the problems arise in normal litigation. Suppose in a sex harassment case a demand is made for all email. The employer says the email is all gone. In large part this is not a problem of developing new rules. Instead, it is a problem of proportionality of the sort addressed by Rule 26(b)(2): how much expense and effort are required and appropriate in relation to the stakes in the litigation, the probability of finding useful

information, and other values? The first solution may well lie not in rules changes but in judicial education about technology issues.

Kenneth Withers responded that this is what judges are saying all around the country. They want training in what information retrieval is feasible, and what effective protections are possible. We need to collect the forms and protective orders, the standard interrogatories, the law review literature. In response to the suggestion of a committee member that lawyers groups are becoming interested in these questions, he agreed and noted that the FJC is finding the people working in this area. Continuing legal education programs are beginning to investigate the problems. We must anticipate the prospect that "paper may become a rare event."

In response to another question, Kenneth Withers noted that we do not yet know enough to say what search costs are, nor what arrangements are being worked out to pay the costs. There are examples. Cost data are likely to be available, in sanitized form, from the independent contractors who design the searches. And people talk about these things. The question remains: what does the advisory committee need to know?

The problem, of course, is that what the advisory committee needs to know involves a base line of comparison. The costs and problems of electronic discovery must be compared to the benefits achieved and to the costs encountered by other modes of discovery. It might help to have a study of ten or a dozen cases with substantial electronic discovery. The study would at least provide examples of how much discovery was pursued, how much information was discovered, how much of the information was useful, and what the costs were. It could find out the parties' evaluations of the usefulness of the discovery and of the problems. The nature of the problems encountered in practice will be important in deciding whether the problems can profitably be addressed by rulemaking. And it will help simply to listen to plaintiff and defendant attorneys talk about the problems. We do find people who say this is important. Raw data alone may not be enough to help us tell.

Professor Marcus asked whether there is a way to compare electronic discovery to paper discovery.

It was suggested that research design questions are better answered by the Discovery Subcommittee working with the FJC. The full advisory committee can help to raise the issues, but it is not possible for so many people to participate directly in the research design.

Professor Marcus urged that any committee member who finds a problem should send it on to the Subcommittee. It is important to know during the design stage what questions should be asked.

Judge Niemeyer noted that we have had a tradition of full disclosure of every document that relates to the claims and defenses in an action. It is not clear what is going on with

respect to electronic discovery. Anecdotal review — a little meeting with experienced practitioners — may help to focus the issues. There is an emerging group of knowledgeable people whose learning can be tapped with profit.

Assistant Attorney General Ogden noted that there are people at the Department of Justice who are expert in these issues, and who would be glad to help the committee.

Judge Niemeyer suggested that the discussion had been helpful, in part in a discouraging way by illustrating the scope of the problems, the changing nature of the problems, and the vast areas of information that remain to be searched. We should leave it to the Discovery Subcommittee to organize a preliminary inquiry of the sort that launched their last major project.

It was suggested that the first challenge is to articulate the issues that are peculiar to electronic information and that are outside the scope of the present rules. We need to learn whether this is a rules question at all.

Some issues were suggested for illustration. Electronic mail takes the place of communications that often were oral in earlier days. If there is a tangible record, it seems to be a record. But the volume of these records may be immense: do we need a new definition of what is a "document" for discovery practice? Or do we need to define some other limiting principle that applies peculiarly to electronic records? The operative meaning of Rule 34 has expanded greatly, both in potential invasiveness and potential burdens, and we need to decide whether this reality requires new measures of containment.

Agreement was expressed with these observtions, subject to the reservation that it is not clear what issues are peculiar to electronic discovery in ways that might justify rules amendments. One distinctive issue may arise with respect to the attempts to have experts for the inquiring party work directly with the computer system of the party whose information is demanded in discovery — there has not been any analogous practice of having agents of the inquiring party search the paper record files of the party whose information is demanded. And the issues of volume may be so magnified as to become different in kind, not merely amount.

This discussion concluded by agreeing that the immediate work must be left to be organized by the Discovery Subcommittee. The project likely will begin by gathering anecdotal information to help develop more pointed further inquiries.

Corporate Disclosure

Judge Niemeyer introduced the question of corporate disclosure by observing that from time to time popular media reports have focused attention on cases in which failures of the disclosure systems have led federal judges to act in cases in which they

should have recused themselves. These questions should be addressed by some part of the Judicial Conference process. Congress seems to prefer that the Third Branch address these issues directly, without interference from Congress. That leaves the questions of what should be done, and whether part of the answer should be found in rules adopted under the Enabling Act.

Professor Coquillette began the discussion by asking what is it that the Standing Committee expects the Civil Rules Advisory Committee to do. There are several immediate pressures to consider these problems. Recent newspaper accounts highlighting failures of disclosure systems have stimulated interest in means of improving the systems. The Committee on Codes of Conduct would like to see a uniform rule on disclosure that applies to bankruptcy courts, district courts, and courts of appeals, with only such variations as may be required by differences in the natures of those courts. And the Appellate Rules Committee has already secured approval in 1998 of an amended Rule 26.1 that reduces still further the information required in corporate disclosures.

There has been a real effort to find a way to get the several advisory committee reporters to work through toward a joint solution for the several committees. But the Appellate Rules Committee believes that they have found the right answer for the appellate courts in their recent work, and is little inclined to reopen the question so soon. At the same time, the Standing Committee believes that uniformity across the Appellate, Bankruptcy, Civil, and Criminal Rules would be good for the bar, and good for the consistent development of interpretations of disclosure practices. More courts working on the same basic rule would develop a better working body of law, and do so faster.

The most likely alternatives are: (1) Adopt Appellate Rule 26.1 for all federal courts. This would please the Committee on Codes of Conduct. But this course would not alone answer the need for prompt rulemaking. With all ordinary speed, new national rules could not take effect before December 1, 2002. The gap could be filled in the interim by promulgating a Model Local Rule based on Rule 26.1 and urging all courts to adopt it. (2) Answers could be found entirely outside the Enabling Act process. The alternatives might be simply to suggest a Model Local Rule, or to encourage adoption and promotion of a uniform disclosure form by the Administrative Office. This course would not engender any conflict among the national rules — Appellate Rule 26.1 would stand alone as the only national rule. (3) The advisory committees concerned with the district courts and bankruptcy courts could adopt their own disclosure rules, different from Appellate Rule 26.1. This approach would require an answer to the question whether the different courts face different needs that justify different disclosure requirements. If there is no apparent reason for different requirements, the question would be raised whether Appellate Rule 26.1 should be changed again — there are indeed many people who believe that Rule 26.1 is too narrow.

Professor Cooper provided a supplemental introduction, aimed specifically at the questions facing the Civil Rules Advisory Committee. The starting point must be recognition that no one has urged adoption of a disclosure rule for any court that would require disclosure of all the information that might bear on a recusal decision. The burden on the parties of providing such information in all cases, and the difficulty of processing the information in the court system, would be too great. So the task is the inevitably unsatisfying task of finding the most workable compromise, knowing that occasionally something will slip through the system.

A second starting point must be recognition that it will not be possible for the other advisory committees to act by next spring to recommend to the June Standing Committee publication of rules that depart substantially from Appellate Rule 26.1. Even cursory examination of the many different disclosure systems adopted by local circuit rules and local district rules shows that a great many choices would have to be made as to who must make disclosure, what information must be disclosed, and when the disclosure must be made. The options for prompt action, apart from doing nothing, come down to two choices. Appellate Rule 26.1 could be adapted for district court application, changing the provisions on timing and number of copies to fit district court circumstances. Or a rule could be drafted that delegates to the Judicial Conference responsibility for creating a uniform disclosure form for use in all courts.

Choice among these alternatives will be affected by the importance of uniformity in two different dimensions. Professor Coquillette has already described the presumption that it is important to achieve uniformity as between bankruptcy courts, district courts, and courts of appeals. Uniformity also seems important as among all district courts, all bankruptcy courts, and all courts of appeals. The situation today is that there is no uniformity.

The lack of uniformity is most graphically illustrated by the situation in the courts of appeals. Appellate Rule 26.1 was adopted in 1989. The 1989 Committee Note observed that the rule required only minimal disclosure, and suggested that the circuits might wish to require greater disclosure by local rules. The result has been that eleven of the thirteen circuits have adopted local rules. Some of the local rules do not much expand the requirements of Rule 26.1. Other local rules go far beyond Rule 26.1. Rule 26.1 invites this response not only because of the express Committee Note suggestion but also because of its designedly minimalist nature. The 1998 revision of Rule 26.1 has reduced disclosure requirements still further, deleting as unnecessary the former requirement that a corporate party disclose its subsidiaries and affiliates. There is little reason to suppose that it would be satisfactory to adapt Appellate Rule 26.1 to district court practice without also adopting the permission to

adopt local district rules that require additional disclosure. The result would be not only to continue the variety of local rule and related practices disclosed by the Federal Judicial Center study prepared for the Standing Committee, but also to encourage a further proliferation of district-court practices.

The question of timing is one that clearly distinguishes the district courts from appellate courts. Appellate Rule 26.1 reflects the pace of appellate review. In many cases, filing with a party's principal brief is all that is required. In the district courts, it is essential that filing be made at the earliest possible moment. Several of the judges reviewed by the Kansas City Star made rulings, without adequate recusal information, that involved ministerial actions. Less than a minute of judge attention often was required. Some of the orders were as simple as appointing a "legal courier." An individual docket system makes it possible to establish early screening, and accordingly makes it imperative that the information be provided at the very outset. If only it were possible, it would be desirable to require the plaintiff to provide complete disclosure as to all parties at the time of filing. That is not possible. But the closer, the better.

The difficulty of drafting a more detailed national disclosure rule is not only a matter of time. The District of Kansas recently adopted a new broad disclosure rule. Within three months the rule was repealed because it had generated great confusion and difficulty in application. The difficulties will only grow with time. It is important to remain in constant contact with actual experience under a disclosure system, to see whether it is generating the information needed to avoid embarrassing oversights. It also is important to remain in constant contact with the technological capabilities of the district courts to match disclosure information with recusal information for individual judges. Disclosures that cannot profitably be used today may become profitable tomorrow.

All of these difficulties suggest that it may be important to explore the alternative of Judicial Conference forms. The Judicial Conference could be informed about the needs for disclosure by the Committee on Codes of Conduct. The Committee on Codes of Conduct responds to hundreds of inquiries each year, and is the judicial system's repository of wisdom about judicial conduct. The Administrative Office works continually with the technological capacities of the district clerks' offices, and can devise forms that facilitate optimal use of the information that is gathered. Perhaps most important, forms can be changed much more easily through this process than national rules can be changed.

Carol Krafka then presented a summary of the FJC study on district court disclosure rules that is included in the Agenda materials. There is a parallel study of circuit disclosure rules. It confirms the observation that the minimal nature of Appellate Rule 26.1 has stimulated broader disclosure requirements in most of

the circuits. There are explicit local rules in at least 19 districts. Other districts have something else in place, often by standing order. These rules adopt quite variable approaches to the central questions of who is required to file a disclosure statement, what information is required, and when the information is required. There also are different sanctions for failure to file. The most drastic sanction, and no doubt an effective one, is that the case is stopped in its tracks until the required filings are made.

Judge Scirica asked what sort of information the FJC should be asked to look for? Should they be asked to survey district judges for suggestions? Carol Krafka responded that this suggestion has not been made. Perhaps people have not asked what district judges would like by way of disclosure because they do not often face these issues.

It was observed that federal judges have financial information on file with the Administrative Office. The Administrative Office has followed the practice of informing a judge whenever a request is made for that judge's information. But much, and perhaps all, of the information has now been put on the Internet. It will no longer be possible to know when the information is sought out.

One practical problem with increasing the scope of disclosure requirements is that federal judges are busy. They, and their staffs, tend to review disclosure forms quickly. It is possible to miss things. If the forms become increasingly complicated, we may face the embarrassment of overlooking more of the available information.

It was suggested that it would be better not to attempt a rule change. The typical problem is that, by one means or another, a judge buys stock and then genuinely forgets about it. No amount of disclosure will cure that problem, particularly when routine orders are made at the outset of an action when no one has focused on who the parties are. The Bankruptcy Rules Committee believes that Appellate Rule 26.1 disclosure is satisfactory — you do not need to know, for example, what other subsidiaries are owned by the parent of a party to the action. It is important that all committees do something soon. Meanwhile, the draft national rule should be promulgated as a Model Local Rule.

It was responded that there is an approach that does not involve local rules. We want the Administrative Office to give us a reliable administrative system that will enable a district judge to recuse immediately, at the very beginning of an action or proceeding. Software has been developed by the Administrative Office, and has been improved. We should be able to rely on getting information from the parties that matches the software. In federal court in Houston, an order goes out from the court clerk in each case as soon as it is filed. It asks for "26.1 type" information. This is not a local rule, but a case-specific order

entered in every case.

Discussion returned to the question of seeking to achieve a consensus draft by work among the reporters for the several advisory committees. The Appellate Rules Committee has recently revised Appellate Rule 26.1 and believes that it has achieved a sound rule that meets the needs of the courts of appeals, as supplemented by local circuit rules. The Bankruptcy, Civil, and Criminal reporters can meet at the January Standing Committee meeting and work toward a joint draft. Agreement among the advisory committees would be the best result, avoiding the need for the Standing Committee to arbitrate among them. The Committee on Codes of Conduct does want the Standing Committee to begin the process of developing national rules, and would be pleased to have the rules for bankruptcy courts and district courts parallel Appellate Rule 26.1.

Professor Coquillette added the advice that if the Civil Rules Advisory Committee could reach agreement on a Civil Rule parallel to Appellate Rule 26.1, it seemed likely that the Criminal and Bankruptcy Rules Advisory Committees would agree. That would resolve the question neatly. If the Civil Rules Committee concludes that there should not be any national Civil Rule, the Standing Committee could begin work on alternatives. But there will be difficult questions of uniformity and coordination if work is undertaken to develop a Civil Rule that departs from Appellate Rule 26.1.

A motion was made to adopt a Civil Rule parallel to Appellate Rule 26.1. This motion was later withdrawn.

It was asked whether adoption of the Rule 26.1 model for the district courts would be intended to displace local district rules requiring greater disclosure. This question will remain open as the process continues. And it was recalled that the district court rule would, in any event, require different provisions for the time of filing a disclosure statement and for the number of copies. It also was suggested that because Rule 26.1 requires filing only by corporate parties, district courts might want to expand disclosure to reach other forms of commercial enterprise with public investors.

Judge Niemeyer observed that if a Rule 26.1 model were adopted, a Civil Rule tailored for the circumstances of district courts could be prepared for consideration with this committee's report to the January Standing Committee meeting. Or more drafts might be prepared, illustrating alternative approaches; that process could not be completed by January, and might not yield a draft that could be recommended for publication in 2000.

It was observed that Appellate Rule 26.1 disclosure is "so minimal that it may not serve the function." The disclosures required by several of the local district rules recounted in the FJC report are much more extensive. Adherence to the Rule 26.1

approach invites local rules. It would be better to adopt a system that relies on Administrative Office and Judicial Conference resources to develop and modify disclosure forms.

The virtues of forms were seen in another light. Three years will be required to get any national rule into effect. A form could be developed for use in the interim. The Codes of Conduct Committee and the Administrative Office could help develop the form. The Codes of Conduct Committee is considering these problems, although it must be remembered that its present position is that it would be good to adopt the Rule 26.1 approach for all federal courts.

It was suggested that perhaps disclosure is an area in which bench and bar are in agreement. The task, however, will be to discover just how much information judges want, how much of that information can be managed efficiently within the court system, and how great would be the burdens of extracting that information from the parties.

It was asked whether disclosure is a procedural problem at all. The Committee on Codes of Conduct may be the body best equipped to think about these problems. Disclosure may be desirable "way beyond" the Rule 26.1 level. The question is how to implement the Codes of Conduct. There is little reason to believe that the rules committees are especially knowledgeable in this area, or that the deliberately protracted process for adopting rules of procedure is well suited to the disclosure problem.

These questions suggest that perhaps the better approach is to adopt a national rule that requires filing a form developed by the Judicial Conference.

Further discussion found interest in two models: one would adapt Appellate Rule 26.1 to the circumstances of the bankruptcy courts and district courts, while the other would delegate to the Judicial Conference the task of developing forms that must be filed.

It was urged that the Rule 26.1 approach would invite local rules, and that the result would be a lack of any national uniformity. There is no apparent reason to believe that there are local differences in the appropriate levels of disclosure. But it also was urged that the Rule 26.1 approach should be kept alive for discussions with the Bankruptcy and Criminal Rules Advisory Committees. A draft should be prepared for that purpose.

The committee was reminded that there is a short-term question that should be kept separate from the long-term solution. For the short run, the advisory committees could work with the Administrative Office to provide leadership to the district courts on a uniform disclosure form. That approach is not inconsistent with a long-term project to develop a national rule. We should work in that direction. We are not yet able to draft a rule more

comprehensive than Rule 26.1, but we are likely to want more detailed disclosure than Rule 26.1 provides. It may be that the end result will be a rule that both specifies some level of detailed disclosure and also leaves the way open to require still greater detail by a process that does not require repeated amendment of the national rules. This approach would make it easier to preempt local disclosure rules.

Professor Coquillette agreed that attention must be paid to both the short- and long-term processes. Rule 26.1 does set a low threshold that invites local rulemaking. Judges find that these questions are terribly important; they want to be sure to have as much information as possible so as to avoid unknowing failures to recuse. The Codes of Conduct Committee wants a uniform minimum rule. An attempt to take away from individual judges the power to require the information they want will be very controversial. Local discretion is prized. Yet we could achieve a lot of uniformity by any of several approaches. A low-disclosure national rule could be supplemented by a Model Local Rule or model form that go beyond the rule requirements.

It was observed again that the administrative process can move more rapidly than the Enabling Act process. If a Model Local Rule and administrative forms can be used to fill the short-term need, there seems little reason to move with undue haste to shape a rule that could take effect in 2002.

It seemed to be agreed that it would not make sense to act in haste to adopt a national rule that is intended to be only an interim measure. A form could be prepared with relative speed. A national rule might be adopted to require use of the form, looking ahead to the day when experience with the form — as it might be modified in response to actual implementation — might justify a more detailed national rule. Appellate Rule 26.1 could be used as a starting point. And it must always be remembered that whatever rule may be adopted, the rule will be addressed only to the litigants. The administrative responsibility of the courts will continue to be to make effective use of the information provided by the litigants.

The discussion concluded by committee directions that both approaches should be followed for now. Two drafts should be prepared by the Reporter, working with the committee's delegates to the attorney conduct subcommittee. One draft will adapt Rule 26.1 for use in the trial courts. The other draft will require filing of a form approved by the Judicial Conference. These drafts can be discussed with reporters for the other advisory committees, and perhaps considered by the Standing Committee in January. If no clear choice emerges on consideration of these drafts, and perhaps others, it may prove desirable to publish alternative models for comment.

Special appreciation was expressed to Carol Krafka for the

great help provided by her excellent FJC report.

Agenda Subcommittee

Justice Durham gave the report of the Agenda Subcommittee. The Subcommittee circulated a list of docket items as a consent calendar in August. The docket materials supporting each item were circulated with the Subcommittee recommendations for disposition. No advisory committee member asked that any of these items be moved to the discussion calendar. The Subcommittee report comes to the advisory committee as a motion for approval.

Brief discussion focused on the continuing desirability of working with the Maritime Law Association on suggestions for changes in the Admiralty Rules. Several agenda items are involved in this process now, and it is expected that this cooperative approach will be continued. It also was noted that it is important to ensure that advisory committee members have adequate time to consider consent calendar items before the time designated to request treatment on the discussion calendar. With this protection, this early experience with the consent-calendar approach has seemed good.

The consent calendar recommendations were approved.

Rule 53 Subcommittee

Chief Judge Vinson summarized the work of the Rule 53 Special Masters Subcommittee. Interest in Rule 53 and the use of special masters has been simmering in the advisory committee for several years. Rule 53 does not directly authorize many practices in the use of special masters that in fact are being done with some frequency. A draft revision of Rule 53 has been prepared to speak to many of the practices that seem to have emerged. The first step of the inquiry whether to develop the draft further has been to find out what is actually being done, and why it is done. To that end, the Federal Judicial Center has agreed to undertake a study. A preliminary report on the first phase of that study is included in the agenda materials.

Thomas Willging summarized the results of the first phase of the FJC study. He began with a brief review of the methods used to gather information. The initial goal was to identify more than 100 cases with some special master activity. To that end, an electronic docket search was made of nearly 450,000 cases that had closed in 1997 and 1998. Searching for specific terms in the entries, the study found more than 1,230 cases that involved special master activity. The terms searched included all of the terms used in Rule 53, plus a few more such as "appraiser," "trustee," and "court-appointed expert." A sample of nearly one-ninth of these cases, a total of 136 cases, was selected for more detailed investigation. All of the documents in these 136 cases were examined and summarized in a data base.

The first finding is that use of special masters is relatively rare, occurring in something like three-tenths of one percent of all federal cases. Even in the types of cases that show the most frequent use, such as environmental, patent, and air-crash personal injury cases, use ran at just less than three percent; it can be said with statistical confidence that special masters are used in no more than five or six percent of even these types of cases. Court-appointed experts were much more rare, occurring about once in every ten thousand cases. Although special masters thus appear to be used infrequently in relation to the total caseload in federal courts, it also can be said that an event that occurs six hundred times a year is not a rare or inconsequential event. The topic need not be written off the advisory committee agenda because it just never arises. Nor, for that matter, can it be known whether special masters would be used more often, or differently, if Rule 53 provided greater guidance.

The question of appointing a master is raised by the judge in the plurality of cases; plaintiffs raise the question almost as often. Defendants seldom initiate consideration of an appointment. Opposition was not frequently expressed; when there is opposition, it is generally from the defendant. Absent settlement or dismissal, the judge usually accepted a party's suggestion that a master be appointed.

More than half the orders appointing special masters did not refer to any Rule or other authority for the appointment. Authority seems to be assumed.

In selecting the person to be master, judges commonly received nominations from the parties, but appointments also were made by other means. Ordinarily the master is an attorney, but not always. A non-attorney master is likely to be either a court-appointed expert, or to be appointed to address a specific issue.

Costs commonly are shared by the parties.

The responsibilities assigned to special masters cover a wide range of activities from pretrial through trial and on to post-trial work. This range of activity suggests there is at least room to expand Rule 53, which focuses only on trial uses.

Generally the court accepted the report and recommendations of the master. Modification is relatively rare, and rejection is quite rare.

As a subjective assessment, it seems that generally the master has at least some impact on the outcome. It is rare that the master's recommendations are either determinative or have no impact.

Judges were more likely to take the initiative in appointing special masters for pretrial use. Curiously, appointments for pretrial work were more likely than other appointments to rely expressly on Rule 53, even though Rule 53 does not refer to this

use. Pretrial appointments were most likely to aim at settlement. When settlement was the purpose, settlement always happened. Plaintiffs were more likely to suggest trial and post-trial appointments of masters.

The study is limited to some extent by the reliance on electronic records. It likely fails to pick up appointments of magistrate judges for master-like functions. But it does not seem likely that there are many of these appointments. It may be that the study underreports total master activity by some fraction, but it does not seem likely that the margin is greater than ten percent.

Phase 2 of the study will involve interviews with judges, attorneys, and masters in a sample of the cases to ask more detailed questions. It will be asked whether Rule 53 created problems, whether a clearer rule would have facilitated anything.

Chief Judge Vinson then observed that the question for the Subcommittee is whether to continue to explore Rule 53. The Phase 1 data suggest a need to update Rule 53 to cover pretrial and post-trial activity. The Subcommittee recommends that work proceed on the Rule 53 draft while the FJC goes on with its study.

It was asked whether the intersection between the duties of magistrate judges and the functions of special masters makes a difference. Magistrate judges, for example, commonly supervise discovery. Similar functions may be assigned to a master. Should this overlap be dealt with in the rule? It was responded that indeed magistrate judges now perform many functions that once might have been performed by a special master. But there may not be enough magistrate judges to displace special masters. Some massive discovery cases may demand more time than a magistrate judge could devote to supervision. And in some districts, there simply are not enough magistrate judges and district judges to meet the needs for discovery supervision. Section 636(b)(2) expressly provides for appointing magistrate judges as special masters, including a provision that allows appointment when the parties consent "without regard to the provisions of Rule 53(b)." And Rule 53(f), somewhat indirectly, provides that a magistrate judge is subject to Rule 53 "only when the order referring a matter to the magistrate judge expressly provides that the reference is made under this Rule."

It was further observed that using a master to enforce a decree in an institutional reform case can lead to reshaping the role of the courts in sensitive areas. Thomas Willging noted that the FJC sample includes some institutional decree enforcement functions, and that these will be explored in Phase 2.

Another committee member noted that there is extensive experience with special masters in environmental cases, and that this practice has proved highly desirable. A master can bring to the case highly specialized knowledge and experience that cannot be provided by a district judge or magistrate judge.

It was noted that Rule 54(d)(2) specifically provides for use of special masters to resolve attorney fee questions.

The motion to continue the Rule 53 study was approved unanimously.

Simplified Procedure

Judge Niemeyer introduced the simplified procedure question by observing that the continued growth in "ADR" mechanisms seems to reflect dissatisfaction with the court system. It suggests that courts are not able to meet the social need for dispute resolution. Some people are turning away from the courts. The federal courts may be particularly feared — the old "making a federal case out of it" epithet has come to be associated with six-figure attorney fees and burdensome procedures. People with claims that are important to them individually cannot afford to litigate their claims; the barriers reach claims of tens or even hundreds of thousands of dollars, and business claims as well as personal claims. One effort to address these problems in part is represented by the "rocket docket" in the Eastern District of Virginia. This system encounters criticism, but also deserves praise. It provides a date certain for a prompt trial, and that is a real benefit. The complaints that emerge seem to focus more on the short time allowed for the trial itself, rather than the expedited pretrial procedure. People manage to live with accelerated pretrial — the result is not "trial by ambush."

The question now is whether it is possible to develop a simplified procedure for some cases, shifting the tasks performed by the pretrial devices of pleading, disclosure, and discovery and ensuring prompt trials. Whenever this idea is mentioned to lawyers or judges, it evokes great interest. When it was suggested to a meeting of the district judge members of the Judicial Conference in September, they were unanimously in favor of pursuing the project and excited by the prospect. When the idea is suggested to lawyers, their reactions seem hesitant and to be based on uncertainty whether the result would be to help them and their clients. But there is little indication that lawyers have actually registered the nature of the proposal.

In pursuing any project such as this, it is important that it not be described as a "small claims" project. The purpose is not to provide a second-class procedure for claims that are deemed unimportant. Instead, the purpose is to provide a procedure that will better enable these claims to be enforced. Plaintiffs will be attracted to a procedure that enables them to move into court and emerge quickly with a final judgment. The focus is on adjudication, not prolonged pretrial work. The system will need a cap on damages. With a cap on damages, the defendant too can save money — without the risk of a runaway damages award, it is sensible to budget litigation expenses accordingly.

Some inspiration for simplified procedure rules may be found

in The American Law Institute's Transnational Procedure Rules project. This project aims at developing a set of rules that can be universally accepted as providing for fair and efficient adjudication of controversies. It has the benefit not only of outstanding reporters — including Standing Committee member Professor Geoffrey C. Hazard, Jr. — but also of drawing from the experience of procedure systems and experts all over the world.

Civil Rule 1, promising just and speedy determination of civil actions, has roots as far back as Magna Carta. Magna Carta, indeed, prohibited delay in justice in terms more bold than Rule 1.

A project to do something this broad for our system will be difficult. But we have an initial draft of nine rules that provide one picture of what a simplified system might look like. The Rule 103(b)(2) requirement that documents be attached to the pleadings seems attractive. The Rule 109 firm trial date also seems attractive. The idea draws from practice in a small-claims court that issued a firm trial date when the complaint was filed. A six-month trial date is compatible with the reduced pretrial procedures provided by these rules, apart from cases in which there are obstacles to prompt service of process.

The difficulties, moreover, may not be as great as appears. They can be reduced by following the draft approach, which does not attempt to adopt a self-contained complete system. It is essential that the procedure be fair to both sides — it is not enough to make it less expensive than the regular rules. Fairness is particularly important if the rules are made mandatory for any category of cases, as the draft would do for cases seeking less than $50,000.

Professor Cooper provided a more detailed description of the Simplified Rules draft. The draft is very much a first attempt to illustrate the nature of the issues that must be faced; it is not even close to a model of what might eventually be done.

The first question is whether to make the attempt at all. One part of the concern must be whether an attractive new procedure will bring to federal courts cases that might better remain in state courts: can federal courts handle the new business fairly and well, even if the procedure is itself well designed? Another concern is that the new rules not seem a second-class procedure. It must be clear, both in purpose and result, that the new rules are designed to be better than the ordinary rules for the cases in which they apply.

A basic question of approach is whether to attempt to create a complete set of self-contained rules, or whether to follow the draft approach that simply displaces some of the regular rules. The draft approach has been numbered beginning "Rule 101" and following numbers to emphasize the distinctness of these rules, but also to contain them within the broad framework of the Civil Rules. This approach makes it possible to have a much shorter set of rules, and to rely on the vast body of precedent that gives meaning

to the ordinary rules. But it also makes the supplemental rules difficult for pro se litigants. Any attempt to develop a set of rules for pro se litigation must look quite different from this draft, and is likely to involve provisions that will be unattractive for lawyer-managed cases.

The approach taken in this draft is based on the view that the most profitable approach to simplification lies in the package of pleading, disclosure, and discovery rules. It does not address motion practice directly, in part because it is difficult to conceive of a system that does not permit a motion to dismiss for lack of jurisdiction or for failure to state claim, or does not permit summary judgment. But motion practice may be the source of great delay and expense. If pleading is a proper focus, is it desirable to attempt to restore more detailed fact pleading? Are the early indications of success with the disclosure practice invented by the 1993 version of Rule 26(a)(1)(A) and (B) sufficient to justify building on that version in these rules? Is it possible to enforce a requirement that requires greater specificity in demands to produce documents under Rule 34?

The attempt to establish firm trial dates raises obvious questions of courts' abilities to make good on the promise. The draft does not include any provision for shortening trials themselves, a feature that might be important in achieving a firm trial date.

Choice of the actions that come within the rules — the matters covered by draft Rule 102 — also is an important question. The choice will depend in part on what the rules actually do, and on the confidence we have in the rules. The FJC has provided information about the numbers of cases involving various dollar recovery demands brought in federal courts over a ten-year period. About 70% of the cases did not involve any stated dollar amount, often because that was not relevant to the relief requested. Nearly 12% of the cases involved demands for $50,000 or less. Although this is a very large fraction of the cases in which there was a stated demand, that comparison of itself does not provide much guidance to the total portion of the docket that involves demands in this range. Depending on the approach that is taken, it may be important to consider adoption of a requirement that a definite amount be pleaded — either for all actions in federal court, to defeat evasion of a mandatory rule directing that all cases of below a certain dollar level come into the new procedure, or for cases in which the plaintiff seeks to elect the new procedure.

If this project is pursued, it will be important to identify the people who can help. Some help can be found from lawyers who decide not to bring litigation in federal court, although subject-matter jurisdiction is available, because of the complexity of federal procedure. More help may be found from lawyers who do bring to federal court actions that involve rather small amounts of

money, or that involve important principles but cannot support big litigation expenditures. Experience in state small-claims courts may be consulted, but it is questionable whether procedures designed for the problems that typically come to small-claims courts will work for the actions that may be brought to federal courts.

Discussion began with the question of pleading dollar demands. It was urged that actual recovery should be limited when the simplified rules are invoked.

It was observed that Massachusetts has a set of pro se rules that are contained in a short pamphlet, expressed in terms that aim at a sixth-grade reading competence. Such rules would be very different than the simplified rules draft advanced here.

Thomas Willging observed both that dollar demands are not relevant in many federal actions, and also that the electronic data reporting forms do not require information about the amount demanded. The FJC figures do not support the conclusion that specific dollar demands are made only in 30% of federal actions.

It was asked what might be done to make simplified rules attractive to plaintiffs, to encourage them to opt into the system to the extent that it might be made optional. One incentive could be provided by establishing both a right to an early trial and an opportunity for a short trial.

Caution was expressed by asking whether there is a sufficient number of cases to make it worthwhile to adopt a set of simplified rules. If application of the rules is made mandatory, as in the draft Rule 102 application to all cases involving less than $50,000, there will be a lot of litigation over the amount actually involved. Plaintiffs may add claims for punitive damages to escape application of the rules. And defendants must have an incentive to the extent that the rules are made elective — the draft would provide a procedure for consent of all parties when the damages demand ranges between $50,000 and $250,000, and another consent procedure applicable to all cases.

The view was expressed that "if you provide it, they will come." There are types of cases where this may make sense. The dollar limits could easily be raised to $500,000. There is a lot of concern over expense and delay. Corporate defendants would like this procedure as something more attractive than the present choice between spending large sums on attorney fees or on paying off plaintiffs to avoid spending large sums on attorney fees.

It was suggested that "good lawyers are doing this now, when the relative uncertainty of jury verdicts puts all parties in fear." But it may not be wise to raise the dollar limits. Perhaps we should rely on agreement of the parties to invoke the new procedure. And a firm dollar cap on damages would provide an incentive to defendants to agree.

It was agreed that surely this project should go forward. But attention should be made to motion practice. Motions can become an important source of expense and delay. The firm six-month trial date also could be a problem. It would help to find a way to build magistrate-judge trial into the system. To the extent that application of the rules is made to depend on agreement of the parties, it would be easy to provide that trial will be held by a magistrate judge or district judge depending on overall docket management needs.

The dollar limits were approached from another direction, asking why the mandatory limit is set below the amount required for diversity cases. Under this approach, only federal question cases would ever fall within the mandatory reach of the rules. The dollar limit might be set at double the amount required by § 1332 for diversity jurisdiction. Alternatively, an elective procedure could work without any need to refer to dollar limits or limits on other remedies. And Miller Act cases are a good illustration of the types of federal-question cases that might be brought within this procedure.

It was urged that caution should be observed in approaching trial by magistrate judges. Many lawyers are reluctant to consent to trial by magistrate judge because it is difficult to explain the consent to a client "when something goes wrong."

Professor Coquillette observed that simplified procedure reforms are very attractive. In our common-law tradition, they date back at least as far as 1285, when a set of ten simplified rules was adopted for commercial disputes. But we should be careful to consider the question whether these rules, or some other rules, might be adopted to help pro se litigants. At the same time, the simplified rules approach could easily be used for cases that involve more than $50,000.

Drafting in terms of "monetary relief" may prove unwise. There is a lot of state-court litigation over this and similar terms, addressing questions raised by costs, attorney fees, treble damages, punitive damages, and like supplements to compensatory awards.

The question was asked again: what should be done under the draft if a defendant prefers to invoke these rules, and moves to invoke them on the ground that the plaintiff cannot possibly recover more than $50,000?

It was suggested that many lawyers would find some set of simplified procedures attractive for many cases. This led to expanded discussion of the idea of capping damages. Defendants would find simplified rules very attractive if they could be assured that the stakes would not rise above a stated level. Developing litigation budgets would be much more reliable. If consent of the parties is required, there is no need for a dollar limit. It is the cap that is important, not the absolute level of

the cap. There may be many cases in which all parties would agree to invoke simplified procedures even though hundreds of thousands of dollars are in issue. And in any event, it was urged that any dollar limit should be high enough to capture some diversity cases.

One of the questions raised in the introductory materials is whether the simplified rules might provide for majority jury verdicts. It was urged that this topic should be put aside. Any such proposal would prove divisive — virtually all plaintiffs would favor majority verdicts, while virtually all defendants would oppose them. Such a feature would discourage use of the new system.

Thomas Willging observed that any new set of simplified procedures would be a dramatic change for the federal courts. "We cannot research the future." Perhaps it would be desirable to find a way to establish a pilot project in a few courts to provide a firm basis for study before seeking to implement a new system for all federal courts. The Federal Judicial Center would be available to help.

Another committee member observed that in his state lawyers are often reluctant to go to federal court because of the delay, the "paper jungle," and like concerns. A simplified set of procedures would be very attractive. But the dollar limits should be raised. And the nonunanimous jury should be avoided.

A judge noted that a court's ability to ensure a firm trial date is affected by the length of trial. It is much easier to give a firm date if trial is limited to one day or two days. It was added that given an expedited pretrial process, short trials are more likely to occur naturally even if the rules do not include any limit on trial length.

The question was raised about the types of cases that might be reached by new rules. Some would be cases now filed in federal courts. Others would be cases filed in federal court only because of this procedure. And we need to consider pro se cases, and whether the attempt to adopt simplified procedures for some cases would generate momentum to consider also a set of procedures for pro se cases. And it was noted that if there is a satisfactory procedure for money-only cases, demand will emerge to extend the procedure to cases seeking other forms of relief.

The RAND study of the Civil Justice Reform Act showed that discovery is limited in many cases. The more recent FJC study done for this committee had similar findings. It may be useful to look at these studies again to see whether they can afford information about the types of cases best considered for a simplified procedure system.

It was urged again that higher dollar limits are desirable. It was further suggested that there are considerable opportunities to adapt a simplified procedure system to pro se litigants. There

is a resemblance to the "tracking" systems that have been adopted in some local rules. The tracks developed for simpler cases could provide good models for this project. We could find out, for example, what kinds of cases went onto the simplified tracks. Thomas Willging supplemented this suggestion by observing that the FJC studies of the "pilot" districts under the Civil Justice Reform Act could also be useful in this regard.

Returning to one of the opening themes, it was noted that the impulse for simplified judicial procedure is kin to the proliferating programs for court-annexed ADR. ADR schemes at times focus on "low-end" cases. There may be useful experience to be gathered here as well.

It was observed that experience in a large law school clinic program has shown that there are many people who have valid federal claims but for amounts so small that no lawyer will take them on. Clinic resources are not adequate to the task, nor are other legal assistance programs. The claimants are left alone, confronting a judicial system that is for all practical purposes inaccessible. But that does not mean that it is practicable to develop a pro se procedure that will meet their needs.

The pro se discussion led to the observation that it is important to remember that pro se prisoner actions claim a large part of the federal docket. These cases require very truncated procedures.

The simplified procedure discussion concluded with unanimous agreement that the project should be pursued. Judge Niemeyer will make final assignments to the Subcommittee. Experience with seeking even relatively modest changes to the class-action rules and the discovery rules has demonstrated the momentum of entrenched procedures. Simplified procedures for some actions, if they can be devised, may provide a new source of momentum that, many years down the road, may help in amending the rules for all cases.

Rule 51

Rule 51 has been on the agenda for some time, in response to a suggestion by the Ninth Circuit Judicial Council that an amendment should be made to legitimate local rules that require requests for jury instructions to be submitted before the start of trial. The committee has concluded that this question should not be left to local rule variation — if it is desirable to authorize a direction that requests be submitted before trial, the national rule should say so. The committee has not determined whether it is desirable to amend Rule 51 in this way, although it is aware that the Criminal Rules Committee has published for comment an amendment of the Criminal Rules that would authorize an order for pretrial requests. Consideration of this issue may also involve other changes designed to clarify the interpretations that have been grafted onto the text of Rule 51. A revised Rule 51 draft is included in the agenda materials for this meeting. It was

concluded, however, that the questions presented by the draft are sufficiently complex that it would be better to defer consideration to the spring meeting. Any advice from committee members to the Reporter would be welcome.

Next Meeting

The dates for the spring meeting were tentatively set at April 10 and 11, 2000.

Respectfully submitted,

Edward H. Cooper
Reporter

Item 8A

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

TO: **Hon. Anthony J. Scirica, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **W. Eugene Davis, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: **Report of the Advisory Committee on Criminal Rules**

DATE: **December 2, 1998**

I. Introduction

The Advisory Committee on the Rules of Criminal Procedure met on June 21-22, 1999 in Portland, Oregon and on October 7-8, 1999 in Williamsburg, Virginia and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Minutes of those meetings are included at Attachment B.

II. Action Item—Summary and Recommendation.

Since February 1999, the Committee has been working on restyling the Rules of Criminal Procedure. Those discussions have taken place at the two full Committee meetings, noted, *supra*, and at a series of subcommittee meetings.

This report addresses the proposed changes to Rules 1 through 31. The rules and the accompanying Committee Notes are at Appendix A. The Committee requests that the amendments to those rules be approved for public comment. The Committee envisions that it will present the remainder, Rules 32 through 60, to the Standing Committee at its June 2000 meeting, with a view to publishing all of the Rules for public comment in August 2000.

Recommendation—The Committee recommends that Criminal Rules 1 to 31 be approved and published for public comment.

III. Restyling Project—In General

In 1998, the Committee was informed that following successful completion of the restyling of the Appellate Rules, the Style Subcommittee of the Standing Committee would prepare an initial draft of proposed style changes to the Criminal Rules, with the first installment being presented in late 1998. Professor Stephen Saltzburg, of George Washington University School of Law served later as a consultant to the Style Subcommittee. The Advisory Committee was formed into two separate subcommittees to review the rules as they were completed by the Style Subcommittee.

The first subcommittee met in Washington, D.C. in March 1999 and presented its draft and recommendations on changes to Rules 1 to 9 to the full Committee at its April 1999 meeting in Washington, D.C. A similar process was used for a special Committee meeting in June 1999 in Portland (where drafts to Rules 10 to 22 were discussed) and again at the Committee's regularly scheduled meeting in Williamsburg in October 1999 (where drafts of Rules 23 to 31 were discussed, along with revisions to the previous drafts). The subcommittees have continued to meet and consider proposed amendments to the rules and the Committee Notes. At this point, the Committee has completed its work on Rules 1 through 31 and intends to complete the remainder of the rules by May 2000.

In conducting the restyling project, the Committee has focused on several key points. First, the Committee has attempted to standardize (where possible) key terms and phrases that appear throughout the rules. *See* Rule 1.

Second, the Committee has attempted to avoid any unforeseen substantive changes and has attempted in the Committee Notes to clearly state where the Committee is making what it considers to be a "substantive" change. Where a real question has arisen as to whether a particular change is substantive in nature, the Committee has identified it as such.

Third, in several rules, the Committee has deleted provisions that it believed were no longer necessary or required, usually because the caselaw has evolved since the rule was initially promulgated (or last amended). Whether those constitute substantive changes is not always clear. *See* Rule 4, where the Committee has deleted the reference to whether hearsay may be used to establish probable cause.

Fourth, during the restyling effort, several rules have been completely reorganized to make them easier to read and apply. *See, e.g.,* Rules 11 and 16 In several others, sections from one rule have been transferred to another rule. *See, e.g.*, Rules 4 and 9.

Fifth, in some rules, major substantive changes have been made. *See, e.g.*, Rules 5 and 10 (use of video teleconferencing). Some of those changes have been under discussion for some time but were deferred pending the restyling projects. Still others were identified and included during the project.

IV. Restyling Project—Proposed Substantive Changes in the Rules.

The following discussion focuses on the Rules that include one or more substantive changes, or changes which the Committee believes are likely to generate some debate.

A. Rule 1. Scope; Definitions.

Rule 1 has been entirely revised. The Committee expanded the Rule by incorporating Rule 54, which deals with application of the Rules and includes key definitions. One of the definitions, "magistrate judge" has been changed and may result in a substantive change in the rules. In the current Rules, there are three different definitions for "magistrate judge;" it includes not only United States Magistrate Judges but also district court judges, court of appeals judges, and Supreme Court Justices. And it includes state and local officers who may be authorized to act in a particular case. The Committee believed that the definition in the revised rules should be limited to United States Magistrate Judges, which reflects the current practice of using Magistrate Judges, especially in preliminary matters. As noted in the Committee Note, however, the definition is not intended to restrict the use of other federal judges to perform those functions.

B. Rule 3. The Complaint: Preference for Federal Judicial Officers.

The amendment to Rule 3 makes one substantive change. Currently, Rule 3 requires the complaint to be sworn before a "magistrate judge," which under current Rule 54 could include a state or local judicial officer. Revised Rule 1 no longer includes state and local officers in the definition of magistrate judges for the purposes of these rules. Instead, the definition includes only "United States Magistrate Judges." Rule 3 requires that the complaint be made before a United States Magistrate Judge or before a state or local officer. The revised rule does, however, make a change to reflect prevailing practice and the outcome desired by the Committee—that the procedure take place before a *federal* judicial officer if one is reasonably available. As noted in Rule 1(c), where the rules, such as Rule 3, authorize a magistrate judge to act, any other federal judge may act.

C. Rule 4. Arrest Warrant or Summons on a Complaint:

1. Discretion to Issue Warrant.

There are several substantive changes in the amendments to Rule 4. The first substantive change is in Rule 4(a), which has been amended to provide an element of discretion in those situations when the defendant fails to respond to a summons. Under the current rule, the judge must in all cases issue an arrest warrant. The revised rule provides discretion to the judge to issue an arrest warrant if the attorney for the government does not request that an arrest warrant be issued for a failure to appear.

2. Preference for Federal Judicial Officers.

The second substantive change reflects a preference that the defendant be brought before a *federal* judicial officer, as noted above in Rule 3.

3. Requirement of Prompt Appearance.

A change that may be viewed as a substantive amendment is located in amended Rule 4(b)(1)(C) which requires that the warrant require that the defendant be brought "promptly" before a judge. The Committee believed that this was a more appropriate standard than the current requirement that the defendant be brought before the "nearest available" magistrate judge. This language accurately reflects the thrust of the original rule—time is of the essence more so than distance and that the defendant should be brought with dispatch before a judicial officer. In *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), the Supreme Court used both terms interchangeably and the Committee intends no change in practice.

4. Production of Arrest Warrant.

Amended Rule 4(c) (currently Rule 4(d)) includes three substantive changes. The first is current Rule 4(d)(3) which provides that the arresting officer is only required to inform the defendant of the offense charged and that a warrant exists, if the officer does not have a copy of the warrant. As revised, Rule 4(c)(3)(A) requires the arresting officer in all instances to inform the defendant of the offense charged and of the fact that an arrest warrant exists. The new rule continues the current provision that the arresting officer need not have a copy of the warrant but if the defendant requests to see it, the officer must show the warrant to the defendant as soon as possible. The rule does not attempt to define any particular time limits for showing the warrant to the defendant.

5. Serving Summons on Organization.

The second substantive changes is in Rule 4(c)(3)(C), which is taken from former Rule 9(c)(1). That provision specifies the manner of serving a summons on an organization. The Committee believed that Rule 4 was the more appropriate location for general provisions addressing the mechanics of arrest warrants and summons. Revised Rule 9 liberally cross-references the basic provisions appearing in Rule 4. Under the amended rule, in all cases in which a summons is being served on an organization, a copy of the summons must be mailed to the organization. Current Rule 9 provides for service upon a corporation by delivering a copy to an authorized agent or by mailing.

6. Returning an Executed Arrest Warrant.

A change is made in Rule 4(c)(4). Current Rule 4(d)(4) states that an unexecuted warrant must be returned to the judicial officer or judge who issued it. Amended Rule 4(c)(4)(A) provides that after a warrant is executed, the officer must return it to the judge before whom the defendant will appear under Rule 5. At the government's request, however, an unexecuted warrant may be returned and canceled by any magistrate judge. The change recognizes the possibility that at the time the warrant is returned, the judicial officer who issued the warrant may not be available.

D. Rule 5. Initial Appearance.

1. Prompt Appearance.

Several changes have been made in Rule 5(a), which governs initial appearances by an arrested defendant before a magistrate judge. The first is a clarifying change (which might be viewed as a substantive change). Revised Rule 5(a)(1) provides that a person making the arrest must bring the defendant "promptly" before a magistrate judge, instead of the current reference to "nearest available" magistrate. This language parallels changes in Rule 4 and reflects the view that time is of the essence.

2. Preference for Federal Judicial Officer.

The amended rule contains a substantive change in that it reflects the stated preference (as in other provisions throughout the rules) that the defendant be brought before a federal judicial officer. Only if a magistrate judge is not available should the defendant be taken before a state or local officer.

3. Video Teleconferencing.

The final substantive change is in new Rule 5(d), which permits video teleconferencing for an appearance under this rule—if the defendant consents. This change reflects the growing practice among state courts to use video teleconferencing to conduct initial proceedings. A similar amendment has been made to Rule 10 concerning arraignments. In amending Rules 5, 10, and 43 (which generally requires the defendant's presence at all proceedings), the Committee was very much aware of the argument that permitting a defendant to appear by video teleconferencing might be considered an erosion of an important element of the judicial process. The Committee nonetheless believed that in appropriate circumstances the court and the defendant should have the option of using video teleconferencing, as long as the defendant consents to that procedure. The question of when it would be appropriate for a defendant to consent is not spelled out in the rule. That is left to the defendant and the court in each case. Nor does the rule specify any particular technical requirements for the video conferencing system to be used.

E. Rule 5.1. Preliminary Hearing in a Felony Case: Authority of Magistrate Judge to Grant Continuance.

Rule 5.1(c) contains a substantive change that creates a conflict between the rule and a federal statute—18 U.S.C. § 3060(c). At its April 1997 meeting, the Committee considered a proposed amendment to Rule 5(c) which would permit magistrate judges to grant continuances where the defendant objects. The original proposal originated in the Federal Magistrate Judges Association, which pointed out that under the current version of Rule 5(c), during an initial appearance before a magistrate judge, that judge is not authorized to grant a continuance over an objection by the defendant; that authority rests only in a federal district judge. The Committee decided to recommend to the Standing Committee that it first propose legislative changes to § 3060(c). The Standing Committee, however, believed it more appropriate to for the Advisory Committee to propose a change to Rule 5(c) through the Rules Enabling Act and remanded the issue to the Advisory Committee. At its October 1997 meeting, the Committee considered the issue and decided not to pursue the issue any further, and reported that position to the Standing Committee at its January 1998 meeting.

The matter was presented to the Judicial Conference during its Spring 1998 meeting. In its summary of actions, the Conference remanded the issue to the Advisory Committee with:

> "instructions to the Rules Committee to propose an amendment to Criminal Rule 5(c) consistent with the amendment 18 U.S.C. § 3060 which has been proposed by the Magistrate Judges Committee."

At its April 1998 meeting, the Advisory Committee reconsidered the proposed amendment and voted unanimously to approve the amendment but not to seek publication of the amendment. The Standing Committee agreed to that position at its June 1998 meeting. The proposal is now a part of the proposed amendments to Rule 5.

The revised rule includes language that expands the authority of a United States Magistrate Judge to grant a continuance for a preliminary hearing conducted under the rule. Currently, the rule authorizes a magistrate judge to grant a continuance only in those cases in which the defendant has consented to the continuance. If the defendant does not consent, then the government must present the matter to a district court judge, usually on the same day. As noted above, the proposed amendment conflicts with 18 U.S.C. § 3060, which tracks the original language of the rule and permits only district court judges to grant continuances when the defendant objects. The Committee believes that this restriction is an anomaly. The Committee also believes that the change will promote judicial economy and that it is entirely appropriate to seek this change to the rule through the Rules Enabling Act procedures. *See* 28 U.S.C. § 2072(b). Under those procedures, approval by Congress of this rule change would supersede the parallel provisions in 18 U.S.C. § 3060.

F. Rule 6. The Grand Jury:

1. Challenges to Grand Jurors Before Oath Given.

The first substantive change to Rule 6 is in (b)(1). The last sentence of current Rule 6(b)(1) provides that "Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court." The Committee has deleted that language from the amended rule. The remainder of this subdivision rests on the assumption that formal proceedings have begun against a person, i.e. an indictment has been returned. The Committee believed that although the first sentence reflects current practice that permits a defendant to challenge the composition or qualifications of the grand jurors after the indictment is returned, the second sentence does not comport with modern practice. In other words, a defendant will normally not know the composition or identity of the grand jurors before they are administered their oath. Thus, there is no opportunity to challenge them and have the court decide the issue before the oath is given.

2. Disclosure to Armed Forces Personnel.

Rule 6(e)(3)(D)(iv) is a new substantive provision that addresses disclosure of grand jury information to armed forces personnel where the disclosure is for the purpose of enforcing military criminal law under the Uniform Code of Military Justice, 10 U.S.C. §§ 801-946. Although this issue is not likely to arise with great frequency, existing agreements between the military and the Department of Justice recognize the need for

coordinated investigation and prosecution of federal crimes that may involve military personnel. *See, e.g.*, Department of Defense Directive 5525.7 (January 22, 1985); 1984 Memorandum of Understanding Between Department of Justice and Department of Justice; Memorandum of Understanding Between the Departments of Justice and Transportation (Coast Guard) Relating to the Investigations and Prosecution of Crimes Over Which the Two Departments Have Concurrent Jurisdiction (October 9, 1967).

G. Rule 7. The Indictment and the Information: Deletion of Hard Labor.

There is a potential substantive change in Rule 7 to the extent that the Committee has deleted the references to "hard labor" in the rule. This punishment is no longer found in current federal statutes.

H. Rule 9. Arrest Warrant or Summons on an Indictment or Information:

1. Discretion to Issue Arrest Warrant.

Rule 9(a) has been amended to permit a judge discretion whether to issue an arrest warrant when a defendant fails to respond to a summons on a complaint. Under the current rule, if the defendant fails to appear, the judge *must* issue a warrant. Under the amended version, if the defendant fails to appear and the government requests that a warrant be issued, the judge must issue one. In the absence of such a request, the judge has the discretion whether to do so. This change mirrors language in amended Rule 4(a).

2. Setting Bail on Warrant.

Another substantive amendment has been made in Rule 9(b)(1), which has been amended to delete language permitting the court to set the amount of bail on the warrant. The Committee believes that this language is inconsistent with the 1984 Bail Reform Act. *See United States v. Thomas*, 992 F. Supp. 782 (D. Virgin Islands 1998) (bail amount endorsed on warrant that has not been determined in proceedings conducted under Bail Reform Act has no bearing on decision by judge conducting Rule 40 hearing).

I. Rule 10. Arraignment.

1. Waiver of Presence for Arraignment.

The proposed amendments to Rule 10 create two exceptions to the requirement that the defendant must be personally present in court for an arraignment. The first provides that the court may hold an arraignment in the defendant's absence when the

defendant has waived the right to be present in writing and the court consents to that waiver and the second permits the court to hold arraignments by video teleconferencing. A conforming amendment will also be made to Rule 43, which will be presented to the Standing Committee at its June 2000 meeting.

Although the Committee considered the traditional objections to permitting a defendant to waive a personal appearance, the Committee nonetheless believed that in appropriate circumstances the court, and the defendant, should have the option of conducting the arraignment in the defendant's absence —a procedure used in some state courts. The question of when it would be appropriate for a defendant to waive an appearance is not spelled out in the rule; that decision is left to the defendant and the court. Under the amendment, the defendant must give his or her consent in writing and it must be signed by both the defendant and the defendant's attorney. Finally, the amendment requires that the waiver specifically state that the defendant has received a copy of the charging instrument.

The amendment does not permit waiver of an appearance when the defendant is charged with a felony information. In that instance, the defendant is required by Rule 7(b) to be present in court to waive the indictment. Nor does the amendment permit a waiver of appearance when the defendant is standing mute, or entering a conditional plea, a nolo contendere plea, or a guilty plea. In each of those instances the Committee believed that it was more appropriate for the defendant to appear personally.

The amendment does not permit the defendant to waive the arraignment itself, which may be a triggering mechanism for other rules.

2. Video Teleconferencing for Arraignments.

Rule 10(c) addresses the second substantive change in the rule. That rule would permit the court to conduct arraignments through video teleconferencing. Although the practice is now used in state courts and in some federal courts, Rules 10 and 43 have generally prevented federal courts from using that method for arraignments in criminal cases. *See, e.g., Valenzuela-Gonzales v. United States*, 915 F.2d 1276, 1280 (9th Cir. 1990)(Rules 10 and 43 require personal appearance; thus, pilot program for video teleconferencing not permitted). A similar amendment was proposed by the Committee in 1993 and published for public comment. The amendment was later withdrawn from consideration in order to consider the results of several planned pilot programs for civil cases. Upon further consideration, the Committee believed that the benefits of using video teleconferencing outweighed the costs of doing so. This amendment also parallels a proposed change Rule 5.1(d) that would permit initial appearances to be conducted by video teleconferencing.

In deciding to adopt the amendment, the Committee was persuaded in part by the fact that some districts deal with a very high volume of arraignments of defendants who

are in custody and because of the distances involved, must be transported long distances. That procedure can present security risks to law enforcement and court personnel.

The amendment gives the courts the discretion to decide first, whether to permit video arraignments, and second, what the procedures should be. The Committee was satisfied that the technology has progressed to the point that video teleconferencing can satisfactorily address the concerns raised in the past about the ability of the court and the defendant to see each other and for the defendant and counsel to be in contact with each other.

Unlike the waiver for any appearance whatsoever at an arraignment, noted above, this particular provision would not require that the waiver for video teleconferencing be in writing. Nor does it require that the defendant waive that appearance in person, in open court.

J. Rule 11. Pleas:

1. Advice to Defendant.

Amended Rule 11(b)(1) requires the court to apprise the defendant of his or her rights before accepting a plea of guilty or nolo contendere. The list is generally the same as that in the current rule except that the reference to parole has been removed and the judge is now required under Rule 11(b)(1)(H) to advise the defendant of the possibility of a fine and special assessment as a part of a maximum possible sentence. Also, the list has been re-ordered.

2. Agreement Not to Bring Charges.

Rule 11(c)(1)(A) includes a substantive change which recognizes a common type of plea agreement —that the government will "not bring" other charges.

K. Rule 12. Pleadings and Pretrial Motions: Deletion of Reference to Local Rules.

Rule 12(c) includes a substantive change. Currently, the rule provides that unless a local rule states otherwise, the court may at the time of the arraignment set deadlines for motions or requests. The Committee has deleted the reference to the "local rule" exception to make it clear that judges should be encouraged to set deadlines for motions. The Committee believed that doing so promotes more efficient case management, especially when there is a heavy docket of pending cases. Although the rule permits some discretion in setting a date for motion hearings, the Committee believed that doing so at an early point in the proceedings would also promote judicial economy.

L. Rule 12.1. Notice of Alibi Defense: Phone Numbers of Alibi Witnesses.

Amended Rule 12.1 includes a new requirement that in providing the names and addresses of alibi and any rebuttal witnesses, the parties must also provide the phone numbers of those witnesses. *See* Rule 12.1(a)(2), Rule 12.1(b)(1), and Rule 12.1(c). The Committee believed that requiring such information would facilitate the ability of counsel to locate and interview those alibi witnesses.

M. Rule 12.2. Notice of Insanity Defense; Mental Examination.

Current Rule 12.2, which addresses the notice requirements for presenting an insanity defense or evidence of mental condition on the merits, has been amended in several respects. As amended, the Rule now addresses the issue of a defendant presenting evidence of his mental condition at a capital sentencing proceeding.

1. Defendant's Notice Requirement.

Under current Rule 12.2(b), a defendant who intends to offer expert testimony on the issue of his or her mental condition on the question of guilt must provide a pretrial notice of that intent. The amendment extends that notice requirement to a defendant who intends to offer expert evidence, testimonial or otherwise, on his or her mental condition during a capital sentencing proceeding. The amendment adopts the view, as several courts have recognized, that the better practice is to require pretrial notice of that intent so that any mental examinations can be conducted without unnecessarily delaying capital sentencing proceedings.

2. Authority to Order Mental Examination of Defendant.

A change to Rule 12.2(c) clarifies the authority of the court to order mental examinations for a defendant. As currently written, the subdivision implies that the trial court has discretion to grant a government motion for a mental examination of a defendant who has indicated under Rule 12.2(a) an intent to raise the defense of insanity. But the corresponding statute, 18 U.S.C. § 4242, requires the court to order an examination if the defendant has provided notice of an intent to raise that defense and the government moves for the examination; the amendment conforms Rule 12.2(c) to the statute. Any examination conducted on the issue of the insanity defense would be conducted in accordance with the procedures set out in the statutory provision.

Although the authority of a trial court to order a mental examination of a defendant who has registered an intent to raise the insanity defense seems clear, the authority under the Rule to order an examination of a defendant who intends only to

present expert testimony on his or her mental condition on the issue of guilt is not as clear. Some courts have concluded that a court may order such an examination. In *United States v. Davis*, 93 F.3d 1286 (6th Cir. 1996), however, the court in a detailed analysis of the issue held that the district court lacked the authority under the rule to order a mental examination of a defendant who had provided notice of an intent to offer evidence on a defense of diminished capacity. The court concluded, however, that the trial court had the inherent authority to order such an examination.

The amendment clarifies that the authority of a court to order a mental examination under Rule 12.2(c) extends to those cases when the defendant has provided notice, under Rule 12.2(b), of an intent to present expert testimony on the defendant's mental condition, either on the merits or at capital sentencing. *See, e.g., United States v. Hall*, 152 F.3d 381 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 1767 (1999).

The amendment to Rule 12.2(c) is not intended to affect any statutory or inherent authority a court may have to order other mental examinations.

3. Disclosure of Results of Mental Examination on Defendant; Reciprocal Disclosure.

The issue of when the results of an examination ordered under Rule 12.2(b)(2) may, or must, be disclosed are addressed in revised Rule 12.2(c)(2). The Supreme Court has recognized that use of a defendant's statements during a court-ordered examination may compromise the defendant's right against self-incrimination. *See Estelle v. Smith*, 451 U.S. 454 (1981) (defendant's privilege against self-incrimination violated when he was not advised of right to remain silent during court-ordered examination and prosecution introduced statements during capital sentencing hearing). But subsequent cases have indicated that the defendant waives the privilege if the defendant introduces expert testimony on his or her mental condition. That view is reflected in Rule 12.2(c) which indicates that the statements of the defendant may be used against the defendant only after the defendant has introduced testimony on his or her mental condition. What the current rule does not address is if, and to what extent, the prosecution may see the results of the examination, which may include the defendant's statements, when evidence of the defendant's mental condition is being presented solely at a capital sentencing proceeding.

The proposed change in Rule 12.2(c)(2) adopts the procedure used by some courts to seal or otherwise insulate the results of the examination until it is clear that the defendant will introduce expert evidence about his or her mental condition at a capital sentencing hearing; i.e., after a verdict of guilty on one or more capital crimes, and a reaffirmation by the defendant of an intent to introduce expert mental-condition evidence in the sentencing phase. Most courts that have addressed the issue have recognized that if the government obtains early access to the accused's statements, it will be required to show that it has not made any derivative use of that evidence.

Except as noted in Rule 12.2(c)(3), the rule does not address the time for disclosing results and reports of any expert examination conducted by the defendant. New Rule 12.2(c)(3) provides that upon disclosure under subdivision (c)(2) of the results and reports of the government's examination, disclosure of the results and reports of the defendant's expert examination is mandatory, if the defendant intends to introduce expert evidence relating to the examination.

4. Introduction of Defendant's Statements.

Rule 12.2(c), as previously written, restricted admissibility of the defendant's statements during the course of an examination conducted under the rule to an issue respecting mental condition on which the defendant "has introduced testimony" — expert or otherwise. As amended, Rule 12.2(c)(4) provides that the admissibility of such evidence in a capital sentencing proceeding is triggered only by the defendant's introduction of expert evidence. The Committee believed that, in this context, it was appropriate to limit the government's ability to use the results of its expert mental examination to instances in which the defendant has first introduced expert evidence on the issue.

5. Sanctions.

Rule 12.2(d) has been amended to extend sanctions for failure to comply with the rule to the penalty phase of a capital case. The selection of an appropriate remedy for the failure of a defendant to provide notice or submit to an examination under subdivisions (b) and (c) is with the court's discretion.

M. Rule 12.3. Notice of Public Authority Defense: Telephone Numbers for Witnesses.

Substantive changes have been made in Rule 12.3(a)(4) and 12.3(b). As in Rule 12.1, the Committee decided to include in the restyled rule the requirement that the parties provide the telephone numbers of any witnesses disclosed under the rule.

N. Rule 15. Depositions.

1. Producing "Data."

In Rule 15(a), the list of materials to be produced has been amended to include the broader term "data" to reflect the fact that in an increasingly technological culture, the information in question may exist in a format not already covered by the more conventional list, such as a book or document.

2. Payment of Expenses.

Rule 15(d), which addresses the payment of expenses incurred by the defendant and the defendant's attorney, has been changed. Under the current rule, if the government requests the deposition, or if the defendant requests the deposition and is unable to pay for it, the court *may* direct the government to pay for travel and subsistence expenses for both the defendant and the defendant's attorney. In either case, the current rule requires the government to pay for the transcript. Under the amended rule, if the deposition was requested by the government, the court *must* require the government to pay subsistence and travel expenses and the cost of the deposition transcript. If the defendant is unable to pay the deposition expenses, the court *must* order the government to pay subsistence, travel, and the deposition transcript costs—regardless of who requested the deposition.

O. Rule 16. Discovery and Inspection: Information Being Used.

Amended Rule 16(b)(1)(B) includes a change that may be substantive in nature. Rule 16(a)(1)(E) and 16(a)(1)(F) require production of specified information if the government intends to "use" the information "in its case-in-chief at trial." The Committee believed that the language in revised Rule 16(b)(1)(B), which deals with a defendant's disclosure of information to the government, should track the similar language in revised Rule 16(a)(1). In Rule 16(b)(1)(B)(ii), the Committee changed the current provision which reads: "the defendant intends to *introduce* as evidence" to the "defendant intends to *use* . . ." The Committee recognized that this might constitute a substantive change in the rule but believed that it was a necessary conforming change with the provisions in 16(a)(1)(E) and (F), noted *supra*, regarding use of evidence by the government.

P. Rule 17. Subpoena: Producing "Data."

A potential substantive change has been made in Rule 17(c)(1); the word "data" has been added to the list of matters that may be subpoenaed. The Committee believed that inserting that term will reflect the fact that in an increasingly technological culture, the information may exist in a format not already covered by the more conventional list, such as a book or document. A similar change has been made in Rule 15, noted above.

Q. Rule 24. Trial Jurors: Number of Peremptory Challenges.

Rule 24(b) contains a substantive amendment. For a number of years the Advisory Committee has discussed possible amendments to Rule 24(b) that would

equalize the number of peremptory challenges. In 1990, the Advisory Committee proposed an amendment to Rule 24(b) which would have equalized the number of peremptory challenges—six apiece—for the prosecution and the defense by reducing the number of challenges available to the defense by four. The proposed amendment was approved by the Standing Committee for public comment but when it reviewed the proposal again in February 1991 following that comment period, it rejected the amendment. Until 1998, there was no serious attempt to revisit the issue by either the Advisory Committee or Standing Committee. The Standing Committee's rejection of the proposal in 1991 has generally been used by the Administrate Office and Judicial Conference to convince Congress not to amend Rule 24(b).

Nonetheless, in 1998 the Committee believed that in light of persistent proposals to legislatively amend Rule 24(b) it would be appropriate to revisit the issue. In June 1998, the Standing Committee approved in principle a proposed amendment to Rule 24(b) that would equalize the number of challenges. The amendment tracked the legislative proposal in § 501, Senate Bill 3 (*Omnibus Crime Control Act of 1997*). The change was not published for comment, with the understanding that it could be included in the restyling project.

Accordingly, revised Rule 24(b) equalizes the number of peremptory challenges normally available to the prosecution and the defense in a felony case. Under the amendment, the number of challenges available to the defendant remain the same, ten challenges, and those available to the prosecution's are increased by four. The number of peremptory challenges in capital and misdemeanor cases remain unchanged.

Finally, the rule authorizes the court in multi-defendant cases to grant additional peremptory challenges to the defendants. If the court does so, the prosecution may request additional challenges in a multi-defendant case, not to exceed the total number available to the defendants jointly. But the court is not required in that case to equalize the number of challenges.

R. Rule 26. Taking Testimony: Remote Transmission of Testimony.

A substantive change has been made to Rule 26(b). That amendment permits a court to receive the video transmission of an absent witness if certain conditions are met. Current Rule 26 indicates that normally only testimony given orally in open court will be considered, unless otherwise provided by these rules, an Act of Congress, or any other rule adopted by the Supreme Court. For example, Rule 15 recognizes that depositions, in conjunction with Federal Rule of Evidence 804, may be used to preserve and present testimony if there are exceptional circumstances in the case and it is in the interest of justice to do so.

The revision to Rule 26(b) extends the logic underlying that exception to contemporaneous video testimony of an unavailable witness. The amendment generally parallels a similar provision in Federal Rule of Civil Procedure 43.

The Committee believed that permitting use of video transmission of testimony only in those instances when deposition testimony could be used is appropriate. Under the amendment, the proponent of the testimony must establish that there are exceptional circumstances for such transmission. A party against whom a deposition may be introduced at trial will normally have no basis for objecting if contemporaneous testimony is used instead.

The amendment recognizes that there is a need for the trial court to impose appropriate safeguards and procedures to insure the accuracy and quality of the transmission, the ability of the jurors to hear and view the testimony, and the ability of the judge, counsel, and the witness to hear and understand each other during questioning. Deciding what safeguards are appropriate is left to the sound discretion of the trial court.

Finally, the Committee recognized that there might be Confrontation Clause problems but believed that including the requirement of "unavailability" as that term is defined in Federal Rule of Evidence 804(a) will insure that those rights are not infringed. of the witness. *See United States v. Gigante*, *supra* (use of remote transmission of unavailable witness' testimony did not violate confrontation clause).

S. Rule 26.2. Producing a Witness's Statement: Preservation of Statement.

Current Rule 26.2(c) states that if the court withholds a portion of a statement, over the defendant's objection, "the attorney for the government" must preserve the statement. The Committee believed that the better rule would be for the court to simply seal the entire statement as a part of the record, in the event that there is an appeal.

T. Rule 29. Motion for Judgment of Acquittal: Timing of Motion.

A change has been made in Rule 29(c)(1), which addresses the issue of the timing of a motion for acquittal. The amended rule now includes language that the motion must be made within 7 days after a guilty verdict or after the judge discharges the jury, "whichever is later." That change reflects the fact that in a capital case or in case involving criminal forfeiture, for example, the jury may not be discharged until it has completed its sentencing duties.

VI. Restyling Project —Nonsubstantive, Style, Changes.

Every rule included in this package includes what the Committee believes to be nonsubstantive, style, changes. Because the accompanying Committee Notes address those changes, they are not separately discussed in this Report.

VII. Information Items

A. Rules Governing Habeas Corpus Proceedings.

For the last several meetings, the Committee has considered proposed amendments to the Rules Governing Habeas Corpus Proceedings. The Committee may have a package of amendments ready for consideration by the Standing Committee at its June 2000 meeting.

B. Rules Governing Attorney Conduct.

At the Committee's meeting in Williamsburg, Virginia in October 1999, Judge Scirica informed the Committee of the latest developments of the proposed rules governing attorney conduct. He noted that at this point, there might be a consensus that if any rules are to be adopted, it would be better to proceed with a single rule, applicable to all proceedings, both trial and appellate. Following some discussion of the issue, there was a consensus that that approach would be appropriate.

C. Rules Governing Electronic Filing.

The Committee is also aware of pending amendments in Civil Rules 5, 6, and 77 concerning electronic filing. Because the Criminal Rules apply the Civil Rules regarding the filing papers and pleadings, *see* Criminal Rule 49, the Criminal Rules Committee is inclined, for now, to let that Committee proceed and not propose any amendments on that issue.

D. Rules Governing Financial Disclosure.

The Committee is aware that there is growing interest in devising a rule that insures that a judge does not inadvertently sit on a case where he or she has a financial interest. Specifically, the Committee understands that the Code of Conduct Committee is addressing the issue and that the current plan is to circulate a proposed Appellate Rule 26.1 as a possible model.

At its recent meeting, the Committee discussed the problems that might arise in the context of a criminal trial. Several members raised the question of whether a judge might be disqualified in a criminal case if he or she has a financial interest in a business entity that is the victim in the case. The Committee ultimately voted to recommend that the appropriate committees address the problem of financial disclosure vis a vis victims in criminal cases.

Attachments:

A. Proposed Amendments to Criminal Rules 1 - 31.
B. Minutes of June 1999 and October 1999 Meetings

Report to Standing Committee
Criminal Rules Committee
December 1999

EXHIBIT A

RULES 1 - 31

PRELIMINARY DRAFT OF PROPOSED REVISION

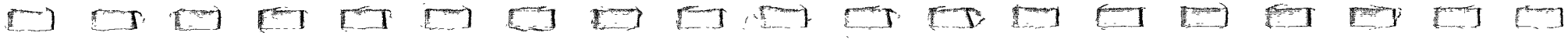
OF THE

FEDERAL RULES OF CRIMINAL PROCEDURE

USING

GUIDELINES FOR DRAFTING AND EDITING COURT RULES

DECEMBER 7, 1999



I. SCOPE, PURPOSE, AND CONSTRUCTION	**Title I. Applicability of Rules**
	Rule 1. Scope; Definitions
Rule 1. Scope These rules govern the procedure in all criminal proceedings in the courts of the United States, as provided in Rule 54(a); and, whenever specifically provided in one of the rules, to preliminary, supplementary, and special proceedings before United States magistrate judges and at proceedings before state and local judicial officers. **Rule 54. Application and Exception** (a) **Courts**. These rules apply to all criminal proceedings in the United States District Courts; in the District of Guam; in the District Court for the Northern Mariana Islands, except as otherwise provided in articles IV and V of the covenant provided by the Act of March 24, 1976 (90 Stat. 263); in the District Court of the Virgin Islands; and (except as otherwise provided in the Canal Zone) in the United States District Court for the District of the Canal Zone; in the United States Courts of Appeals; and in the Supreme Court of the United States; except that the prosecution of offenses in the District Court of the Virgin Islands shall be by indictment or information as otherwise provided by law.	**(a) Scope.** **(1)** ***In General.*** These rules govern the procedure in all criminal proceedings in the United States District Courts, United States Courts of Appeals, and the Supreme Court of the United States. **(2)** ***State or Local Judicial Officer.*** When a rule so states, it applies to a proceeding before a state or local judicial officer. **(3)** ***Territorial Courts.*** These rules also govern the procedure in criminal proceedings in the following courts: (A) the district court of Guam; (B) the district court for the Northern Mariana Islands, except as otherwise provided by law; and (C) the district court of the Virgin Islands, except that the prosecution of offenses in that court must be by indictment or information as otherwise provided by law.

(b) PROCEEDINGS (Rule 54 continued) **(1) Removed Proceedings.** These rules apply to criminal prosecutions removed to the United States district courts from state courts and govern all procedure after removal, except that dismissal by the attorney for the prosecution shall be governed by state law. **(2) Offenses Outside a District or State.** These rules apply to proceedings for offenses committed upon the high seas or elsewhere out of the jurisdiction of any particular state or district, except that such proceedings may be had in any district authorized by 18 U.S.C. § 3238. **(3) Peace Bonds.** These rules do not alter the power of judges of the United States or of United States magistrate judges to hold security of the peace and for good behavior under Revised Statutes, § 4069, 50 U.S.C. § 23, but in such cases the procedure shall conform to these rules so far as they are applicable. **(4) Proceedings Before United States Magistrate Judges.** Proceedings involving misdemeanors and other petty offenses are governed by Rule 58.	(4) ***Removed Proceedings.*** Although these rules govern all proceedings after removal from a state court, state law governs a dismissal by the prosecution.
(5) Other Proceedings. These rules are not applicable to extradition and rendition of fugitives; civil forfeiture of property for violation of a statute of the United States; or the collection of fines and penalties. Except as provided in Rule 20(d) they do not apply to proceedings under 18 U.S.C. Chapter 403 — Juvenile Delinquency — so far as they are inconsistent with that chapter. They do not apply to summary trials for offenses against the navigation laws under Revised Statutes §§ 4300-4305, 33 U.S.C. §§ 391-396, or to proceedings involving disputes between seamen under Revised Statutes §§ 4079-4081, as amended, 22 U.S.C. §§ 256-258, or to proceedings for fishery offenses under the Act of June 28, 1937, c. 392, 50 Stat. 325-327, 16 U.S.C. §§ 772-772i, or to proceedings against a witness in a foreign country under 28 U.S.C. § 1784.	(5) ***Excluded Proceedings.*** Proceedings not governed by these rules include: (A) the extradition and rendition of a fugitive; (B) a civil property forfeiture for the violation of a federal statute; (C) the collection of a fine or penalty; (D) a proceeding under a statute governing juvenile delinquency to the extent the procedure is inconsistent with the statute, unless Rule 20(d) provides otherwise; and (E) a dispute between seamen under 22 U.S.C. §§ 256–58.

(c) Application of Terms. (Rule 54 continued) As used in these rules the following terms have the designated meanings. "Act of Congress" includes any act of Congress locally applicable to and in force in the District of Columbia, in Puerto Rico, in Puerto Rico, in a territory or in any insular possession. "Attorney for the government" means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney, when applicable to cases arising under the laws of Guam the Attorney General of Guam or such other person or persons as may be authorized by the laws of Guam to act therein, and when applicable to cases arising under the laws of the Northern Mariana Islands the Attorney General of the Northern Mariana Islands or any other person or persons as may be authorized by the laws of the Northern Marianas to act therein. "Civil action" refers to a civil action in a district court. The words "demurrer," "motion to quash," "plea in abatement," "plea in bar" and "special plea in bar," or words to the same effect, in any act of Congress shall be construed to mean the motion raising a defense or objection provided in Rule 12. "District court" includes all district courts named in subdivision (a) of this rule.	**(b) Definitions.** The following definitions apply to these rules: **(1)** "Attorney for the government" means: (A) the Attorney General, or an authorized assistant; (B) a United States attorney, or an authorized assistant; (C) when applicable to cases arising under Guam law, the Guam Attorney General or other person whom Guam law authorizes to act in the matter; and (D) any other attorney authorized by law to conduct proceedings under these rules as a prosecutor.
"Federal magistrate judge" means a United States magistrate judge as defined in 28 U.S.C. §§ 631-639, a judge of the United States or another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates. "Judge of the United States" includes a judge of the district court, court of appeals, or the Supreme Court. "Law" includes statutes and judicial decisions. "Magistrate judge" includes a United States magistrate judge as defined in 28 U.S.C. §§ 631-639, a judge of the United States, another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates, and a state or local judicial officer, authorized by 18 U.S.C. § 3041 to perform the functions prescribed in Rules 3, 4, and 5.	**(2)** "Court" means a federal judge performing functions authorized by law. **(3)** "Federal judge" means **[Study further possibility of deletion or incorporation into Rule 1(c)]**: (A) a justice or judge of the United States as these terms defined in 28 U.S.C. § 451; (B) a magistrate judge; or (C) a judge confirmed by the United States Senate and empowered by statute in any commonwealth, territory, or possession to perform a function to which a particular rule relates. **(4)** "Judge" means a federal judge or a state or local judicial officer. **(5)** "Magistrate Judge" means a United States magistrate judge as defined in 28 U.S.C. §§ 631-39.

"Oath" includes affirmations. "Petty offense" is defined in 18 U.S.C. § 19. "State" includes District of Columbia, Puerto Rico, territory and insular possession. "United States magistrate judge" means the officer authorized by 28 U.S.C. §§ 631-639.	**(6)** "Oath" includes an affirmation. **(7)** "Organization" is defined in 18 U.S.C. § 18. **(8)** "Petty offense" is defined in 18 U.S.C. § 19. **(9)** "State" includes the District of Columbia, and any commonwealth, territory, or possession of the United States. **(10)** "State or local judicial officer" means: (A) a state or local officer authorized to act under 18 U.S.C. § 3041; and (B) a judicial officer specifically empowered by statute in force in the District of Columbia or in any commonwealth, territory, or possession, to perform a function to which a particular rule relates. **(c) Authority of Justices and Judges of the United States.** When these rules authorize a magistrate judge to act, any other federal judge may also act.

Committee Notes
Rule 1
December 1, 1999

COMMITTEE NOTE

Rule 1 is entirely revised and expanded to incorporate Rule 54 which deals with the application of the rules. Consistent with the title of the existing rule, the Committee believed that a statement of the scope of the rules should be placed at the beginning to show readers which proceedings are governed by these rules. The Committee also revised the rule to incorporate the definitions found in Rule 54(c) as a new Rule 1(b).

Rule 1(a) now contains language from Rule 54(b). But language in current Rule 54(b)(2)-(4) has been deleted for several reasons: First, Rule 54(b)(2) refers to a venue statute that governs an offense committed on the high seas or somewhere outside the jurisdiction of a particular district; it is unnecessary and has been deleted because once venue has been established, the Rules of Criminal Procedure automatically apply. Second, Rule 54(b)(3) currently deals with peace bonds; that provision is inconsistent with the governing statute and has therefore been deleted. Finally, Rule 54(b)(4) references proceedings conducted before United States Magistrate Judges, a topic now covered in Rule 58.

Rule 1(a)(5) consists of material currently located in Rule 54(b)(5), with the exception of the references to fishery offenses and to proceedings against a witness in a foreign country. Those provisions were considered obsolete. But if those proceedings were to arise, they would be governed by the Rules of Criminal Procedure.

Rule 1(b) is composed of material currently located in Rule 54(c), with several exceptions. First, the reference to an "Act of Congress" has been replaced with the term "federal statute." Second, the language concerning demurrers, pleas in abatement, etc. has been deleted as being anachronistic. Third, the definitions of "civil action" and "district court" have been deleted. Fourth, the term "attorney for the government" has been expanded to include reference to those attorneys who may serve as special or independent counsel under applicable federal statutes.

Fifth, the Committee added a definition for the term "court" in Rule 1(b)(1). Although that term originally was almost always synonymous with the term "district judge," the term might be misleading or unduly narrow because it may not cover the many functions performed by magistrate judges. *See generally* 28 U.S.C. §§ 132, 636. Additionally, the term does not cover Circuit judges who may be authorized to hold a district court. *See* 28 U.S.C. § 291. The proposed definition continues the traditional view that "court" means district judge, but also

reflects the current understanding that magistrate judges act as the "court" in many proceedings.

Sixth, the term "Judge of the United States" has been replaced with the term "Federal Judge." That term includes, as noted in Rule 1(b)(3)(C), federal judges other than Article III judges who may be authorized by statute to perform a particular act specified in the Rules of Criminal Procedure. Seventh, the definition of "Law" has been deleted as being superfluous and possibly misleading because it suggests that administrative regulations are excluded.

Eighth, the current rules include three definitions of "magistrate judge." The term used in amended Rule 1(b)(5) is limited to United States Magistrate Judges. In the current rules the term magistrate judge includes not only United States Magistrate Judges, but also district court judges, court of appeals judges, Supreme Court Justices, and where authorized, state and local officers. The Committee believed that the rules should reflect current practice, i.e. the wider and almost exclusive use of United States Magistrate Judges, especially in preliminary matters. The definition, however, is not intended to restrict the use of other federal judicial officers to perform those functions. Thus, Rule 1(c) has been added to make it clear that where the rules authorize a magistrate judge to act, any other federal judge or justice may act.

Finally, the term "organization" has been added to the list of definitions.

The remainder of the rule has been amended as part of the general restyling of the rules to make them more easily understood. In addition to changes made to improve the clarity, the Committee has changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only.

Rule 2. Purpose and Construction	Rule 2. Interpretation
These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.	These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.

Committee Notes
Rule 2
December 1, 1999

COMMITTEE NOTE

The language of Rule 2 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic. No substantive change is intended.

In particular, Rule 2 has been amended to clarify the purpose of the Rules of Criminal Procedure. The words "are intended" have been changed to read "are to be interpreted." The Committee believed that was the original intent of the drafters and more accurately reflects the purpose of the rules.

II. PRELIMINARY PROCEEDINGS	**Title II. Preliminary Proceedings**
Rule 3. The Complaint	**Rule 3. The Complaint**
The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a magistrate judge.	The complaint is a written statement of the essential facts constituting the offense charged. It must be made under oath before a magistrate judge, or, if none is reasonably available, before a state or local judicial officer.

Committee Notes
Rule 3
December 1, 1999

COMMITTEE NOTE

The language of Rule 3 is amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended, except as described below.

The amendment makes one substantive change. Currently, Rule 3 requires the complaint to be sworn before a "magistrate judge," which under current Rule 54 could include a state or local judicial officer. Revised Rule 1 no longer includes state and local officers in the definition of magistrate judges for the purposes of these rules. Instead, the definition includes only United States Magistrate Judges. Rule 3 requires that the complaint be made before a United States Magistrate Judge or before a state or local officer. The revised rule does, however, make a change to reflect prevailing practice and the outcome desired by the Committee—that the procedure take place before a *federal* judicial officer if one is reasonably available. As noted in Rule 1(c), where the rules, such as Rule 3, authorize a magistrate judge to act, any other federal judge may act.

Rule 4. Arrest Warrant or Summons Upon Complaint	Rule 4. Arrest Warrant or a Summons on a Complaint
(a) Issuance. If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.	**(a) Issuance.** If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant to an officer authorized to execute it. At the request of the attorney for the government, the judge must issue a summons, instead of a warrant, to a person authorized to serve it. A judge may issue more than one warrant or summons on the same complaint. If a defendant fails to appear in response to a summons, a judge may, and upon request of the attorney for the government must, issue a warrant.
(b) Probable Cause. The finding of probable cause may be based upon hearsay evidence in whole or in part.	
(c) Form. **(1) Warrant.** The warrant shall be signed by the magistrate judge and shall contain the name of the defendant or, if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available magistrate judge. **(2) Summons.** The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate at a stated time and place.	**(b) Form.** **(1)** ***Warrant.*** A warrant must: (A) contain the defendant's name or, if it is unknown, a name or description by which the defendant can be identified with reasonable certainty; (B) describe the offense charged in the complaint; (C) command that the defendant be arrested and promptly brought before a magistrate judge or, if none is reasonably available, before a state or local judicial officer; and (D) be signed by a judge. **(2)** ***Summons.*** A summons is to be in the same form as a warrant except that it must require the defendant to appear before a magistrate judge at a stated time and place.

(d) Execution or Service; and Return. **(1) By Whom.** The warrant shall be executed by a marshal or by some other officer authorized by law. The summons may be served by any person authorized to serve a summons in a civil action. **(2) Territorial Limits.** The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States.	**(c) Execution or Service, and Return.** (1) ***By Whom.*** Only a marshal or other authorized officer may execute a warrant. Any person authorized to serve a summons in a federal civil action may serve the summons. (2) ***Territorial Limits.*** A warrant may be executed, or a summons served, only within the jurisdiction of the United States.
(3) Manner. The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant at the time of the arrest but upon request shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant at the time of the arrest, the officer shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The summons shall be served upon a defendant by delivering a copy to the defendant personally, or by leaving it at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein and by mailing a copy of the summons to the defendant's last known address.	(3) ***Manner.*** (A) A warrant is executed by arresting the defendant. Upon arrest, the officer must inform the defendant of the warrant's existence and of the offense charged. At the defendant's request, the officer must show the warrant to the defendant as soon as possible. (B) A summons is served on a defendant: (i) by personal delivery; or (ii) by leaving it at the defendant's residence or usual place of abode with a person of suitable age and discretion residing at that location and by mailing a copy to the defendant's last known address. (C) A summons to an organization is served by delivering a copy to an officer or to a managing or general agent or to another agent appointed or legally authorized to receive service of process. A copy must also be mailed to the organization's last known address within the district or to its principal place of business elsewhere in the United States.

(4) Return. The officer executing a warrant shall make return thereof to the magistrate judge or other officer before whom the defendant is brought pursuant to Rule 5. At the request of the attorney for the government any unexecuted warrant shall be returned to and canceled by the magistrate judge by whom it was issued. On or before the return day the person to whom a summons was delivered for service shall make return thereof to the magistrate judge before whom the summons is returnable. At the request of the attorney for the government made at any time while the complaint is pending, a warrant returned unexecuted and not canceled or summons returned unserved or a duplicate thereof may be delivered by the magistrate judge to the marshal or other authorized person for execution or service.	**(4)** ***Return.*** (A) After executing a warrant, the officer must return it to the judge before whom the defendant is brought in accordance with Rule 5. At the request of the attorney for the government, an unexecuted warrant must be brought back to and canceled by a magistrate judge or, if none is reasonably available, by a state or local officer. (B) The person to whom a summons was delivered for service must return it on or before the return day. (C) At the request of the attorney for the government, a judge may deliver an unexecuted warrant or an unserved summons or a copy of the warrant or summons to the marshal or other authorized person for execution or service.

Committee Notes
Rule 4
December 1, 1999

COMMITTEE NOTE

The language of Rule 4 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic, except as noted below.

The first substantive change is in Rule 4(a), which has been amended to provide an element of discretion in those situations when the defendant fails to respond to a summons. Under the current rule, the judge must in all cases issue an arrest warrant. The revised rule provides discretion to the judge to issue an arrest warrant if the attorney for the government does not request that an arrest warrant be issued for a failure to appear.

Current Rule 4(b), which refers to the fact that hearsay evidence may be used to support probable cause, has been deleted. That language was added to the rule in 1974, apparently to reflect emerging federal case law. *See* Advisory Committee Note to 1974 Amendments to Rule 4 (citing cases). In the intervening years, the case law has become perfectly clear on that proposition. Thus, the Committee believed that the reference to hearsay was no longer necessary. Furthermore, the limited reference to hearsay evidence was misleading to the extent that it might have suggested that other forms of inadmissible evidence could not be considered. For example, the rule made no reference to considering a defendant's prior criminal record, which clearly may be considered in deciding whether probable cause exists. *See, e.g.,* Brinegar v. United States, 338 U.S. 160 (1949) (officer's knowledge of defendant's prior criminal activity). Rather than address that issue, or any other similar issues, the Committee believed that the matter was best addressed in Rule 1101(d)(3), Federal Rules of Evidence. That rule explicitly provides that the Federal Rules of Evidence do not apply to "preliminary examinations in criminal cases, . . . issuance of warrants for arrest, criminal summonses, and search warrants." The Advisory Committee Note accompanying that rule recognizes that: "The nature of the proceedings makes application of the formal rules of evidence inappropriate and impracticable." The Committee did not intend to make any substantive changes in practice by deleting the reference to hearsay evidence.

New Rule 4(b), which is currently Rule 4(c), addresses the form of an arrest warrant and a summons and includes two substantive changes. First, Rule 4(b)(1)(C) requires that the warrant require that the defendant be brought "promptly" before a judge. The Committee believed that this was a more appropriate standard than the current requirement that the defendant be brought

before the "nearest available" magistrate judge. This language accurately reflects the thrust of the original rule, that time is of the essence and that the defendant should be brought with dispatch before a judicial officer in the district. Second, the revised rule states a preference that the defendant be brought before a federal judicial officer.

Rule 4(b)(2) has been amended to require that if a summons is issued, the defendant must appear before a magistrate judge. The current rule requires the appearance before a "magistrate," which could include a state or local judicial officer. This change is consistent with the preference for requiring defendants to appear before federal judicial officers stated in revised Rule 4(b)(1).

Rule 4(c) (currently Rule 4(d)) includes three substantive changes. First, current Rule 4(d)(3) provides that the arresting officer is only required to inform the defendant of the offense charged and that a warrant exists, if the officer does not have a copy of the warrant. As revised, Rule 4(c)(3)(A) requires the arresting officer in all instances to inform the defendant of the offense charged and of the fact that an arrest warrant exists. The new rule continues the current provision that the arresting officer need not have a copy of the warrant but if the defendant requests to see it, the officer must show the warrant to the defendant as soon as possible. The rule does not attempt to define any particular time limits for showing the warrant to the defendant.

Second, Rule 4(c)(3)(C) is taken from former Rule 9(c)(1). That provision specifies the manner of serving a summons on an organization. The Committee believed that Rule 4 was the more appropriate location for general provisions addressing the mechanics of arrest warrants and summons. Revised Rule 9 liberally cross-references the basic provisions appearing in Rule 4. Under the amended rule, in all cases in which a summons is being served on an organization, a copy of the summons must be mailed to the organization.

Third, a change is made in Rule 4(c)(4). Currently, Rule 4(d)(4) requires that an unexecuted warrant must be returned to the judicial officer or judge who issued it. As amended, Rule 4(c)(4)(A) provides that after a warrant is executed, the officer must return it to the judge before whom the defendant will appear under Rule 5. At the government's request, however, an unexecuted warrant may be returned and canceled by any magistrate judge. The change recognizes the possibility that at the time the warrant is returned, the issuing judicial officer may not be available.

Rule 5. Initial Appearance Before the Magistrate Judge	Rule 5. Initial Appearance
(a) In General. Except as otherwise provided in this rule, an officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate judge or, in the event that a federal magistrate judge is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. If a person arrested without a warrant is brought before a magistrate judge, a complaint, satisfying the probable cause requirements of Rule 4(a), shall be promptly filed. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate judge, the magistrate judge shall proceed in accordance with the applicable subdivisions of this rule. An officer making an arrest under a warrant issued upon a complaint charging solely a violation of 18 U.S.C. § 1073 need not comply with this rule if the person arrested is transferred without unnecessary delay to the custody of appropriate state or local authorities in the district of arrest and an attorney for the government moves promptly, in the district in which the warrant was issued, to dismiss the complaint.	**(a) In General.** **(1)** A person making an arrest must promptly take the arrested person before a magistrate judge or, if none is reasonably available, before a state or local judicial officer. **(2)** When a person arrested without a warrant is brought before the judge, a complaint meeting Rule 4(a)'s requirement of probable cause must be filed promptly. **(3)** An officer making an arrest under a warrant issued upon a complaint charging solely a violation of 18 U.S.C. § 1073 need not comply with this rule if the person arrested is transferred without unnecessary delay to the custody of appropriate state or local authorities in the district of arrest and an attorney for the government moves promptly, in the district in which the warrant was issued, to dismiss the complaint.

(c) Offenses Not Triable by the United States Magistrate Judge. If the charge against the defendant is not triable by the United States magistrate judge, the defendant shall not be called upon to plead. The magistrate judge shall inform the defendant of the complaint against the defendant and of any affidavit filed therewith, of the defendant's right to retain counsel or to request the assignment of counsel if the defendant is unable to obtain counsel, and of the general circumstances under which the defendant may secure pretrial release. The magistrate judge shall inform the defendant that the defendant is not required to make a statement and that any statement made by the defendant may be used against the defendant. The magistrate judge shall also inform the defendant of the right to a preliminary examination. The magistrate judge shall allow the defendant reasonable time and opportunity to consult counsel and shall detain or conditionally release the defendant as provided by statute or in these rules. * * * * *	**(b) Felonies.** **(1)** If the offense charged is a felony, the judge must inform the defendant of the following: (A) the complaint against the defendant, and any affidavit filed with it; (B) the defendant's right to retain counsel or to request that counsel be appointed if the defendant cannot obtain counsel; (C) the circumstances under which the defendant may secure pretrial release; (D) any right to a preliminary hearing; and (E) the defendant's right not to make a statement, and that any statement made may be used against the defendant. **(2)** The judge must allow the defendant reasonable opportunity to consult counsel. **(3)** The judge must detain or conditionally release the defendant as provided by statute or these rules. **(4)** A defendant may be asked to plead only under Rule 10.
(b) Misdemeanors and Other Petty Offenses. If the charge against the defendant is a misdemeanor or other petty offense triable by a United States magistrate judge under 18 U.S.C. § 3401, the magistrate judge shall proceed in accordance with Rule 58.	**(c) Misdemeanors.** If a defendant is charged with a misdemeanor, the judge must inform the defendant in accordance with Rule 58(b)(2).
	(d) Video Teleconferencing. Video teleconferencing may be used to conduct an appearance under this rule if the defendant waives the right to be present.

Committee Notes
Rule 5
December 1, 1999

COMMITTEE NOTE

The language of Rule 5 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic, except as noted below.

Several changes have been made in Rule 5(a), which governs initial appearances by an arrested defendant before a magistrate judge. The first is a clarifying change; revised Rule 5(a)(1) provides that a person making the arrest must bring the defendant "promptly" before a magistrate judge, instead of the current reference to "nearest available" magistrate. This language parallels changes in Rule 4 and reflects the view that time is of the essence. In *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), the Supreme Court used both terms interchangeably and the Committee intends no change in practice. A second change is substantive, and reflects the stated preference (as in other provisions throughout the rules) that the defendant be brought before a federal judicial officer. Only if a magistrate judge is not available should the defendant be taken before a state or local officer. The third sentence in current Rule 5(a), which states that a magistrate judge must proceed in accordance with the rule where a defendant is arrested without a warrant or given a summons, has been deleted because it is unnecessary.

Rule 5(b), currently Rule 5(c), has been retitled to more clearly reflect the subject of that subdivision, the procedure to be used if the defendant is charged with a felony. Rule 5(b)(4) has been added to make clear that a defendant may only be called upon to enter a plea under the provisions of Rule 10. That language is intended to reflect and reaffirm current practice.

The remaining portions of current Rule 5(c) have been moved to Rule 5.1, which deals with preliminary hearings in felony cases.

The final substantive change is in new Rule 5(d), which permits video teleconferencing for an appearance under this rule, if the defendant consents. This change reflects the growing practice among state courts to use video teleconferencing to conduct initial proceedings. A similar amendment has been made to Rule 10 concerning arraignments. In amending Rules 5, 10, and 43 (which generally requires the defendant's presence at all proceedings), the Committee was very much aware of the argument that permitting a defendant to appear by video teleconferencing might be considered an erosion of an important element of the judicial process. The Committee nonetheless believed that in

appropriate circumstances the court, and the defendant, should have the option of using video teleconferencing, as long as the defendant consents to that procedure. The question of when it would be appropriate for a defendant to consent is not spelled out in the rule. That is left to the defendant and the court in each case. Nor does the rule specify any particular technical requirements regarding the system to be used.

	Rule 5.1. Preliminary Hearing in a Felony Case
Rule 5(c) Offenses Not Triable by the United States Magistrate Judge. * * * * * A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court. If the defendant waives preliminary examination, the magistrate judge shall forthwith hold the defendant to answer in the district court. If the defendant does not waive the preliminary examination, the magistrate judge shall schedule a preliminary examination.	**(a) In General.** If charged with a felony, a defendant is entitled to a preliminary hearing before a magistrate judge unless: **(1)** the defendant waives the hearing; **(2)** the defendant is indicted; or **(3)** the government files an information under Rule 7(b).
Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if the defendant is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination.	**(b) Scheduling.** The magistrate judge must hold the preliminary hearing within a reasonable time, but no later than 10 days after the initial appearance if the defendant is in custody and no later than 20 days if not in custody.
With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times by a federal magistrate judge. In the absence of such consent by the defendant, time limits may be extended by a judge of the United States only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice	**(c) Extending the Time.** With the defendant's consent and upon a showing of good cause — taking into account the public interest in the prompt disposition of criminal cases — a magistrate judge may extend the time limits in Rule 5.1(b) one or more times. If the defendant does not consent, the magistrate judge may extend the time limits only on a showing that extraordinary circumstances exist and justice requires the delay.
Rule 5.1. Preliminary Examination. **(a) Probable Cause Finding.** If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the federal magistrate judge shall forthwith hold the defendant to answer in district court. The finding of probable cause may be based upon hearsay evidence in whole or in part. The defendant may cross-examine adverse witnesses and may introduce evidence. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12.	**(d) Probable-Cause Finding.** If the magistrate judge finds probable cause to believe an offense has been committed and the defendant committed it, the magistrate judge must promptly require the defendant to appear for further proceedings. The defendant may cross-examine adverse witnesses and may introduce evidence but cannot object to evidence on the ground that it was unlawfully acquired.

(b) Discharge of Defendant. If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the defendant committed it, the federal magistrate judge shall dismiss the complaint and discharge the defendant. The discharge of the defendant shall not preclude the government from instituting a subsequent prosecution for the same offense.	**(e) Discharging the Defendant.** If the magistrate judge finds no probable cause to believe an offense has been committed or the defendant committed it, the magistrate judge must dismiss the complaint and discharge the defendant. A discharge does not preclude the government from later prosecuting the defendant for the same offense.
(c) Records. After concluding the proceeding the federal magistrate judge shall transmit forthwith to the clerk of the district court all papers in the proceeding. The magistrate judge shall promptly make or cause to be made a record or summary of such proceeding. (1) On timely application to a federal magistrate judge, the attorney for a defendant in a criminal case may be given the opportunity to have the recording of the hearing on preliminary examination made available to that attorney in connection with any further hearing or preparation for trial. The court may, by local rule, appoint the place for and define the conditions under which such opportunity may be afforded counsel.	**(f) Records.** The preliminary hearing must be recorded by a court reporter or by a suitable recording device. A recording of the proceeding may be made available to any party upon request. A copy of the recording and a transcript may be provided to any party upon request and upon payment as required by applicable Judicial Conference regulations.
(2) On application of a defendant addressed to the court or any judge thereof, an order may issue that the federal magistrate judge make available a copy of the transcript, or of a portion thereof, to defense counsel. Such order shall provide for prepayment of costs of such transcript by the defendant unless the defendant makes a sufficient affidavit that the defendant is unable to pay or to give security therefor, in which case the expense shall be paid by the Director of the Administrative Office of the United States Courts from available appropriated funds. Counsel for the government may move also that a copy of the transcript, in whole or in part, be made available to it, for good cause shown, and an order may be entered granting such motion in whole or in part, on appropriate terms, except that the government need not prepay costs nor furnish security therefor.	
(d) Production of Statements. (1) In General. Rule 26.2(a)-(d) and (f) applies at any hearing under this rule, unless the court, for good cause shown, rules otherwise in a particular case. (2) Sanctions for Failure to Produce Statement. 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 testimony of a witness whose statement is withheld.	**(g) Production of Statements.** **(1)** ***In General.*** Rule 26.2(a)-(d) and (f) applies at any hearing under this rule, unless the magistrate judge for good cause, rules otherwise in a particular case. **(2)** ***Sanctions for Failure to Produce Statement.*** If a party disobeys a Rule 26.2(a) order to deliver a statement to the moving party, the magistrate judge must not consider the testimony of a witness whose statement is withheld.

Committee Notes
Rule 5.1
December 1, 1999

COMMITTEE NOTE

The language of Rule 5.1 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic, except as noted below.

First, the title of the rule has been changed. Although the underlying statute, 18 U.S.C. § 3060, uses the phrase *preliminary examination*, the Committee believes that the phrase *preliminary hearing* is more accurate. What happens at this proceeding is more than just an examination; it includes an evidentiary hearing, argument, and a judicial ruling. Further, the phrase *preliminary hearing* predominates in actual usage.

Rule 5.1(a) is composed of the first sentence of the second paragraph of current Rule 5(c). Rule 5.1(b) includes material currently located in Rule 5(c): scheduling and extending the time limits for the hearing. Although the rule continues to refer to proceedings before a "court," the Committee is aware that in most districts, magistrate judges perform these functions. That point is also reflected in the definition of "court" in Rule 1(b), which in turn recognizes that magistrate judges may be authorized to act.

Rule 5.1(d), addressing the issue of probable cause, contains the language currently located in Rule 5.1(a), with the exception of the sentence, "The finding of probable cause may be based upon hearsay evidence in whole or in part." That language was included in the original promulgation of the rule in 1972. Similar language was added to Rule 4 in 1974. In the Committee Note on the 1974 amendment, the Advisory Committee explained that the language was included to make it clear that a finding of probable cause may be based upon hearsay, noting that there had been some uncertainty in the federal system about the propriety of relying upon hearsay at the preliminary examination. *See* Advisory Committee Note to Rule 5.1 (citing cases and commentary). Federal law is now clear on that proposition. Thus, the Committee believed that the reference to hearsay was no longer necessary. Further, the Committee believed that the matter was best addressed in Rule 1101(d)(3), Federal Rules of Evidence. That rule explicitly states that the Federal Rules of Evidence do not apply to "preliminary examinations in criminal cases,...issuance of warrants for arrest, criminal summonses, and search warrants." The Advisory Committee Note accompanying that rule recognizes that: "The nature of the proceedings makes application of the formal rules of evidence inappropriate and impracticable." The Committee did

not intend to make any substantive changes in practice by deleting the reference to hearsay evidence.

Rule 5.1(c) contains a substantive change. The revised rule includes language that expands the authority of a United States Magistrate Judge to grant a continuance for a preliminary hearing conducted under the rule. Currently, the rule authorizes a magistrate judge to grant a continuance only in those cases in which the defendant has consented to the continuance. If the defendant does not consent, then the government must present the matter to a district court judge, usually on the same day. The proposed amendment conflicts with 18 U.S.C. § 3060, which tracks the original language of the rule and permits only district court judges to grant continuances when the defendant objects. The Committee believes that this restriction is an anomaly and that it can lead to needless consumption of judicial and other resources. Magistrate judges are routinely required to make probable cause determinations and other difficult decisions regarding the defendant's liberty interests, reflecting that the magistrate judge's role has developed toward a higher level of responsibility for pre-indictment matters. The Committee believes that the change in the rule will provide greater judicial economy and that it is entirely appropriate to seek this change to the rule through the Rules Enabling Act procedures. *See* 28 U.S.C. § 2072(b). Under those procedures, approval by Congress of this rule change would supersede the parallel provisions in 18 U.S.C. § 3060.

Rule 5.1(e), which deals with the discharge of a defendant, consists of former Rule 5.1(b).

Rule 5.1(f) is a revised version of the material in current Rule 5.1(c). Instead of including detailed information in the rule itself concerning records of preliminary hearings, the Committee opted simply to direct the reader to the applicable Judicial Conference regulations governing records. The Committee did not intend to make any substantive changes in the way in which those records are currently made available.

Finally, although the rule speaks in terms of initial appearances being conducted before a magistrate judge, Rule 1(c) makes clear that a district judge may perform any function in these rules that a magistrate judge may perform.

III. INDICTMENT AND INFORMATION	**Title III. The Grand Jury, The Indictment, and The Information**
Rule 6. The Grand Jury	**Rule 6. The Grand Jury**
(a) Summoning Grand Juries. **(1) Generally.** The court shall order one or more grand juries to be summoned at such time as the public interest requires. The grand jury shall consist of not less than 16 nor more than 23 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement. **(2) Alternate Jurors.** The court may direct that alternate jurors may be designated at the time a grand jury is selected. Alternate jurors in the order in which they were designated may thereafter be impanelled as provided in subdivision (g) of this rule. Alternate jurors shall be drawn in the same manner and shall have the same qualifications as the regular jurors, and if impanelled shall be subject to the same challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors.	**(a) Summoning a Grand Jury.** **(1)** ***In General.*** When the public interest so requires, the court must order that one or more grand juries be summoned. A grand jury must have 16 to 23 members, and the court must order that enough legally qualified persons be summoned to meet this requirement. **(2)** ***Alternate Jurors.*** When a grand jury is selected, the court may designate alternate jurors. They must be drawn and summoned in the same manner and must have the same qualifications as regular jurors. Alternate jurors will be impaneled in the sequence in which they are designated. If impaneled, an alternate juror is subject to the same challenges, takes the same oath, and has the same functions, duties, powers, and privileges as a regular juror.
(b) Objections to Grand Jury and to Grand Jurors. **(1) Challenges.** The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court. **(2) Motion to Dismiss.** A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. It shall be made in the manner prescribed in 28 U.S.C. § 1867(e) and shall be granted under the conditions prescribed in that statute. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.	**(b) Objections to the Grand Jury or to a Grand Juror.** **(1)** ***Challenges.*** Either the government or a defendant may challenge the grand jury on the ground that it was not lawfully drawn, summoned, or selected, and may challenge an individual juror on the ground that the juror is not legally qualified. **(2)** ***Motion to Dismiss an Indictment.*** A party may move to dismiss the indictment based on an objection to the grand jury or on an individual juror's lack of legal qualification, unless the court has previously ruled on the same objection under Rule 6(b)(1). The motion to dismiss is governed by 28 U.S.C. § 1867(e). The court cannot dismiss the indictment on the ground that a grand juror was not legally qualified if the record shows that at least 12 qualified jurors concurred in the indictment.

(c) Foreperson and Deputy Foreperson. The court shall appoint one of the jurors to be foreperson and another to be deputy foreperson. The foreperson shall have power to administer oaths and affirmations and shall sign all indictments. The foreperson or another juror designated by the foreperson shall keep record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. During the absence of the foreperson, the deputy foreperson shall act as foreperson.	**(c) Foreperson and Deputy Foreperson.** The court will appoint one juror as the foreperson and another as the deputy foreperson. In the foreperson's absence, the deputy foreperson will act as the foreperson. The foreperson may administer oaths and affirmations and will sign all indictments. The foreperson — or another juror designated by the foreperson — will record the number of jurors concurring in every indictment and will file the record with the district clerk, but the record may not be made public unless the court so orders.
(d) Who May Be Present. **(1) While Grand Jury is in Session.** Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session. **(2) During Deliberations and Voting.** No person other than the jurors, and any interpreter necessary to assist a juror who is hearing or speech impaired, may be present while the grand jury is deliberating or voting.	**(d) Who May Be Present.** (1) ***While the Grand Jury Is in Session.*** The following persons may be present while the grand jury is in session: attorneys for the government, the witness being questioned, interpreters when needed, and a stenographer or operator of a recording device. (2) ***During Deliberations and Voting.*** No person other than the jurors, and any interpreter needed to assist a hearing-impaired or speech-impaired juror, may be present while the grand jury is deliberating or voting.

(e) Recording and Disclosure of Proceedings.	**(e) Recording and Disclosing Proceedings.**
(1) Recording of Proceedings. All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.	(1) ***Recording the Proceedings.*** Except while the grand jury is deliberating or voting, all proceedings must be recorded by a court reporter or by a suitable recording device. The validity of a prosecution is not affected by the unintentional failure to make a recording. Unless the court orders otherwise, an attorney for the government will retain control of the recording, the reporter's notes, and any transcript prepared from those notes.
(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.	(2) ***General Rule of Secrecy.*** Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury: (A) a grand juror; (B) an interpreter; (C) a court reporter; (D) an operator of a recording device; (E) a person who transcribes recorded testimony; (F) an attorney for the government; or (G) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii).

(3) Exceptions. (A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to— (i) an attorney for the government for use in the performance of such attorney's duty; and (ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law. (B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of their obligation of secrecy under this rule.	(3) ***Exceptions.*** (A) Disclosure of a grand-jury matter — other than the grand jury's deliberations or any grand juror's vote — may be made to: (i) an attorney for the government for use in performing that attorney's duty; or (ii) any government personnel — including those of a state or state subdivision or of an Indian tribe — that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law. (B) A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law. An attorney for the government must promptly provide the court that impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made— (i) when so directed by a court preliminarily to or in connection with a judicial proceeding; (ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury; (iii) when the disclosure is made by an attorney for the government to another federal grand jury; or (iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law. If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.	(C) An attorney for the government may disclose any grand-jury matter to another federal grand jury. (D) The court may authorize disclosure — at a time, in a manner, and subject to any other conditions that it directs — of a grand-jury matter: (i) preliminarily to or in connection with a judicial proceeding; (ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury; (iii) at the request of the government if it shows that the matter may disclose a violation of state or Indian tribal criminal law, as long as the disclosure is to an appropriate state, state-subdivision, or Indian tribal official for the purpose of enforcing that law; or (iv) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.
(D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened. Unless the hearing is ex parte, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard.	(E) A petition to disclose a grand jury matter under Rule 6(e)(3)(D)(i) must be filed in the district where the grand jury convened. Unless the hearing is ex parte — as it may be when the government is the petitioner — the petitioner must serve the petition on, and the court must afford a reasonable opportunity to appear and be heard to: (i) the attorney for the government; (ii) the parties to the judicial proceeding; and (iii) any other person whom the court may designate.

(E) If the judicial proceeding giving rise to the petition is in a federal district court in another district, the court shall transfer the matter to that court unless it can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper. The court shall order transmitted to the court to which the matter is transferred the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy. The court to which the matter is transferred shall afford the aforementioned persons a reasonable opportunity to appear and be heard.	(F) If the petition to disclose arises out of a proceeding in another district, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper. If the petitioned court decides to transfer, it must send to the transferee court the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand-jury secrecy. The transferee court must afford those persons identified in Rule 6(e)(3)(E) a reasonable opportunity to appear and be heard.
(4) Sealed Indictments. The federal magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons. **(5) Closed Hearing.** Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury. **(6) Sealed Records.** Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.	**(4)** ***Sealed Indictment.*** The magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. The clerk must then seal the indictment, and no person may disclose the indictment's existence except as necessary to issue or execute a warrant or summons. **(5)** ***Closed Hearing.*** Subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury. **(6)** ***Sealed Records.*** Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury. **(7)** ***Contempt.*** A knowing violation of Rule 6 may be punished as a contempt of court.

(f) Finding and Return of Indictment. A grand jury may indict only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury, or through the foreperson or deputy foreperson on its behalf, to a federal magistrate judge in open court. If a complaint or information is pending against the defendant and 12 persons do not vote to indict, the foreperson shall so report to a federal magistrate judge in writing as soon as possible.	**(f) Indictment and Return.** A grand jury may indict only if at least 12 jurors concur. The grand jury — or its foreperson or deputy foreperson — must return the indictment to a magistrate judge in open court. If a complaint or information is pending against the defendant and 12 jurors do not concur in the indictment, the foreperson must promptly and in writing report the lack of concurrence to the magistrate judge.
(g) Discharge and Excuse. A grand jury shall serve until discharged by the court, but no grand jury may serve more than 18 months unless the court extends the service of the grand jury for a period of six months or less upon a determination that such extension is in the public interest. At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another person in place of the juror excused.	**(g) Discharge.** A grand jury must serve until the court discharges it, but it may serve more than 18 months only if the court, having determined that an extension is in the public interest, extends the grand jury's service. An extension may be granted for no more than 6 months, except as otherwise provided by statute. **(h) Excuse.** At any time, for good cause, the court may excuse a juror either temporarily or permanently, and if permanently, the court may impanel an alternate juror in place of the excused juror. **(i) Indian Tribe.** Indian tribe means an Indian tribe recognized by the Secretary of the Interior on a list published in the Federal Register under 25 U.S.C. § 479a-1.

Committee Notes
Rule 6
December 1, 1999

COMMITTEE NOTE

The language of Rule 6 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic, except as noted below.

The first substantive change is in Rule 6(b)(1). The last sentence of current Rule 6(b)(1) provides that "Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court." That language has been deleted from the amended rule. The remainder of this subdivision rests on the assumption that formal proceedings have begun against a person, i.e. an indictment has been returned. The Committee believed that although the first sentence reflects current practice of a defendant being able to challenge the composition or qualifications of the grand jurors after the indictment is returned, the second sentence does not comport with modern practice. That is, a defendant will normally not know the composition or identity of the grand jurors before they are administered their oath. Thus, there is no opportunity to challenge them and have the court decide the issue before the oath is given.

In Rule 6(d)(1), the term "court stenographer" has been changed to "court reporter." Similar changes have been made in Rule 6(e)(1) and (2). **[The language in Rule 6(d)(2) regarding the presence of interpreters has been approved by the Supreme Court and is now before Congress]**

Rule 6(e) continues to spell out the general rule of secrecy of grand jury proceedings and the exceptions to that general rule. The last sentence in current Rule 6(e)(2), concerning contempt for violating Rule 6, now appears in Rule 6(e)(7). No change in substance is intended.

Rule 6(e)(3)(A)(ii) includes a new provision recognizing the sovereignty of Indian Tribes and the possibility that it would be necessary to disclose grand jury information to appropriate tribal officials in order to enforce federal law. Similar language has been added to Rule 6(e)(3)(D)(iii).

Rule 6(e)(3)(C) consists of language located in current Rule 6(e)(3)(C)(iii). The Committee believed that this provision, which recognizes that prior court approval is not required for disclosure of a grand jury matter to another grand jury, should be treated as a separate subdivision in revised Rule 6(e)(3). No change in practice is intended.

Rule 6(e)(3)(D)(iv) is a new substantive provision that addresses disclosure of grand jury information to armed forces personnel where the disclosure is for the purpose of enforcing military criminal law under the Uniform Code of Military Justice, 10 U.S.C. §§ 801-946. *See, e.g.,* Department of Defense Directive 5525.7 (January 22, 1985); 1984 Memorandum of Understanding Between Department of Justice and Department of Justice; Memorandum of Understanding Between the Departments of Justice and Transportation (Coast Guard) Relating to the Investigations and Prosecution of Crimes Over Which the Two Departments Have Concurrent Jurisdiction (October 9, 1967).

In Rule 6(e)(3)(E)(ii), the Committee considered whether to amend the language relating to "parties to the judicial proceeding" and determined that in the context of the rule, it is understood that the parties referred to are the parties in the same judicial proceeding identified in Rule 6(e)(3)(D)(i).

The Committee decided to leave in subdivision (e) the provision stating that a "knowing violation of Rule 6" may be punished by contempt notwithstanding that, due to its apparent application to the entirety of the Rule, the provision seemingly is misplaced in subdivision (e). Research shows that the provision was added by Congress in 1977 and that it was crafted solely to deal with violations of the secrecy prohibitions in subdivision (e). *See* S. Rep. No. 95-354, p. 8 (1977). Supporting this narrow construction, the Committee found no reported decision involving an application or attempted use of the contempt sanction to a violation other than of the disclosure restrictions in subdivision (e). On the other hand, the Supreme Court in dicta did indicate on one occasion its understanding that the contempt sanction arguably would be available also for a violation of Rule 6(d) relating to who may be present during the grand jury's deliberations. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1987).

In sum, it appears that the scope of the contempt sanction in Rule 6 is unsettled. Because the provision creates an offense, altering its scope may be beyond the authority bestowed by the Rules Enabling Act, 28 U.S.C. 2071 et seq. *See* 28 U.S.C. 2072(b) (Rules must not "abridge, enlarge, or modify any substantive right"). The Committee decided to leave the contempt provision in its present location in subdivision (e), because breaking it out into a separate subdivision could be construed to support the interpretation that the sanction may be applied to a knowing violation of any of the Rule's provisions rather than just those in subdivision (e). Whether or not that is a correct interpretation of the provision—a matter on which the Committee takes no position—must be determined by caselaw, or resolved by Congress.

[Rule 6(f) language has been approved by the Supreme Court and is now pending at Congress]

Current Rule 6(g) has been divided into two new subdivisions, Rule 6(g), Discharge and Rule 6(h), Excuse.

Rule 6(i) is a new provision defining the term "Indian Tribe," a term used only in this rule.

Rule 7. The Indictment and the Information	Rule 7. The Indictment and the Information
(a) Use of Indictment or Information. An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.	**(a) When Used.** **(1)** ***Felony.*** An offense must be prosecuted by an indictment if it is punishable: (A) by death; or (B) by imprisonment for more than one year. **(2) Misdemeanor.** An offense punishable by imprisonment for one year or less may be prosecuted in accordance with Rule 58(b)(1).
(b) Waiver of Indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor may be prosecuted by information if the defendant, after having been advised of the nature of the charge and of the rights of the defendant, waives in open court prosecution by indictment.	**(b) Waiving Indictment.** An offense punishable by imprisonment for more than one year may be prosecuted by information if the defendant — in open court and after being advised of the nature of the charge and of the defendant's rights — waives prosecution by indictment.

(c) Nature and Contents. **(1) In General.** The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. **(2) Criminal Forfeiture.** No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information provides notice that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute.[1] **(3) Harmless Error.** Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice.	**(c) Nature and Contents.** **(1)** ***In General.*** The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government. It need not contain a formal introduction or conclusion. A count may incorporate by reference an allegation made in another count. A count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. For each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated. **(2)** ***Criminal Forfeiture.*** No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information provides notice that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute. **(3)** ***Citation Error.*** Unless the defendant was misled and thereby prejudiced, neither an error in a citation nor a citation's omission is a ground to dismiss the indictment or information or to reverse a conviction.
(d) Surplusage. The court on motion of the defendant may strike surplusage from the indictment or information.	**(d) Surplusage.** On the defendant's motion, the court may strike surplusage from the indictment or information.
(e) Amendment of Information. The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.	**(e) Amending an Information.** Unless an additional or different offense is charged or a substantial right of the defendant is prejudiced, the court may permit an information to be amended at any time before verdict or finding.
(f) Bill of Particulars. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.	**(f) Bill of Particulars.** The court may direct the government to file a bill of particulars. The defendant may move for a bill of particulars before or within 10 days after arraignment or at a later time if the court permits. The government may amend a bill of particulars subject to such conditions as justice requires.

[1]Judicial Conference approved amendment in March 1999. The amendments take effect on December 1, 2000, if approved by the Supreme Court and Congress takes no action otherwise.

Committee Notes
Rule 7
December 1, 1999

COMMITTEE NOTE

The language of Rule 7 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic.

The Committee has deleted the references to "hard labor" in the rule. This punishment is not found in current federal statutes.

[Rule 7(c)(2), Criminal Forfeiture, is language approved by the Judicial Conference but not yet by the Supreme Court]

The title of Rule 7(c)(3) has been amended. The Committee believed that potential confusion could arise with the use of the term "harmless error." Rule 52, which deals with the issues of harmless error and plain error, is sufficient to address the topic. Potentially, the topic of harmless error could arise with regard to any of the other rules and there is insufficient need to highlight the term in Rule 7. The focus in the language of (c)(3), on the other hand is specifically on the topic of the effect of an error in the citation of authority in the indictment. That material remains but without any reference to harmless error.

Rule 8. Joinder of Offenses and of Defendants	Rule 8. Joinder of Offenses or Defendants
(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.	**(a) Joinder of Offenses.** The indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged — whether felonies or misdemeanors or both — are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.
(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.	**(b) Joinder of Defendants.** The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

Committee Notes
Rule 8
December 1, 1999

COMMITTEE NOTE

The language of Rule 8 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 9. Warrant or Summons Upon Indictment or Information	Rule 9. Arrest Warrant or Summons on an Indictment or Information
(a) Issuance. Upon the request of the attorney for government the court shall issue a warrant for each defendant named in an information supported by a showing of probable cause under oath as is required by Rule 4(a), or in an indictment. Upon the request of the attorney for the government a summons instead of a warrant shall issue. If no request is made, the court may issue either a warrant or a summons in its discretion. More than one warrant or summons may issue for the same defendant. The clerk shall deliver the warrant or summons to the marshal or other person authorized by law to execute or serve it. If a defendant fails to appear in response to the summons, a warrant shall issue. When a defendant arrested with a warrant or given a summons appears initially before a magistrate judge, the magistrate judge shall proceed in accordance with the applicable subdivisions of Rule 5.	**(a) Issuance.** The court must issue a warrant — or at the government's request, a summons — for each defendant named in an indictment or named in an information if one or more affidavits accompanying the information establish probable cause to believe that an offense has been committed and that the defendant committed it. More than one warrant or summons may issue for the same defendant. If a defendant fails to appear in response to a summons, the court may, and upon request of the attorney for the government must, issue a warrant. The court must issue the arrest warrant to an officer authorized to execute it or the summons to a person authorized to serve it.
(b) Form. **(1) Warrant.** The form of the warrant shall be as provided in Rule 4(c)(1) except that it shall be signed by the clerk, it shall describe the offense charged in the indictment or information and it shall command that the defendant be arrested and brought before the nearest available magistrate judge. The amount of bail may be fixed by the court and endorsed on the warrant. **(2) Summons.** The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate judge at a stated time and place.	**(b) Form.** **(1)** ***Warrant.*** The warrant must conform to Rule 4(b)(1) except that it must be signed by the clerk and must describe the offense charged in the indictment or information. **(2)** ***Summons.*** The summons is to be in the same form as a warrant except that it must require the defendant to appear before the court at a stated time and place.
(c) Execution or Service; and Return. **(1) Execution or Service.** The warrant shall be executed or the summons served as provided in Rule 4(d)(1), (2) and (3). A summons to a corporation shall be served by delivering a copy to an officer or to a managing or general agent or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the corporation's last known address within the district or at its principal place of business elsewhere in the United States. The officer executing the warrant shall bring the arrested person without unnecessary delay before the nearest available federal magistrate judge or, in the event that a federal magistrate judge is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041.	**(c) Execution or Service; Return; Initial Appearance.** **(1)** ***Execution or Service.*** (A) The warrant must be executed or the summons served as provided in Rule 4(c)(1), (2), and (3). (B) The officer executing the warrant must proceed in accordance with Rule 5(a)(1).

(2) Return. The officer executing a warrant shall make return thereof to the magistrate judge or other officer before whom the defendant is brought. At the request of the attorney for the government any unexecuted warrant shall be returned and cancelled. On or before the return day the person to whom a summons was delivered for service shall make return thereof. At the request of the attorney for the government made at any time while the indictment or information is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the clerk to the marshal or other authorized person for execution or service.	(2) ***Return.*** A warrant or summons must be returned in accordance with Rule 4(c)(4). (3) ***Initial Appearance.*** When an arrested or summoned defendant first appears before the court, the judge must proceed under Rule 5.
[(d) Remand to United States Magistrate for Trial of Minor Offenses] (Abrogated Apr. 28, 1982, eff. Aug. 1, 1982).	

Committee Notes
Rule 9
December 1, 1999

COMMITTEE NOTE

The language of Rule 9 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Rule 9 has been changed to reflect its relationship to Rule 4 procedures for obtaining an arrest warrant or summons. Thus, rather than simply repeating material that is already located in Rule 4, the Committee determined that where appropriate, Rule 9 should simply direct the reader to the procedures specified in Rule 4.

Rule 9(a) includes a substantive change. It has been amended to permit a judge discretion whether to issue an arrest warrant when a defendant fails to respond to a summons on a complaint. Under the current language of the rule, if the defendant fails to appear, the judge must issue a warrant. Under the amended version, if the defendant fails to appear and the government requests that a warrant be issued, the judge must issue one. In the absence of such a request, the judge has the discretion whether to do so. This change mirrors language in amended Rule 4(a).

A second substantive amendment has been made in Rule 9(b)(1). The rule has been amended to delete language permitting the court to set the amount of bail on the warrant. The Committee believes that this language is inconsistent with the 1984 Bail Reform Act. *See United States v. Thomas*, 992 F. Supp. 782 (D. Virgin Islands 1998) (bail amount endorsed on warrant that has not been determined in proceedings conducted under Bail Reform Act has no bearing on decision by judge conducting Rule 40 hearing).

The language in current Rule 9(c)(1), concerning service of a summons on an organization, has been moved to Rule 4.

IV. ARRAIGNMENT, AND PREPARATION FOR TRIAL	**Title IV. Arraignment and Preparation for Trial**
Rule 10. Arraignment	**Rule 10. Arraignment**
Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead thereto. The defendant shall be given a copy of the indictment or information before being called upon to plead.	**(a) In General.** Arraignment must be conducted in open court and must consist of: **(1)** ensuring that the defendant has a copy of the indictment or information; **(2)** reading the indictment or information to the defendant or stating to the defendant the substance of the charge; and then **(3)** asking the defendant to plead to the indictment or information. **(b) Waiving Appearance.** A defendant need not be present for the arraignment if: **(1)** the defendant has been charged by indictment or misdemeanor information; **(2)** the defendant, in a written waiver signed by both the defendant and defense counsel, has waived appearance and has affirmed that the defendant received a copy of the indictment or information and that the plea is not guilty; and **(3)** the court accepts the waiver. **(c) Video Teleconferencing.** Video teleconferencing may be used to arraign a defendant if the defendant waives the right to be arraigned in open court.

Committee Notes
Rule 10
December 1, 1999

COMMITTEE NOTE

The language of Rule 10 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Read together, Rules 10 and 43 require the defendant to be physically present in court for the arraignment. *See, e.g., Valenzuela-Gonzales v. United States*, 915 F.2d 1276, 1280 (9th Cir. 1990)(Rules 10 and 43 are broader in protection than the Constitution). The amendments to Rule 10 create two exceptions to that requirement. The first provides that the court may hold an arraignment in the defendant's absence when the defendant has waived the right to be present in writing and the court consents to that waiver. The second permits the court to hold arraignments by video teleconferencing, when the defendant is at a different location. A conforming amendment has also been made to Rule 43.

In amending the rule and Rule 43, the Committee was concerned that permitting a defendant to be absent from the arraignment could be viewed as an erosion of an important element of the judicial process. First, it may be important for a defendant to see and experience first-hand the formal impact of the reading of the charge. Second, it may be necessary for the court to personally see and speak with the defendant at the arraignment, especially when there is a real question whether the defendant really understands the gravity of the proceedings. And third, there may be difficulties in providing the defendant with effective and confidential assistance of counsel if counsel, but not the defendant, appears at the arraignment.

The Committee nonetheless believed that in appropriate circumstances the court, and the defendant, should have the option of conducting the arraignment in the defendant's absence. The question of when it would be appropriate for a defendant to waive an appearance is not spelled out in the rule. That is left to the defendant and the court in each case.

A critical element to the amendment is that no matter how convenient or cost effective a defendant's absence might be, the defendant's right to be present in court stands unless he or she waives that right in writing. Under the amendment, the waiver must be signed by both the defendant and the defendant's attorney. Further, the amendment requires that the waiver specifically state that the defendant has received a copy of the charging instrument.

If the trial court has reason to believe that in a particular case the defendant should not be permitted to waive the right, the court may reject the waiver and require that the defendant actually appear in court. That might be particularly appropriate when the court wishes to discuss substantive or procedural matters in conjunction with the arraignment and the court believes that the defendant's presence is important in resolving those matters.

The amendment does not permit waiver of an appearance when the defendant is charged with a felony information. In that instance, the defendant is required by Rule 7(b) to be present in court to waive the indictment. Nor does the amendment permit a waiver of appearance when the defendant is standing mute, (see Rule 11(a)(4)) or entering a conditional plea, (see Rule 11(a)(2)), a nolo contendere plea, (see Rule 11(a)(3)), or a guilty plea, (see Rule 11(a)(1)). In each of those instances the Committee believed that it was more appropriate for the defendant to appear personally before the court.

It is important to note that the amendment does not permit the defendant to waive the arraignment itself, which may be a triggering mechanism for other rules.

Rule 10(c) addresses the second substantive change in the rule. That provision permits the court to conduct arraignments through video teleconferencing. Although the practice is now used in state courts and in some federal courts, Rules 10 and 43 have generally prevented federal courts from using that method for arraignments in criminal cases. *See, e.g., Valenzuela-Gonzales v. United States*, *supra* (Rules 10 and 43 mandate physical presence of defendant at arraignment and that arraignment take place in open court; thus, pilot program for video teleconferencing not permitted). A similar amendment was proposed by the Committee in 1993 and published for public comment. The amendment was later withdrawn from consideration in order to consider the results of several planned pilot programs for civil cases. Upon further consideration, the Committee believed that the benefits of using video teleconferencing outweighed the costs of doing so. This amendment also parallels an amendment in Rule 5.1(d) that would permit initial appearances to be conducted by video teleconferencing.

The arguments for opposing video teleconferencing of arraignments generally parallel those noted, *supra*, for permitting the defendant to waive the right to be personally brought before a judicial officer. Yet, if one accepts the argument that the defendant may voluntarily waive a personal appearance altogether at the arraignment, the same defendant should be able to consent to an arraignment from a remote location. Further, the Committee was persuaded in part by the fact that some districts deal with a very high volume of arraignments of defendants who are in custody and because of the distances involved, must be transported long distances. That potentially presents security risks to law enforcement and court personnel.

The amendment leaves to the courts the decision first, whether to permit video arraignments, and second, the procedures to be used. The Committee was satisfied that the technology has progressed to the point that video teleconferencing can address the concerns raised in the past about the ability of the court and the defendant to see each other and for the defendant and counsel to be in contact with each other, either at the same location or by a secure remote connection.

Although the rule requires the defendant to waive a personal appearance for an arraignment, the rule does not require that the waiver for video teleconferencing be in writing. Nor does it require that the defendant waive that appearance in person, in open court. It would normally be sufficient for the defendant to waive an appearance while participating through a video teleconference.

Rule 11. Pleas	Rule 11. Pleas
(a) Alternatives. **(1) In General.** A defendant may plead guilty, not guilty, or nolo contendere. If a defendant refuses to plead, or if a defendant organization, as defined in 18 U.S.C. § 18, fails to appear, the court shall enter a plea of not guilty. **(2) Conditional Pleas.** With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.	**(a) Entering a Plea.** **(1)** ***In General.*** A defendant may plead guilty, not guilty, or (with the court's consent) nolo contendere. **(2)** ***Conditional Plea.*** With the consent of the court and government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.
(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.	**(3)** ***Nolo Contendere Plea.*** Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice. **(4)** ***Failure to Enter a Plea.*** If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following: **(1)** the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and **(2)** if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding, and, if necessary, one will be appointed to represent the defendant; and **(3)** that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and **(4)** that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and **(5)** if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement; and	**(b) Consideration and Acceptance of a Guilty or Nolo Contendere Plea.** **(1)** ***Advising and Questioning the Defendant.*** Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following: (A) any statement that the defendant gives under oath may be used against the defendant in a later prosecution for perjury or false statement; (B) the right to plead not guilty, or having already so pleaded, to persist in that plea; (C) the right to a jury trial; (D) the right to be represented by counsel — and if necessary have the court appoint counsel — at trial and at every other stage of the proceeding; (E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses; (F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere; (G) the nature of each charge to which the defendant is pleading;

(6) the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence.	(H) any maximum possible penalty, including imprisonment, fine, special assessment, forfeiture, restitution, and term of supervised release; (I) any mandatory minimum penalty; (J) the court's obligation to apply the sentencing guidelines, and the court's authority to depart from those guidelines under some circumstances; and (K) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.
(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.	(2) ***Ensuring That a Plea Is Voluntary***. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement). (3) ***Determining the Factual Basis for a Plea***. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(e) Plea Agreement Procedure. (1) **In General.** The attorney for the government and the attorney for the defendant — or the defendant when acting pro se — may agree that, upon the defendant's entering a plea of guilty or nolo contendere to a charged offense, or to a lesser or related offense, the attorney for the government will: (A) move to dismiss other charges; or (B) recommend, or agree not to oppose the defendant's request for a particular sentence or sentencing range, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Any such recommendation or request is not binding on the court; or (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Such a plea agreement is binding on the court once it is accepted by the court. The court shall not participate in any discussions between the parties concerning any such plea agreement.	**(c) Plea Agreement Procedure.** (1) ***In General.*** The attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and agree to a plea. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either the charged offense or a lesser or related offense, the plea agreement may specify that the attorney for the government will: (A) not bring, or will move to dismiss, other charges; (B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable (such a recommendation or request does not bind the court); or (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable (such a recommendation or request binds the court once the court accepts it).
(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, upon a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.	(2) ***Disclosing a Plea Agreement.*** The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.	**(3)** ***Judicial Consideration of a Plea Agreement*** (A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report. (B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request. **(4)** ***Accepting a Plea Agreement.*** If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11 (c)(1)(A) or (C), the agreed disposition will be included in the judgment.
(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.	**(5)** ***Rejecting a Plea Agreement.*** If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must on the record: (A) inform the parties that the court rejects the plea agreement; (B) advise the defendant personally in open court — or, for good cause, in camera — that the court may not follow the plea agreement and give the defendant an opportunity to withdraw the plea; and (C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.	**(d)** ***Withdrawing a Guilty or Nolo Contendere Plea.*** A defendant may withdraw a plea of guilty or nolo contendere as follows: **(1)** Before the court accepts a plea of guilty or a plea of nolo contendere, for any, or no, reason. **(2)** After the court accepts a plea of guilty or nolo contendere, but before it imposes sentence if: (A) the court rejects a plea agreement under Rule 11(c)(5); or (B) the defendant can show fair and just reasons for requesting the withdrawal. **(e)** ***Finality of Guilty or Nolo Contendere Plea.*** After the court imposes sentence the defendant may not withdraw a plea of guilty or nolo contendere and the plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.
(6) Inadmissibility of Pleas, Plea Discussions, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions: **(A)** a plea of guilty which was later withdrawn; **(B)** a plea of nolo contendere; **(C)** any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or **(D)** any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made in by the defendant under oath, on the record, and in the presence of counsel.	**(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements.** Except as otherwise provided in this subdivision, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions: **(1)** a plea of guilty that was later withdrawn; **(2)** a plea of nolo contendere; **(3)** any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or **(4)** any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.	
(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.	**(g) Recording the Proceedings.** The proceedings during which the defendant enters a plea must be recorded verbatim by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).
(h) Harmless Error. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.	**(h) Harmless Error.** A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

Committee Notes
Rule 11
December 1, 1999

COMMITTEE NOTE

The language of Rule 11 has been amended and reorganized as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Amended Rule 11(b)(1) requires the court to apprise the defendant of his or her rights before accepting a plea of guilty or nolo contendere. The list is generally the same as that in the current rule except that the reference to parole has been removed and the judge is now required under Rule 11(b)(1)(H) to advise the defendant of the possibility of a fine and special assessment as a part of a maximum possible sentence. Also, the list has been re-ordered.

Rule 11(c)(1)(A) includes a substantive change which recognizes a common type of plea agreement —that the government will "not bring" other charges.

The Committee considered whether to address the practice in some courts of using judges to facilitate plea agreements. The current rule indicates that "the court shall not participate in any discussions between the parties concerning such plea agreement." Some courts apparently believe that that language acts as a limitation only upon the judge taking the defendant's plea and thus permit other judges to serve as facilitators for reaching a plea agreement between the government and the defendant. *See, e.g., United States v. Torres*, 999 F.2d 376, 378 (9th Cir. 1993) (noting practice and concluding that presiding judge had not participated in a plea agreement that had resulted from discussions involving another judge). The Committee decided to leave the Rule as it is with the understanding that doing so was in no way intended to make any change in the existing law interpreting that provision.

Amended Rules 11(c)(3) to (5) address the topics of consideration, acceptance, and rejection of a plea agreement. The amendments are not intended to make any change in practice. The topics are discussed separately because in the past there has been some question about the possible interplay between the court's consideration of the guilty plea in conjunction with a plea agreement and sentencing and the ability of the defendant to withdraw a plea. *See United States v. Hyde*, 520 U.S. 670 (1997) (holding that plea and plea agreement need not be accepted or rejected as a single unit; "guilty pleas can be accepted while plea agreements are deferred, and the acceptance of the two can be separated in

time."). Similarly, the Committee decided to more clearly spell out in Rule 11(d) and 11(e) the ability of defendant to withdraw a plea. *See United States v. Hyde, supra.*

Finally, Rule 11(e) is a new provision, taken from Rule 32, that addresses the finality of a guilty or nolo contendere plea after the court imposes sentence. The provision makes it clear that it is not possible for a defendant to withdraw a plea after sentence is imposed.

Rule 12. Pleadings and Motions Before Trial; Defenses and Objections.	Rule 12. Pleadings And Pretrial Motions
(a) Pleadings and Motions. Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and nolo contendere. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.	**(a) Pleadings.** Pleadings in criminal proceedings are the indictment, the information, and the pleas of not guilty, guilty, and nolo contendere.
(b) Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial: **(1)** Defenses and objections based on defects in the institution of the prosecution; or **(2)** Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or **(3)** Motions to suppress evidence; or **(4)** Requests for discovery under Rule 16; or **(5)** Requests for a severance of charges or defendants under Rule 14.	**(b) Pretrial Motions.** **(1)** ***In General.*** The parties may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue. At the court's discretion, a motion may be written or oral. The following must be raised before trial: (A) a motion alleging a defect in the institution of the prosecution; (B) a motion alleging a defect in the indictment or information — but at any time during the proceeding, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense; (C) a motion to suppress evidence; (D) a Rule 14 motion to sever charges or defendants; and (E) a Rule 16 motion for discovery.

	(2) ***Notice of the Government's Intent to Use Evidence.*** (A) *At the Government's Discretion.* At the arraignment or as soon afterward as practicable, the government may give notice to the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under Rule 12(b)(1). (B) *At the Defendant's Request.* At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(1), request notice of the government's intent to use (in its evidence in chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.
(c) Motion Date. Unless otherwise provided by local rule, the court may, at the time of the arraignment or as soon thereafter as practicable, set a time for the making of pretrial motions or requests and, if required, a later date of hearing.	**(c) Motion Deadline.** The court may at the arraignment, or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing.
(d) Notice by the Government of the Intention to Use Evidence. **(1) At the Discretion of the Government.** At the arraignment or as soon thereafter as is practicable, the government may give notice to the defendant of its intention to use specified evidence at trial in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under subdivision (b)(3) of this rule. **(2) At the Request of the Defendant.** At the arraignment or as soon thereafter as is practicable the defendant may, in order to afford an opportunity to move to suppress evidence under subdivision (b)(3) of this rule, request notice of the government's intention to use (in its evidence in chief at trial) any evidence which the defendant may be entitled to discover under Rule 16 subject to any relevant limitations prescribed in Rule 16.	
(e) Ruling on Motion. A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.	**(d) Ruling on a Motion.** The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.

(f) Effect of Failure To Raise Defenses or Objections. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.	**(e) Waiver of a Defense, Objection, or Request.** A party waives any Rule 12(b)(1) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver.
(g) Records. A verbatim record shall be made of all proceedings at the hearing, including such findings of fact and conclusions of law as are made orally.	**(f) Records.** All proceedings at a motion hearing, including any findings of fact and conclusions of law made by the court, must be recorded by a court reporter or a suitable recording device.
(h) Effect of Determination. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be continued in custody or that bail be continued for a specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect the provisions of any Act of Congress relating to periods of limitations.	**(g) Defendant's Continued Custody or Release Status.** If the court grants a motion to dismiss based on a defect in the institution of the prosecution, in the indictment, or in the information, it may order the defendant to be released or detained under 18 U.S.C. § 3142 for a specified time until a new indictment or information is filed. This rule does not affect any federal statutory period of limitations.
(i) Production of Statements at Suppression Hearing. Rule 26.2 applies at a hearing on a motion to suppress evidence under subdivision (b)(3) of this rule. For purposes of this subdivision, a law enforcement officer is deemed a government witness.	**(h) Producing Statements at a Suppression Hearing.** Rule 26.2 applies at a suppression hearing under Rule 12(b)(1)(C). In a suppression hearing, a law enforcement officer is considered a government witness.

Committee Notes
Rule 12
December 1, 1999

COMMITTEE NOTE

The language of Rule 12 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The last sentence of current Rule 12(a), referring to the abolishment of "all other pleas, and demurrers and motions to quash" has been deleted as being unnecessary.

Rule 12(b)(2) is composed of what is currently Rule 12(d). The Committee believed that that provision, which addresses the government's requirement to disclose discoverable information for the purpose of facilitating timely defense objections and motions, was more appropriately associated with the pretrial motions specified in Rule 12(b)(1).

Rule 12(c) includes a substantive change. The reference to the "local rule" exception has been deleted to make it clear that judges should be encouraged to set deadlines for motions. The Committee believed that doing so promotes more efficient case management, especially when there is a heavy docket of pending cases. Although the rule permits some discretion in setting a date for motion hearings, the Committee believed that doing so at an early point in the proceedings would also promote judicial economy.

Moving the language in current Rule 12(d) caused the relettering of the subdivisions following Rule 12(c).

Although amended Rule 12(e) is a revised version of current Rule 12(f), the Committee intends to make no change in the current law regarding waivers of motions or defenses.

Rule 12.1. Notice of Alibi	Rule 12.1. Notice of Alibi Defense
(a) Notice by Defendant. Upon written demand of the attorney for the government stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten days, or such different time as the court may direct, upon the attorney for the government a written notice of the defendant's intention to offer a defense of alibi. Such notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defendant intends to rely to establish such alibi.	**(a) Government's Request for Notice and Defendant's Response.** **(1)** ***Government's Request.*** The attorney for the government may request in writing that the defendant notify the attorney for the government of any intended alibi defense. The request must state the time, date, and place of the alleged offense. **(2)** ***Defendant's Response.*** Within 10 days after the request, or some other time the court directs, the defendant must serve written notice on the attorney for the government of any intended alibi defense. The defendant's notice must state the specific places where the defendant claims to have been at the time of the alleged offense and the names, addresses, and telephone numbers of the alibi witnesses on whom the defendant intends to rely.
(b) Disclosure of Information and Witness. Within ten days thereafter, but in no event less than ten days before trial, unless the court otherwise directs, the attorney for the government shall serve upon the defendant or the defendant's attorney a written notice stating the names and addresses of the witnesses upon whom the government intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied upon to rebut testimony of any of the defendant's alibi witnesses.	**(b) Disclosure of Government Witnesses.** **(1)** ***Disclosure.*** If the defendant serves a Rule 12.1(a)(2) notice, the attorney for the government must disclose in writing to the defendant, or the defendant's attorney, the names, addresses, and telephone numbers of the witnesses the government intends to rely on to establish the defendant's presence at the scene of the alleged offense, and any government rebuttal witnesses to the defendant's alibi witnesses. **(2)** ***Time to Disclose.*** Unless the court directs otherwise, the attorney for the government must give notice under Rule 12.1(b)(1) within 10 days after the defendant serves notice of an intended alibi defense under Rule 12.1(a)(2), but no later than 10 days before trial.
(c) Continuing Duty to Disclose. If prior to or during trial, a party learns of an additional witness whose identity, if known, should have been included in the information furnished under subdivision (a) or (b), the party shall promptly notify the other party or the other party's attorney of the existence and identity of such additional witness.	**(c) Continuing Duty to Disclose.** Both the attorney for the government and the defendant must promptly disclose in writing to the other party the name, address, and telephone numbers of any additional witness if: **(1)** the disclosing party learns of the witness before or during trial; and **(2)** the witness should have been disclosed under Rule 12.1(a) or (b) if the disclosing party had earlier known of the witness.

(d) Failure to Comply. Upon failure of either party to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at, the scene of the alleged offense. This rule shall not limit the right of the defendant to testify.	**(d) Exceptions.** For good cause the court may grant an exception to any requirement of Rule 12.1 (a) -(c).
(e) Exceptions. For good cause shown, the court may grant an exception to any of the requirements of subdivisions (a) through (d) of this rule.	**(e) Failure to Comply.** If a party fails to comply with this rule, the court may exclude the testimony of any undisclosed witness regarding the defendant's alibi. This rule does not limit the defendant's right to testify.
(f) Inadmissibility of Withdrawn Alibi. Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connections with such intention, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.	**(f) Inadmissibility of Withdrawn Intent.** Evidence of an intent to rely on an alibi defense, later withdrawn, or of statements made in connection with that intent, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intent.

Committee Notes
Rule 12.1
December 1, 1999

COMMITTEE NOTE

The language of Rule 12.1 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Current Rules12.1(d) and 12.1(e) have been switched in the amended rule to improve the organization of the rule.

Finally, the amended rule includes a new requirement that in providing the names and addresses of alibi and any rebuttal witnesses, the parties must also provide the phone numbers of those witnesses. *See* Rule 12.1(a)(2), Rule 12.1(b)(1), and Rule 12.1(c). The Committee believed that requiring such information would facilitate locating and interviewing those witnesses.

Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition	Rule 12.2. Notice of Insanity Defense; Mental Examination
(a) Defense of Insanity. If a defendant intends to rely upon the defense of insanity at the time of the alleged offense, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.	**(a) Notice of an Insanity Defense.** A defendant who intends to assert a defense of insanity at the time of the alleged offense must notify the attorney for the government in writing within the time provided for filing a pretrial motion, or at any later time the court directs. A defendant who fails to do so cannot rely on an insanity defense. The court may — for good cause — allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.
(b) Expert Testimony of Defendant's Mental Condition. If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of guilt, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.	**(b) Notice of Expert Evidence of a Mental Condition.** If a defendant intends to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on either (1) the issue of guilt or (2) the issue of punishment in a capital case, the defendant must — within the time provided for the filing of pretrial motions or at a later time as the court directs — notify the attorney for the government in writing of this intention and file a copy of the notice with the clerk. The court may, for good cause, allow late filing of the notice or grant additional time to the parties to prepare for trial or make any other appropriate order.

(c) Mental Examination of Defendant. In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to an examination pursuant to 18 U.S.C. 4241 or 4242. No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony.	**(c) Mental Examination.** (1) ***Authority to Order Examination; Procedures.*** If the defendant provides notice under Rule 12.2(a), the court must, upon the government's motion, order the defendant to be examined under 18 U.S.C. § 4242. If the defendant provides notice under Rule 12.2(b) the court may, upon the government's motion, order the defendant to be examined under procedures ordered by the court. (2) ***Disclosing Results and Reports of Capital Sentencing Examination.*** The results and reports of any examination conducted solely under Rule 12.2 (c)(1) after notice under Rule 12.2(b)(2) must be sealed and must not be disclosed to any attorney for the government or the defendant unless the defendant is found guilty of one or more capital crimes and the defendant confirms an intent to offer during sentencing proceedings expert evidence on mental condition. (3) ***Disclosing Results and Reports of the Defendant's Expert Examination.*** After disclosure under Rule 12.2(c)(2) of the results and reports of the government's examination, the defendant must disclose to the government the results and reports of any examination on mental condition conducted by the defendant's expert about which the defendant intends to introduce expert evidence. (4) ***Admitting a Defendant's Statements.*** No statement made by a defendant in the course of any examination conducted under this rule (whether conducted with or without the defendant's consent), no testimony by the expert based on the statement, and no other fruits of the statement may be admitted into evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant: (i) has introduced evidence after notice under Rule 12.2(a) or (b)(1), or (ii) has introduced expert evidence after notice under Rule 12.2(b)(2).

(d) Failure to Comply. If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's guilt.	**(d) Failure to Comply.** If the defendant fails to give notice under Rule 12.2(b) or does not submit to an examination when ordered under Rule 12.2(c), the court may exclude any expert evidence from the defendant on the issue of the defendant's mental disease, mental defect, or any other mental condition bearing on the defendant's guilt or the issue of punishment in a capital case.
(e) Inadmissibility of Withdrawn Intention. Evidence of an intention as to which notice was given under subdivision (a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.	**(e) Inadmissibility of Withdrawn Intention.** Evidence of an intention as to which notice was given under Rule 12.2(a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

Committee Notes
Rule 12.2
December 1, 1999

COMMITTEE NOTE

The language of Rule 12.2 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The substantive changes to Rule 12.2 are designed to address five issues. First, the amendments clarify that a court may order a mental examination for a defendant who has indicated an intention to raise a defense of mental condition bearing on the issue of guilt. Second, the defendant is required to give notice of an intent to present expert evidence of the defendant's mental condition during a capital sentencing proceeding. Third, the amendments address the ability of the trial court to order a mental examination for a defendant who has given notice of an intent to present evidence of mental condition during capital sentencing proceedings and when the results of that examination may be disclosed. Fourth, the amendment addresses the timing of disclosure of the results and reports of the defendant's expert examination. Finally, the amendment extends the sanctions for failure to comply with the rule's requirements to the punishment phase of a capital case.

Under current Rule 12.2(b), a defendant who intends to offer expert testimony on the issue of his or her mental condition on the question of guilt must provide a pretrial notice of that intent. The amendment extends that notice requirement to a defendant who intends to offer expert evidence, testimonial or otherwise, on his or her mental condition during a capital sentencing proceeding. As several courts have recognized, the better practice is to require pretrial notice of that intent so that any mental examinations can be conducted without unnecessarily delaying capital sentencing proceedings. *See, e.g., United States v. Beckford*, 962 F. Supp. 748, 754-64 (E.D. Va. 1997); *United States v. Haworth*, 942 F. Supp. 1406, 1409 (D.N.M. 1996). The amendment adopts that view.

A change to Rule 12.2(c) clarifies the authority of the court to order mental examinations for a defendant. As currently written, the subdivision implies that the trial court has discretion to grant a government motion for a mental examination of a defendant who has indicated under Rule 12.2(a) an intent to raise the defense of insanity. But the corresponding statute, 18 U.S.C. § 4242, requires the court to order an examination if the defendant has provided notice of an intent to raise that defense and the government moves for the examination. The amendment conforms Rule 12.2(c) to the statute. Any examination

conducted on the issue of the insanity defense would thus be conducted in accordance with the procedures set out in the statutory provision.

While the authority of a trial court to order a mental examination of a defendant who has registered an intent to raise the insanity defense seems clear, the authority under the Rule to order an examination of a defendant who intends only to present expert testimony on his or her mental condition on the issue of guilt is not as clear. Some courts have concluded that a court may order such an examination. *See, e.g., United States v. Stackpole*, 811 F.2d 689, 697 (1st Cir. 1987); *United States v. Buchbinder*, 796 F.2d 910, 915 (1st Cir. 1986); and *United States v. Halbert*, 712 F.2d 388 (9th Cir. 1983). In *United States v. Davis*, 93 F.3d 1286 (6th Cir. 1996), however, the court in a detailed analysis of the issue concluded that the district court lacked the authority under the rule to order a mental examination of a defendant who had provided notice of an intent to offer evidence on a defense of diminished capacity. The court noted first that the defendant could not be ordered to undergo commitment and examination under 18 U.S.C. § 4242, because that provision relates to situations when the defendant intends to rely on the defense of insanity. The court also rejected the argument that the examination could be ordered under Rule 12.2(c) because this was, in the words of the rule, an "appropriate case." The court concluded, however, that the trial court had the inherent authority to order such an examination.

The amendment clarifies that the authority of a court to order a mental examination under Rule 12.2(c) extends to those cases when the defendant has provided notice, under Rule 12.2(b), of an intent to present expert testimony on the defendant's mental condition, either on the merits or at capital sentencing. *See, e.g., United States v. Hall*, 152 F.3d 381 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 1767 (1999).

The amendment to Rule 12.2(c) is not intended to affect any statutory or inherent authority a court may have to order other mental examinations.

The amendment leaves to the court the determination of what procedures should be used for a court-ordered examination on the defendant's mental condition (apart from insanity). As currently provided in the Rule, if the examination is being ordered in connection with the defendant's stated intent to present an insanity defense, the procedures are dictated by 18 U.S.C. § 4242. On the other hand, if the examination is being ordered in conjunction with a stated intent to present expert testimony on the defendant's mental condition (not amounting to a defense of insanity) either at the guilt or sentencing phases, no specific statutory counterpart is available. Accordingly, the court is given the discretion to specify the procedures to be used. In so doing, the court may certainly be informed by other provisions, which address hearings on a defendant's mental condition. *See, e.g.*, 18 U.S.C. § 4241, et. seq.

Additional changes address the question when the results of an examination ordered under Rule 12.2(b)(2) may, or must, be disclosed. The Supreme Court has recognized that use of a defendant's statements during a court-ordered examination may compromise the defendant's right against self-incrimination. *See Estelle v. Smith*, 451 U.S. 454 (1981) (defendant's privilege against self-incrimination violated when he was not advised of right to remain silent during court-ordered examination and prosecution introduced statements during capital sentencing hearing). But subsequent cases have indicated that the defendant waives the privilege if the defendant introduces expert testimony on his or her mental condition. *See, e.g., Powell v. Texas*, 492 U.S. 680, 683-84 (1989); *Buchanan v. Kentucky*, 483 U.S. 402, 421-24 (1987); *Presnell v. Zant*, 959 F.2d 1524, 1533 (11th Cir. 1992); *Williams v. Lynaugh*, 809 F.2d 1063, 1068 (5th Cir. 1987); *United States v. Madrid*, 673 F.2d 1114, 1119-21 (10th Cir. 1982). That view is reflected in Rule 12.2(c) which indicates that the statements of the defendant may be used against the defendant only after the defendant has introduced testimony on his or her mental condition. What the current rule does not address is if, and to what extent, the prosecution may see the results of the examination, which may include the defendant's statements, when evidence of the defendant's mental condition is being presented solely at a capital sentencing proceeding.

The proposed change in Rule 12.2(c)(2) adopts the procedure used by some courts to seal or otherwise insulate the results of the examination until it is clear that the defendant will introduce expert evidence about his or her mental condition at a capital sentencing hearing; i.e., after a verdict of guilty on one or more capital crimes, and a reaffirmation by the defendant of an intent to introduce expert mental-condition evidence in the sentencing phase. *See, e.g., United States v. Beckford*, 962 F. Supp. 748 (E.D. Va. 1997). Most courts that have addressed the issue have recognized that if the government obtains early access to the accused's statements, it will be required to show that it has not made any derivative use of that evidence. Doing so can consume time and resources. *See, e.g., United States v. Hall, supra*, 152 F.3d at 398 (noting that sealing of record, although not constitutionally required, "likely advances interests of judicial economy by avoiding litigation over [derivative use issue]").

Except as provided in Rule 12.2(c)(3), the rule does not address the time for disclosing results and reports of any expert examination conducted by the defendant. New Rule 12.2(c)(3) provides that upon disclosure under subdivision (c)(2) of the results and reports of the government's examination, disclosure of the results and reports of the defendant's expert examination is mandatory, if the defendant intends to introduce expert evidence relating to the examination.

Rule 12.2(c), as previously written, restricted admissibility of the defendant's statements during the course of an examination conducted under the rule to an issue respecting mental condition on which the defendant "has introduced testimony" — expert or otherwise. As amended, Rule 12.2(c)(4)

provides that the admissibility of such evidence in a capital sentencing proceeding is triggered only by the defendant's introduction of expert evidence. The Committee believed that, in this context, it was appropriate to limit the government's ability to use the results of its expert mental examination to instances in which the defendant has first introduced expert evidence on the issue.

Rule 12.2(d) has been amended to extend sanctions for failure to comply with the rule to the penalty phase of a capital case. The selection of an appropriate remedy for the failure of a defendant to provide notice or submit to an examination under subdivisions (b) and (c) is entrusted to the discretion of the court. While subdivision (d) recognizes that the court may exclude the evidence of the defendant's own expert in such a situation, the court should also consider "the effectiveness of less severe sanctions, the impact of preclusion on the evidence at trial and the outcome of the case, the extent of prosecutorial surprise or prejudice, and whether the violation was willful." *Taylor v. Illinois*, 484 U.S. 400, 414 n.19 (1988) (citing *Fendler v. Goldsmith*, 728 F.2d 1181 (9th Cir. 1983)).

Rule 12.3. Notice of Defense Based upon Public Authority	Rule 12.3. Notice of Public-Authority Defense
(a) Notice by Defendant; Government Response; Disclosure of Witnesses. **(1) Defendant's Notice and Government's Response.** A defendant intending to claim a defense of actual or believed exercise of public authority on behalf of a law enforcement or Federal intelligence agency at the time of the alleged offense shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, serve upon the attorney for the Government a written notice of such intention and file a copy of such notice with the clerk. Such notice shall identify the law enforcement or Federal intelligence agency and any member of such agency on behalf of which and the period of time in which the defendant claims the actual or believed exercise of public authority occurred. If the notice identifies a Federal intelligence agency, the copy filed with the clerk shall be under seal. Within ten days after receiving the defendant's notice, but in no event less than twenty days before the trial, the attorney for the Government shall serve upon the defendant or the defendant's attorney a written response which shall admit or deny that the defendant exercised the public authority identified in the defendant's notice.	**(a) Notice of Defense and Disclosure of Witnesses.** **(1)** ***Notice in General.*** A defendant who intends to assert a defense of actual or believed exercise of public authority on behalf of a law-enforcement agency or federal intelligence agency at the time of the alleged offense must so notify the attorney for the government in writing and must file a copy of the notice with the clerk within the time provided for filing a pretrial motion, or at any later time the court directs. The notice filed with the clerk must be under seal if the notice identifies a federal intelligence agency under whose authority the defendant claims to have acted. **(2)** ***Contents*** **of Notice.** The notice must contain the following information: (A) the law-enforcement agency or federal intelligence agency involved; (B) the agency member on whose behalf the defendant claims to have acted; and (C) the time during which the defendant claims to have acted with public authority. **(3)** ***Response to Notice.*** The attorney for the government must serve a written response on the defendant or the defendant's attorney within 10 days after receiving the defendant's notice, but no later than 20 days before trial. The response must admit or deny that the defendant exercised the public authority identified in the defendant's notice.

(2) Disclosure of Witnesses. At the time that the Government serves its response to the notice or thereafter, but in no event less than twenty days before trial, the attorney for the Government may serve upon the defendant or the defendant's attorney a written demand for the names and addresses of the witnesses, if any, upon whom the defendant intends to rely in establishing the defense identified in the notice. Within seven days after receiving the Government's demand, the defendant shall serve upon the attorney for the Government a written statement of the names and addresses of any such witnesses. Within seven days after receiving the defendant's written statement, the attorney for the Government shall serve upon the defendant or the defendant's attorney a written statement of the names and addresses of the witnesses, if any, upon whom the Government intends to rely in opposing the defense identified in the notice.	**(4)** ***Disclosing Witnesses.*** (A) *Government's Request.* The attorney for the government may request in writing that the defendant disclose the name, address, and telephone number of each witness the defendant intends to rely on to establish a public-authority defense. The attorney for the government may serve the request when the government serves its response to the defendant's notice under Rule 12.3(a)(1), or later, but must serve the request no later than 20 days before trial. (B) *Defendant's Response.* Within 7 days after receiving the government's request, the defendant must serve on the attorney for the government a written statement of the name, address, and telephone number of each witness. (C) *Government's Reply.* Within 7 days after receiving the defendant's statement, the attorney for the government must serve on the defendant or the defendant's attorney a written statement of the name, address, and telephone number of each witness the government intends to rely on to oppose the defendant's public-authority defense.
(3) Additional Time. If good cause is shown, the court may allow a party additional time to comply with any obligation imposed by this rule.	**(5)** ***Additional Time.*** The court may for good cause allow a party additional time to comply with this rule.
(b) Continuing Duty to Disclose. If, prior to or during trial, a party learns of any additional witness whose identity, if known, should have been included in the written statement furnished under subdivision (a)(2) of this rule, that party shall promptly notify in writing the other party or the other party's attorney of the name and address of any such witness.	**(b) Continuing Duty to Disclose.** Both the attorney for the government and the defendant or the defendant's attorney must promptly disclose in writing to the other party the name, address, and telephone number of any additional witness if: **(1)** the disclosing party learns of the witness before or during trial; and **(2)** the witness should have been disclosed under Rule 12.3(a)(4) if the disclosing party had earlier known of the witness.
(c) Failure to Comply. If a party fails to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered in support of or in opposition to the defense, or enter such other order as it deems just under the circumstances. This rule shall not limit the right of the defendant to testify.	**(c) Failure to Comply.** If a party fails to comply with this rule, the court may exclude the testimony of any undisclosed witness regarding the public-authority defense. This rule does not limit the defendant's right to testify.

(d) Protective Procedures Unaffected. This rule shall be in addition to and shall not supersede the authority of the court to issue appropriate protective orders, or the authority of the court to order that any pleading be filed under seal.	**(d) Protective Procedures Unaffected.** This rule does not limit the court's authority to issue appropriate protective orders or to order that any filings be under seal.
(e) Inadmissibility of Withdrawn Defense Based upon Public Authority. Evidence of an intention as to which notice was given under subdivision (a), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.	**(e) Inadmissibility of Withdrawn Defense Based upon Public Authority.** Evidence of an intention as to which notice was given under Rule 12.3(a), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

Committee Notes
Rule 12.3
December 1, 1999

COMMITTEE NOTE

The language of Rule 12.3 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The Committee considered the issue of whether (as currently provided in Rule 12.3) a defendant could invoke the defense of public authority on either an actual or believed exercise of public authority. The Committee ultimately decided that any attempt to provide the defendant with a "right" to assert the defense was not a matter within the purview of the Committee under the Rules Enabling Act. The Committee decided to retain the current language, which recognizes, as a nonsubstantive matter, that if the defendant intends to raise the defense, notice must be given. Thus, the Committee decided not to make any changes in the current rule regarding the availability of the defense.

Substantive changes have been made in Rule 12.3(a)(4) and 12.3(b). As in Rule 12.1, the Committee decided to include in the restyled rule the requirement that the parties provide the telephone numbers of any witnesses disclosed under the rule.

Rule 13. Trial Together of Indictments or Informations	Rule 13. Joint Trial of Separate Cases
The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.	The court may order that separate cases be tried together as though brought in a single indictment or information if all offenses and all defendants could have been joined in a single indictment or information.

Committee Notes
Rule 13
December 1, 1999

COMMITTEE NOTE

The language of Rule 13 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 14. Relief from Prejudicial Joinder	Rule 14. Relief from Prejudicial Joinder
If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.	**(a) Relief.** If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires. **(b) Defendants' Statements.** Before ruling on a defendant's motion to sever, the court may order the attorney for the government to deliver to the court for in camera inspection any defendants' statements that the government intends to use as evidence.

Committee Notes
Rule 14
December 1, 1999

COMMITTEE NOTE

The language of Rule 14 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The reference to a defendant's "confession" in the last sentence of the current rule has been deleted. The Committee believed that the reference to the "defendant's statements" in the amended rule would fairly embrace any confessions or admissions by a defendant.

Rule 15. Depositions	Rule 15. Depositions
(a) When Taken. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place. If a witness is detained pursuant to section 3144 of title 18, United States Code, the court on written motion of the witness and upon notice to the parties may direct that the witness' deposition be taken. After the deposition has been subscribed the court may discharge the witness.	**(a) When Taken.** **(1)** ***In General.*** A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant such motion due to exceptional circumstances in the case and in the interest of justice. If the court orders the deposition to be taken, it may also require the deponent to produce at the deposition any designated book, paper, document, record, recording, data, or other material not privileged. **(2)** ***Detained Material Witness.*** A witness who is detained under 18 U.S.C. § 3144 may request to be deposed by filing a written motion and giving notice to the parties. The court may then order that the deposition be taken and may discharge the witness after the witness has signed under oath the deposition transcript.
(b) Notice of Taking. The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time or change the place for taking the deposition. The officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce the defendant at the examination and keep the defendant in the presence of the witness during the examination, unless, after being warned by the court that disruptive conduct will cause the defendant's removal from the place of the taking of the deposition, the defendant persists in conduct which is such as to justify exclusion from that place. A defendant not in custody shall have the right to be present at the examination upon request subject to such terms as may be fixed by the court, but a failure, absent good cause shown, to appear after notice and tender of expenses in accordance with subdivision (c) of this rule shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.	**(b) Notice.** **(1)** ***In General.*** A party seeking to take a deposition must give every other party reasonable written notice of the deposition's date and location. The notice must state the name and address of each deponent. If requested by a party receiving the notice, the court for good cause may change the deposition's date or location. **(2)** ***To the Custodial Officer.*** A party seeking to take the deposition must also notify the officer who has custody of the defendant of the scheduled date and location.

	(c) Defendant's Presence. **(1)** ***Defendant in Custody.*** The officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant: (A) waives in writing the right to be present; or (B) persists in disruptive conduct justifying exclusion after the court has warned the defendant that disruptive conduct will result in the defendant's exclusion. **(2)** ***Defendant Not in Custody.*** A defendant who is not in custody has the right upon request to be present at the deposition, subject to any conditions imposed by the court. If the government tenders the defendant's expenses as provided in Rule 15(d) but the defendant still fails to appear, the defendant — absent good cause — waives both the right to appear and any objection to the taking and use of the deposition based on that right.
(c) Payment of Expenses. Whenever a deposition is taken at the instance of the government, or whenever a deposition is taken at the instance of a defendant who is unable to bear the expenses of the taking of the deposition, the court may direct that the expense of travel and subsistence of the defendant and the defendant's attorney for attendance at the examination and the cost of the transcript of the deposition shall be paid by the government.	**(d) Expenses.** If the deposition was requested by the government the court may — or if the defendant is unable to bear the deposition expenses the court must — order the government to pay: **(1)** the travel and subsistence expenses of the defendant and the defendant's attorney to attend the deposition, and **(2)** the deposition transcript costs.
(d) How Taken. Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules, provided that (1) in no event shall a deposition be taken of a party defendant without that defendant's consent, and (2) the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself. The government shall make available to the defendant or the defendant's counsel for examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the government and to which the defendant would be entitled at the trial.	**(e) How Taken.** Unless these rules or a court order provides otherwise, a deposition must be filed, and it must be taken in the same manner as a deposition in a civil action, except that: **(1)** A defendant may not be deposed without that defendant's consent. **(2)** The scope and manner of the deposition examination and cross-examination must be the same as would be allowed during trial. **(3)** The government must provide to the defendant or the defendant's attorney, for use at the deposition, any statement of the deponent in the government's possession to which the defendant would be entitled at trial.

(e) Use. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with that witness' deposition. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require the offering of all of it which is relevant to the part offered and any party may offer other parts.	**(f) Use as Evidence** **(1)** ***Substantive and Impeachment Use.*** If admissible under the Federal Rules of Evidence, a party may use all or part of a deposition — (A) as substantive evidence at a trial or hearing if: (i) the witness is unavailable as defined in Federal Rule of Evidence 804(a); or (ii) the witness testifies inconsistently with the deposition at the trial or hearing; and (B) to impeach the deponent. **(2)** ***Parts of a Deposition.*** If a party introduces in evidence only a part of a deposition, an adverse party may require the introduction of other admissible parts that ought in fairness to be considered with the part introduced. Any party may offer other parts.
(f) Objections to Deposition Testimony. Objections to deposition testimony or evidence or parts thereof and the grounds for the objection shall be stated at the time of the taking of the deposition.	**(g) Objections.** A party objecting to deposition testimony or evidence must state the grounds for the objection during the deposition.
(g) Deposition by Agreement Not Precluded. Nothing in this rule shall preclude the taking of a deposition, orally or upon written questions, or the use of a deposition, by agreement of the parties with the consent of the court.	**(h) Agreed Depositions Permitted.** The parties may by agreement take and use a deposition with the court's consent.

Committee Notes
Rule 15
December 1, 1999

COMMITTEE NOTE

The language of Rule 15 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

In Rule 15(a), the list of materials to be produced has been amended to include the expansive term "data" to reflect the fact that in an increasingly technological culture, the information may exist in a format not already covered by the more conventional list, such as a book or document.

The last portion of current Rule 15(b), dealing with the defendant's presence at a deposition, has been moved to amended Rule 15(c).

Rule 15(d), which addresses the payment of expenses incurred by the defendant and the defendant's attorney, has been changed. The Committee discussed the issue of payment of expenses raised in restyled Rule 15(d). Under the current rule, if the government requests the deposition, or if the defendant requests the deposition and is unable to pay for it, the court *may* direct the government to pay for travel and subsistence expenses for both the defendant and the defendant's attorney. In either case, the current rule requires the government to pay for the transcript. Under the amended rule, if the deposition was requested by the government, the court *must* require the government to pay subsistence and travel expenses and the cost of the deposition transcript. If the defendant is unable to pay the deposition expenses, the court *must* order the government to pay subsistence, travel, and the deposition transcript costs—regardless of who requested the deposition.

Rule 15(f)(2) comports with the familiar rule of optional completeness in Federal Rule of Evidence 106. Under that rule, once a party introduces a portion of a item of evidence, the opponent may require the proponent to introduce other parts of the evidence which ought in fairness be considered. In making this change, the Committee intended to make no substantive change and noted that the revision parallels similar language in Federal Rule of Civil Procedure 32(a)(4).

Rule 16. Discovery and Inspection	Rule 16. Discovery and Inspection
(a) Governmental Disclosure of Evidence. **(1) Information Subject to Disclosure.** **(A) Statement of Defendant.** Upon request of a defendant the government must disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. The government must also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial. Upon request of a defendant which is an organization such as a corporation, partnership, association, or labor union, the government must disclose to the defendant any of the foregoing statements made by a person who the government contends (1) was, at the time of making the statement, so situated as a director, officer, employee or agent as to have been able legally to bind the defendant in respect to the subject of the statement, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to that alleged conduct in which the person was involved.	**(a) Government's Disclosure.** **(1) *Discloseable Information.*** (A) *Defendant's Oral Statement.* Upon request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial. (B) *Defendant's Written or Recorded Statement.* Upon request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following: (i) any relevant written or recorded statement by the defendant if: (a) the statement is within the government's possession, custody, or control; and (b) the attorney for the government knows — or through due diligence could know — that the statement exists; (ii) the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and (iii) the defendant's recorded testimony before a grand jury relating to the charged offense.
	(C) *Organizational Defendant.* Upon request, if the defendant is an organization, the government must disclose to the defendant any statement described in Rule 16(a)(1)(A) and (B) if the government contends that the person making the statement:

	(i) was legally able to bind the defendant regarding the subject of the statement because of that person's position as the defendant's director, officer, employee, or agent; or (ii) was personally involved in the alleged conduct constituting the offense and was legally able to bind the defendant regarding that conduct because of that person's position as the defendant's director, officer, employee, or agent.
(B) Defendant's Prior Record. Upon request of the defendant, the government shall furnish to the defendant such copy of the defendant's prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.	(D) *Defendant's Prior Record.* Upon request, the government must furnish the defendant with a copy of the defendant's prior criminal record that is within the government's possession, custody, or control if the attorney for the government knows — or through due diligence could know — that the record exists.
(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.	(E) *Documents and Objects.* Upon the defendant's request, the government must permit the defendant to inspect and copy, or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control, and: (i) the item is material to the preparation of the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant.
(D) Reports of Examinations and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.	(F) *Reports of Examinations and Tests.* Upon request, the government must permit a defendant to inspect and copy, or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if: (i) the item is within the government's possession, custody, or control; (ii) the attorney for the government knows — or through due diligence could know — that the item exists; and (iii) the item is material to the preparation of the defense or the government intends to use the item in its case-in-chief at trial.

(E) Expert Witnesses. At the defendant's request, the government shall disclose to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case in chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) of this rule and the defendant complies, the government shall, at the defendant's request, disclose to the defendant a written summary of testimony the government intends to use on the Rules 702, 703, or 705 as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subdivision shall describe the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications.	(G) *Expert Testimony*. Upon request, the government must give to the defendant a written summary of any testimony the government intends to use in its case-in-chief at trial under Federal Rules of Evidence 702, 703, or 705. The summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.
(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), (D), and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case. Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.	**(2)** ***Nondisclosable Information.*** Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agent in connection with the investigation or prosecution of the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.
(3) Grand Jury Transcripts. Except as provided in Rules 6, 12(i) and 26.2, and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.	**(3)** ***Grand Jury Transcripts.*** This rule does not apply to the discovery or inspection of a grand jury's recorded proceedings, except as provided in Rules 6, 12(h), 16(a)(1), and 26.2.
[(4) Failure to Call Witness.] (Deleted Dec. 12, 1975)	
(b) The Defendant's Disclosure of Evidence. **(1) Information Subject to Disclosure.** **(A) Documents and Tangible Objects.** If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.	**(b) Defendant's Disclosure.** **(1)** ***Discloseable Information.*** (A) *Documents and Objects*. If the defendant requests disclosure under Rule 16(a)(1)(E), and the government complies, then the defendant must permit the government, upon request, to inspect and copy, or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if: (i) the item is within the defendant's possession, custody, or control; and (ii) the defendant intends to use the item in the defendant's case-in-chief at trial.

(B) Reports of Examinations and Tests. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports related to that witness' testimony.	(B) *Reports of Examinations and Tests.* If the defendant requests disclosure under Rule 16(a)(1)(F), then upon compliance and the government's request, the defendant must permit the government to inspect and copy, or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if: (i) the item is within the defendant's possession, custody, or control; and (ii) the defendant intends to use the item in the defendant's case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony.
(C) Expert Witnesses. Under the following circumstances, the defendant shall, at the government's request, disclose to the government a written summary of testimony that the defendant intends to use on the Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial: (i) if the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, or (ii) if the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition. This summary shall describe the witnesses' opinions, the bases and reasons for those opinions, and the witnesses' qualifications.	(C) *Expert Testimony.* If the defendant requests disclosure under Rule 16(a)(1)(G), then upon compliance and the government's request, the defendant must give the government a written summary of any testimony the defendant intends to use as evidence at trial under Federal Rules of Evidence 702, 703, or 705. The summary must describe the witness's opinions, the bases and reasons for these opinions, and the witness's qualifications.
(2) Information Not Subject To Disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or the defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, the defendant's agents or attorneys.	(2) ***Nondisclosable Information.*** Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of: (A) reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; or (B) a statement made to the defendant, or the defendant's attorney or agent, by: (i) the defendant; (ii) a government or defense witness; or (iii) a prospective government or defense witness.
[(3) Failure to Call Witness.] (Deleted Dec. 12, 1975)	

(c) Continuing Duty to Disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, such party shall promptly notify the other party or that other party's attorney or the court of the existence of the additional evidence or material.	**(c) Continuing Duty to Disclose.** A party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other party or the court, if: **(1)** the evidence or material is subject to discovery or inspection under this rule; and **(2)** the other party previously requested, or the court ordered, its production.
(d) Regulation of Discovery. **(1) Protective and Modifying Orders.** Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.	**(d) Regulating Discovery.** **(1)** ***Protective and Modifying Orders.*** At any time the court may for good cause deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal.
(2) Failure To Comply With a Request. If at any time during the course of proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.	**(2)** ***Failure to Comply.*** If a party fails to comply with Rule 16, the court may: (A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions; (B) grant a continuance; (C) prohibit that party from introducing the undisclosed evidence; or (D) enter any other order that is just under the circumstances.
(e) Alibi Witnesses. Discovery of alibi witnesses is governed by Rule 12.1.	

Committee Notes
Rule 16
December 1, 1999

COMMITTEE NOTE

The language of Rule 16 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Current Rule 16(a)(1)(A) is now located in Rule 16(a)(1)(A), (B) and (C). Current Rule 16(a)(1)(B), (C), (D) and (E) have been relettered.

Amended Rule 16(b)(1)(B) includes a change that may be substantive in nature. Rule 16(a)(1)(E) and 16(a)(1)(F) require production of specified information if the government intends to "use" the information "in its case-in-chief at trial." The Committee believed that the language in revised Rule 16(b)(1)(B), which deals with a defendant's disclosure of information to the government, should track the similar language in revised Rule 16(a)(1). In Rule 16(b)(1)(B)(ii), the Committee changed the current provision which reads: "the defendant intends to *introduce* as evidence" to the "defendant intends to *use* the item . . ." The Committee recognized that this might constitute a substantive change in the rule but believed that it was a necessary conforming change with the provisions in 16(a)(1)(E) and (F), noted *supra*, regarding use of evidence by the government.

In amended Rule 16(d)(1), the last phrase in the current subdivision — which refers to a possible appeal of the court's discovery order—has been deleted. In the Committee's view, no substantive change results from that deletion. The language is unnecessary because the court, regardless of whether there is an appeal, will have maintained the record.

Finally, current Rule 16(e), which addresses the topic of notice of alibi witnesses, has been deleted as being unnecessarily duplicative of Rule 12.1.

Rule 17. Subpoena	Rule 17. Subpoena
(a) For Attendance of Witnesses; Form; Issuance. A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. A subpoena shall be issued by a United States magistrate judge in a proceeding before that magistrate judge, but it need not be under the seal of the court.	**(a) Content.** A subpoena must state the court's name and the title of the proceeding, include the seal of the court, and command the witness to attend and testify at the time and place the subpoena specifies. The clerk must issue a blank subpoena — signed and sealed — to the party requesting it and that party must fill in the blanks before the subpoena is served.
(b) Defendants Unable to Pay. The court shall order at any time that a subpoena be issued for service on a named witness upon an ex parte application of a defendant upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense. If the court orders the subpoena to be issued, the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government.	**(b) Defendant Unable to Pay.** Upon a defendant's ex parte application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness's fees and the necessity of the witness's presence for an adequate defense. If the court orders a subpoena to be issued, the process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas.
(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.	**(c) Producing Documents and Objects.** **(1)** A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them. **(2)** On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.
(d) Service. A subpoena may be served by the marshal, by a deputy marshal or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named and by tendering to that person the fee for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof.	**(d) Service.** A marshal, deputy marshal, or any nonparty who is at least 18 years old, may serve a subpoena. The server must deliver a copy of the subpoena to the witness and must tender to the witness one day's witness-attendance fee and the legal mileage allowance. The server need not tender the attendance fee or mileage allowance when the United States, a federal officer, or a federal agency has requested the subpoena.

(e) Place of Service. **(1) In United States.** A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States. **(2) Abroad.** A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C., § 1783.	**(e) Place of Service.** **(1)** ***In the United States.*** A subpoena requiring a witness to attend a hearing or trial may be served at any place within the United States. **(2)** ***In a Foreign Country.*** If the witness is in a foreign country, 28 U.S.C. § 1783 governs the subpoena's service.
(f) For Taking Depositions; Place of Examination. **(1) Issuance.** An order to take a deposition authorizes the issuance by the clerk of the court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. **(2) Place.** The witness whose deposition is to be taken may be required by subpoena to attend at any place designated by the trial court, taking into account the convenience of the witness and the parties.	**(f) Deposition Subpoena.** **(1)** ***Issuance.*** A court order to take a deposition authorizes the clerk in the district where the deposition is to be taken to issue a subpoena for any witness named or described in the order. **(2)** ***Place.*** After considering the convenience of the witness and the parties, the court may order — and the subpoena may require — the witness to appear anywhere the court designates.
(g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a United States magistrate judge.	**(g) Contempt.** The court may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by a federal court in that district.
(h) Information Not Subject to Subpoena. Statements made by witnesses or prospective witnesses may not be subpoenaed from the government or the defendant under this rule, but shall be subject to production only in accordance with the provisions of Rule 26.2.	**(h) Information Not Subject to a Subpoena.** No party may subpoena a statement of a witness or of a prospective witness under this rule. Rule 26.2 governs the production of the statements.

Committee Notes
Rule 17
December 1, 1999

COMMITTEE NOTE

The language of Rule 17 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

A potential substantive change has been made in Rule 17(c)(1); the word "data" has been added to the list of matters that may be subpoenaed. The Committee believed that inserting that term will reflect the fact that in an increasingly technological culture, the information may exist in a format not already covered by the more conventional list, such as a book or document.

Rule 17.1. Pretrial Conference	Rule 17.1. Pretrial Conference
At any time after the filing of the indictment or information the court upon motion of any party or upon its own motion may order one or more conferences to consider such matters as will promote a fair and expeditious trial. At the conclusion of a conference the court shall prepare and file a memorandum of the matters agreed upon. No admissions made by the defendant or the defendant's attorney at the conference shall be used against the defendant unless the admissions are reduced to writing and signed by the defendant and the defendant's attorney. This rule shall not be invoked in the case of a defendant who is not represented by counsel.	On its own, or on a party's motion, the court may hold one or more pretrial conferences to promote a fair and expeditious trial. When a conference ends, the court must prepare and file a memorandum of any matters agreed to during the conference. The government may not use any statement made during the conference by the defendant or the defendant's attorney unless it is in writing and signed by the defendant and the defendant's attorney.

Committee Notes
Rule 17.1
December 1, 1999

COMMITTEE NOTE

The language of Rule 17.1 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Current Rule 17.1 prohibits the court from holding a pretrial conference where the defendant is not represented by counsel. It is unclear whether this would bar such a conference when the defendant invokes the constitutional right to self-representation. *See Faretta v. California*, 422 U.S. 806 (1975). The amended version makes clear that a pretrial conference may be held in these circumstances. Moreover, the Committee believed that pretrial conferences might be particularly useful in those cases where the defendant is proceeding pro se.

V. VENUE	Title V. Venue
Rule 18. Place of Prosecution and Trial	**Rule 18. Place of Prosecution and Trial**
Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice.	Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district in which the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant and the witnesses, and the prompt administration of justice.

Committee Notes
Rule 18
December 1, 1999

COMMITTEE NOTE

The language of Rule 18 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 19. Rescinded.	Rule 19. [Rescinded.]

Rule 20. Transfer From the District for Plea and Sentence	Rule 20. Transfer for Plea and Sentence
(a) Indictment or Information Pending. A defendant arrested, held, or present in a district other than that in which an indictment or information is pending against that defendant may state in writing a wish to plead guilty or nolo contendere, to waive trial in the district in which the indictment or information is pending, and to consent to disposition of the case in the district in which that defendant was arrested, held, or present, subject to the approval of the United States attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States attorneys, the clerk of the court in which the indictment or information is pending shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant is arrested, held, or present, and the prosecution shall continue in that district.	**(a) Consent to Transfer.** A prosecution may be transferred from the district where the indictment or information is pending, or from which a warrant on a complaint has been issued, to the district where the defendant is arrested, held, or present, if: **(1)** the defendant states in writing a wish to plead guilty or nolo contendere and to waive trial in the district where the indictment, information, or complaint is pending, consents in writing to the court's disposing of the case in the transferee district, and files the statement in the transferee district; and **(2)** the United States attorneys in both districts approve the transfer in writing. **(b) Clerk's Duties.** After receiving the defendant's statement and the required approvals, the clerk where the indictment, information, or complaint is pending must send the file, or a certified copy, to the clerk in the transferee district. **(c) Effect of a Not Guilty Plea.** If the defendant pleads not guilty after the case has been transferred under Rule 20(a), the clerk must return the papers to the court where the prosecution began, and that court must restore the proceeding to its docket. The defendant's statement that the defendant wished to plead guilty or nolo contendere is not, in any civil or criminal proceeding, admissible against the defendant.
(b) Indictment or Information Not Pending. A defendant arrested, held, or present, in a district other than the district in which a complaint is pending against that defendant may state in writing a wish to plead guilty or nolo contendere, to waive venue and trial in the district in which the warrant was issued, and to consent to disposition of the case in the district in which that defendant was arrested, held, or present, subject to the approval of the United States attorney for each district. Upon filing the written waiver of venue in the district in which the defendant is present, the prosecution may proceed as if venue were in such district.	

(c) Effect of Not Guilty Plea. If after the proceeding has been transferred pursuant to subdivision (a) or (b) of this rule the defendant pleads not guilty, the clerk shall return the papers to the court in which the prosecution was commenced, and the proceeding shall be restored to the docket of that court. The defendant's statement that the defendant wishes to plead guilty or nolo contendere shall not be used against that defendant.	
(d) Juveniles. A juvenile (as defined in 18 U.S.C. § 5031) who is arrested, held, or present in a district other than that in which the juvenile is alleged to have committed an act in violation of a law of the United States not punishable by death or life imprisonment may, after having been advised by counsel and with the approval of the court and the United States attorney for each district, consent to be proceeded against as a juvenile delinquent in the district in which the juvenile is arrested, held, or present. The consent shall be given in writing before the court but only after the court has apprised the juvenile of the juvenile's rights, including the right to be returned to the district in which the juvenile is alleged to have committed the act, and of the consequences of such consent.	**(d) Juveniles.** **(1)** ***Consent to Transfer.*** A juvenile, as defined in 18 U.S.C. § 5031, may be proceeded against as a juvenile delinquent in the district where the juvenile is arrested, held, or present, if: (A) the alleged offense that occurred in the other district is not punishable by death or life imprisonment; (B) an attorney has advised the juvenile; (C) the court has informed the juvenile of the juvenile's rights — including the right to be returned to the district where the offense allegedly occurred — and the consequences of waiving those rights; (D) the juvenile, after receiving the court's information about rights, consents in writing to be proceeded against in the transferee district, and files the consent in the transferee district; (E) the United States attorneys for both districts approve the transfer in writing; and (F) the transferee court approves the transfer. **(2)** ***Clerk's Duties.*** After receiving the juvenile's written consent and the required approvals, the clerk where the indictment or information or complaint is pending or where the alleged offense occurred must send the file, or a certified copy, to the clerk in the transferee district.

Committee Notes
Rule 20
December 1, 1999

COMMITTEE NOTE

The language of Rule 20 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Rule 20(d)(2) is new and has been added to parallel a similar provision in Rule 20(b). The new provision rule provides that after the court has determined that the provisions in Rule 20(d)(1) have been completed and the transfer is approved, the file (or certified copy) must be transmitted from the original court to the transferee court.

Rule 21. Transfer From the District for Trial.	Rule 21. Transfer for Trial
(a) **For Prejudice in the District.** The court upon motion of the defendant shall transfer the proceeding as to that defendant to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.	(a) **For Prejudice.** Upon the defendant's motion, the court must transfer the proceeding as to that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.
(b) **Transfer in Other Cases.** For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to that defendant or any one or more of the counts thereof to another district.	(b) **For Convenience.** Upon the defendant's motion, the court may transfer the proceeding, or one or more counts, as to that defendant to another district for the convenience of the parties and witnesses and in the interest of justice.
(c) **Proceedings on Transfer.** When a transfer is ordered the clerk shall transmit to the clerk of the court to which the proceeding is transferred all papers in the proceeding or duplicates thereof and any bail taken, and the prosecution shall continue in that district.	(c) **Proceedings on Transfer.** When the court orders a transfer, the clerk must send to the transferee district the file or a certified copy of it, and any bail taken. The prosecution will then continue in the transferee district.
	(d) **Time to File a Motion to Transfer.** A motion to transfer may be made at or before arraignment or at any other time the court or these rules prescribe.

Committee Notes
Rule 21
December 1, 1999

COMMITTEE NOTE

The language of Rule 21 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Amended Rule 21(d) consists of what was formerly Rule 22. The Committee believed that the substance of Rule 22, which addressed the issue of the timing of motions to transfer, was more appropriate for inclusion in Rule 21.

Rule 22. Time of Motion to Transfer	Rule 22. Time to File a Motion to Transfer
A motion to transfer under these rules may be made at or before arraignment or at such other time as the court or these rules may prescribe.	[Transferred to Rule 21(d).]

Committee Notes
Rule 22
December 1, 1999

COMMITTEE NOTE

Rule 22 has been abrogated. The substance of the rule is now located in Rule 21(d).

VI. TRIAL	TITLE VI. TRIAL
Rule 23. Trial by Jury or by the Court	**Rule 23. Jury or Nonjury Trial**
(a) Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.	**(a) Jury Trial.** If the defendant is entitled to a jury trial, the trial must be by jury unless: **(1)** the defendant waives a jury trial in writing; **(2)** the government consents; and **(3)** the court approves.
(b) Jury of Less Than Twelve. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.	**(b) Jury Size.** **(1)** ***In General.*** A jury consists of 12 persons unless this rule provides otherwise. **(2)** ***Stipulation for a Smaller Jury.*** At any time before the verdict, the parties may, with the court's approval, stipulate in writing that: (A) the jury may consist of fewer than 12 persons; or (B) a jury of fewer than 12 persons may return a verdict if the court finds it necessary to excuse a juror for good cause after the trial begins. **(3)** ***Court Order for a Jury of 11.*** After the jury has retired to deliberate, the court may permit a jury of 11 persons to return a verdict, even without a stipulation by the parties, if the court finds good cause to excuse a juror.
(c) Trial Without a Jury. In a case tried without a jury the court shall make a general finding and shall in addition, on request made before the general finding, find the facts specially. Such findings may be oral. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.	**(c) Nonjury Trial.** In a case tried without a jury, the court must find the defendant guilty or not guilty. If a party requests before the finding of guilty or not guilty, the court must state its specific findings of fact in open court or in a written decision or opinion.

Committee Notes
Rule 23
December 1, 1999

COMMITTEE NOTE

The language of Rule 23 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

In current Rule 23(b), the term "just cause" has been replaced with the more familiar term "good cause," that appears in other rules. No change in substance is intended.

Rule 24. Trial Jurors	Rule 24. Trial Jurors
(a) Examination. The court may permit the defendant or the defendant's attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or the defendant's attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.	**(a) Examination.** **(1)** ***In General.*** The court may examine prospective jurors and may permit the attorneys for the parties to do so. **(2)** ***Court Examination.*** If the court examines the jurors, it must permit the attorneys for the parties to: (A) ask further questions that the court considers proper; or (B) submit further questions that the court may ask if it considers them proper.
(b) Peremptory Challenges. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.	**(b) Peremptory Challenges.** Each side is entitled to the number of peremptory challenges to prospective jurors specified below. The court may allow additional peremptory challenges to multiple defendants, and may allow the defendants to exercise those challenges separately or jointly. **(1)** ***A Crime Punishable by Death.*** Each side has 20 peremptory challenges. **(2)** ***A Crime Punishable by Imprisonment of More Than One Year.*** Each side has 10 peremptory challenges. **(3)** ***A Crime Punishable by Fine, Imprisonment of One Year or Less, or Both.*** Each side has 3 peremptory challenges.

(c) Alternate Jurors. (1) *In General.* The court may empanel no more than 6 jurors, in addition to the regular jury, to sit as alternate jurors. An alternate juror, in the order called, shall replace a juror who becomes or is found to be unable or disqualified to perform juror duties. Alternate jurors shall (i) be drawn in the same manner, (ii) have the same qualifications, (iii) be subject to the same examination and challenges, and (iv) take the same oath as regular jurors. An alternate juror has the same functions, powers, facilities and privileges as a regular juror. (2) *Peremptory Challenges.* In addition to challenges otherwise provided by law, each side is entitled to 1 additional peremptory challenge if 1 or 2 alternate jurors are empaneled, 2 additional peremptory challenges if 3 or 4 alternate jurors are empaneled, and 3 additional peremptory challenges if 5 or 6 alternate jurors are empaneled. The additional peremptory challenges may be used to remove an alternate juror only, and the other peremptory challenges allowed by these rules may not be used to remove an alternate juror. (3) *Retention of Alternate Jurors.* When the jury retires to consider the verdict, the court in its discretion may retain the alternate jurors during deliberations. If the court decides to retain the alternate jurors, it shall ensure that they do not discuss the case with any other person unless and until they replace a juror during deliberations. If an alternate replaces a regular juror after deliberations have begun, the court shall instruct the jury to begin its deliberations anew.	**(c) Alternate Jurors.** **(1)** ***In General.*** The court may impanel up to 6 alternate jurors to replace any jurors who are unable to perform or who are disqualified from performing their duties. **(2)** ***Procedure.*** (A) Alternate jurors must have the same qualifications and be selected and sworn in the same manner as any other juror. (B) Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror has the same authority as the other jurors. **(3)** ***Retention of Alternate Jurors.*** The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew. **(4)** ***Peremptory Challenges.*** Each side is entitled to the number of additional peremptory challenges to prospective alternate jurors specified below, which may be used only to remove alternate jurors. (A) *One or Two Alternates to be Impaneled.* One additional peremptory challenge. (B) *Three or Four Alternates to be Impaneled.* Two additional peremptory challenges. (C) *Five or Six Alternates to be Impaneled.* Three additional peremptory challenges.

Committee Notes
Rule 24
December 1, 1999

COMMITTEE NOTE

The language of Rule 24 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

In restyling Rule 24(a), the Committee deleted the language that authorized the defendant to conduct voir dire of prospective jurors. The Committee believed that the current language was potentially ambiguous and could lead one incorrectly to conclude that a defendant, represented by counsel, could personally conduct voir dire or additional voir dire. The Committee believed that the intent of the current provision was to permit a defendant to participate personally in voir dire only if the defendant was acting pro se. Amended Rule 24(a) refers only to attorneys for the parties, i.e. the defense counsel and the attorney for the government, with the understanding that if the defendant is not represented by counsel, the court may still, in its discretion, permit the defendant to participate in voir dire. In summary, the Committee intends no change in practice.

Rule 24(b) contains a substantive amendment. The revised rule now equalizes the number of peremptory challenges normally available to the prosecution and the defense in a felony case. Under the amendment, the number of challenges available to the defendant remain the same, ten challenges, and those available to the prosecution's are increased by four. The number of peremptory challenges in capital and misdemeanor cases remain unchanged.

In 1976, the Supreme Court adopted and forwarded to Congress amendments to Rule 24(b) which would have reduced and equalized the number of peremptory challenges. Under the proposed change, each side would have been entitled to 20, 5, and 3 challenges, respectively in capital, felony, and misdemeanor cases. *See* Order, Amendments to the Federal Rules of Criminal Procedure, 44 U.S.L.W. 4549 (1976). Congress ultimately rejected the proposed changes but recommended that the Judicial Conference study the matter further. Congress's chief concern was that in most federal courts, the trial judge conducts the voir dire, thus making it more difficult for the parties to identify biased jurors. *See* S. Rep. 354, 95th Cong., 1st Sess. 9, reprinted in [1977] U.S. Code Cong. & Ad. News 1477, 1482-83. In 1990, the Advisory Committee on Criminal Rules

proposed an amendment to Rule 24(b) which would have provided that in a felony case each side would be entitled to 6 peremptory challenges; that result would have been reached by reducing the number available to the defendant by four. The Standing Committee ultimately rejected that amendment in 1991. Since then, however, some members of Congress have indicated a willingness to reconsider the number of peremptory challenges available in a felony case. *See* Senate Bill 3 (*Omnibus Crime Control Act of 1997*) (would have equalized the number of challenges at 10 for each side).

The proposed amendment equalizes the number of peremptory challenges for each side without reducing the number available to the defense. While increasing the number of challenges might, in some cases, require more jurors in the initial pool, the Committee believed that equalizing the number of challenges is desirable.

Finally, the rule authorizes the court in multi-defendant cases to grant additional peremptory challenges to the defendants. If the court does so, the prosecution may request additional challenges in a multi-defendant case, not to exceed the total number available to the defendants jointly. The court, however, is not required to equalize the number of challenges where additional challenges are granted to the defendant.

Rule 25. Judge; Disability	Rule 25. Judge's Disability
(a) During Trial. If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying familiarity with the record of the trial, may proceed with and finish the trial.	**(a) During Trial.** Any judge regularly sitting in or assigned to the court may complete a jury trial if: **(1)** the judge before whom the trial began cannot proceed because of death, sickness, or other disability; and **(2)** the judge completing the trial certifies familiarity with the trial record.
(b) After Verdict or Finding of Guilt. If by reason of absence, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if that judge is satisfied that a judge who did not preside at the trial cannot perform those duties or that it is appropriate for any other reason, that judge may grant a new trial.	**(b) After a Verdict or Finding of Guilty.** **(1)** After a verdict or finding of guilty, any judge regularly sitting in or assigned to a court may complete the court's duties if the judge who presided at trial cannot perform those duties because of absence, death, sickness, or other disability. **(2)** The successor judge may grant a new trial if satisfied that: (A) a judge other than the one who presided at the trial cannot perform the post-trial duties; or (B) a new trial is necessary for some other reason.

Committee Notes
Rule 25
December 1, 1999

COMMITTEE NOTE

The language of Rule 25 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 25(b)(2) addresses the possibility of a new trial when a judge determines that no other judge could perform post-trial duties or when the judge determines that there is some other reason for doing so. The current rule indicates that those reasons must be "appropriate." The Committee, however, believed that a better term would be "necessary," because that term includes notions of manifest necessity. No change in meaning or practice is intended.

Rule 26. Taking of Testimony	Rule 26. Taking Testimony
In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress, or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court.	**(a) In General.** In all trials the testimony of witnesses must be taken in open court, unless otherwise provided by an Act of Congress or by rules adopted under 28 U.S.C. §§ 2072-77. **(b) Transmitting Testimony from Different Location.** In the interest of justice, the court may authorize contemporaneous video presentation in open court of testimony from a witness who is at a different location if: (i) the requesting party establishes compelling circumstances for such transmission; (ii) appropriate safeguards for the transmission are used; and (iii) the witness is unavailable within the meaning of Rule 804(a) of the Federal Rules of Evidence.

Committee Notes
Rule 26
December 1, 1999

COMMITTEE NOTE

The language of Rule 26 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

A substantive change has been made to Rule 26(b). That amendment permits a court to receive the video transmission of an absent witness if certain conditions are met. As currently written, Rule 26 indicates that normally only testimony given orally in open court will be considered, unless otherwise provided by these rules, an Act of Congress, or any other rule adopted by the Supreme Court. An example of a rule which provides otherwise is Rule 15. That Rule recognizes that depositions may be used to preserve testimony if there are exceptional circumstances in the case and it is in the interest of justice to do so. If the person is "unavailable" under Federal Rule of Evidence 804(a), then the deposition may be used at trial as substantive evidence. The amendment to Rule 26(b) extends the logic underlying that exception to contemporaneous video testimony of an unavailable witness. The amendment generally parallels a similar provision in Federal Rule of Civil Procedure 43.

The Committee believed that permitting use of video transmission of testimony only in those instances when deposition testimony could be used is a prudent and measured step. The proponent of the testimony must establish that there are exceptional circumstances for such transmission. A party against whom a deposition may be introduced at trial will normally have no basis for objecting if contemporaneous testimony is used instead. Indeed, the use of such transmitted testimony is in most regards superior to other means of presenting testimony in the courtroom. The participants in the courtroom can see for themselves the demeanor of the witness and hear any pauses in the testimony, matters which are not normally available in non-video deposition testimony. Although deposition testimony is normally taken with all counsel and parties present with the witness, those are not absolute requirements. *See, e.g., United States v. Salim*, 855 F.2d 944, 947-48 (2d Cir. 1988) (conviction affirmed where deposition testimony used although defendant and her counsel were not permitted in same room with witness, witness' lawyer answered some questions, lawyers were not permitted to question witness directly, and portions of proceedings were not transcribed verbatim).

The Committee recognized that there is a need for the trial court to impose appropriate safeguards and procedures to insure the accuracy and quality of the transmission, the ability of the jurors to hear and view the testimony, and the ability of the judge, counsel, and the witness to hear and understand each other during questioning. *See, e.g., United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999). Deciding what safeguards are appropriate is left to the sound discretion of the trial court.

The Committee believed that including the requirement of "unavailability" as that term is defined in Federal Rule of Evidence 804(a) will insure that the defendant's Confrontation Clause rights are not infringed. In deciding whether to permit contemporaneous transmission of the testimony of a government witness, the Supreme Court's decision in *Maryland v. Craig*, 497 U.S. 836 (1990) is instructive. In that case, the prosecution presented the testimony of a child sexual assault victim from another room by way of one-way closed circuit television. The Court outlined four elements which underlie Confrontation Clause issues: (1) physical presence; (2) the oath; (3) cross-examination; and (4) the opportunity for the trier-of-fact to observe the witness' demeanor. *Id.* at 847. The Court rejected the notion that a defendant's Confrontation Clause rights could be protected only if all four elements were present. The trial court had explicitly concluded that the procedure was necessary to protect the child witness, i.e., the witness was psychologically unavailable to testify in open court. The Supreme Court noted that any harm to the defendant resulting from the transmitted testimony was minimal because the defendant received most of the protections contemplated by the Confrontation Clause, i.e., the witness was under oath, counsel could cross-examine the absent witness, and the jury could observe the demeanor of the witness. *See also United States v. Gigante*, *supra* (use of remote transmission of unavailable witness' testimony did not violate confrontation clause).

Although the amendment is not limited to instances such as those encountered in *Craig*, it is limited to situations when the witness is unavailable for any of the reasons set out in Federal Rule of Evidence 804(a). Whether under particular circumstances a proposed transmission will satisfy some, or all, of the four protective factors identified by the Supreme Court in *Craig*, is a decision left to the trial court.

Rule 26.1. Determination of Foreign Law	Rule 26.1. Foreign Law Determination
A party who intends to raise an issue concerning the law of a foreign country shall give reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.	A party who intends to raise an issue of foreign law must provide the court and all parties with reasonable written notice. Issues of foreign law are questions of law, but in deciding such issues a court may consider any relevant material or source — including testimony — without regard to the Federal Rules of Evidence.

Committee Notes
Rule 26.1
December 1, 1999

COMMITTEE NOTE

The language of Rule 26.1 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 26.2. Production of Witness Statements	Rule 26.2. Producing a Witness's Statement
(a) Motion for Production. After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the government or the defendant and the defendant's attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.	**(a) Motion to Produce.** After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, must order the attorney for the government or the defendant and the defendant's attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in the possession and that relates to the subject matter of the witnesses's testimony.
(b) Production of Entire Statement. If the entire contents of the statement relate to the subject matter concerning which the witness has testified, the court shall order that the statement be delivered to the moving party.	**(b) Producing the Entire Statement.** If the entire statement relates to the subject matter of the witness's testimony, the court must order that the statement be delivered to the moving party.
(c) Production of Excised Statement. If the other party claims that the statement contains privileged information or matter that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise the portions of the statement that are privileged or that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion of the statement that is withheld from the defendant over the defendant's objection must be preserved by the attorney for the government, and, if the defendant appeals a conviction, must be made available to the appellate court for the purpose of determining the correctness of the decision to excise the portion of the statement.	**(c) Producing A Redacted Statement.** If the party who called the witness claims that the statement contains information that is privileged or does not relate to the subject matter of the witness's testimony, the court must inspect the statement in camera. After excising any privileged or unrelated portions, the court must order delivery of the redacted statement to the moving party. If the defendant objects to an excision, the court must preserve the entire statement with the excised portion indicated, under seal, as part of the record.
(d) Recess for Examination of Statement. Upon delivery of the statement to the moving party, the court, upon application of that party, may recess the proceedings so that counsel may examine the statement and prepare to use it in the proceedings.	**(d) Recess to Examine a Statement.** The court may recess the proceedings to allow time for a party to examine the statement and prepare for its use.
(e) Sanction for Failure to Produce Statement. If the other party elects not to comply with an order to deliver a statement to the moving party, the court shall order that the testimony of the witness be stricken from the record and that the trial proceed, or, if it is the attorney for the government who elects not to comply, shall declare a mistrial if required by the interest of justice.	**(e) Sanction for Failure to Produce or Deliver a Statement.** If the party who called the witness disobeys an order to produce or deliver a statement, the court must strike the witness's testimony from the record. If the attorney for the government disobeys the order, the court must declare a mistrial if justice so requires.

(f) Definition. As used in this rule, a "statement" of a witness means: **(1)** a written statement made by the witness that is signed or otherwise adopted or approved by the witness; **(2)** a substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof; or **(3)** a statement, however taken or recorded, or a transcription thereof, made by the witness to a grand jury.	**(f) Definition.** As used in this rule, a witness's "statement" means: **(1)** a written statement that the witness makes and signs, or otherwise adopts or approves; **(2)** a substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in any recording or any transcription of a recording; or **(3)** the witness's statement to a grand jury, however taken or recorded, or a transcription of such a statement.
(g) Scope of Rule. This rule applies at a suppression hearing conducted under Rule 12, at trial under this rule, and to the extent specified: **(1)** in Rule 32(c)(2) at sentencing; **(2)** in Rule 32.1(c) at a hearing to revoke or modify probation or supervised release; **(3)** in Rule 46(i) at a detention hearing; **(4)** in Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255; and **(5)** in Rule 5.1 at a preliminary examination.	**(g) Scope.** This rule applies at trial, at a suppression hearing under Rule 12, and to the extent specified in the following rules: **(1)** Rule 5.1 (preliminary hearing); **(2)** Rule 32(c)(2) (sentencing); **(3)** Rule 32.1(c) (hearing to revoke or modify probation or supervised release); **(4)** Rule 46(i) (detention hearing); and **(5)** Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255.

Committee Notes
Rule 26.2
December 1, 1999

COMMITTEE NOTE

The language of Rule 26.2 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Current Rule 26.2(c) states that if the court withholds a portion of a statement, over the defendant's objection, "the attorney for the government" must preserve the statement. The Committee believed that the better rule would be for the court to simply seal the entire statement as a part of the record, in the event that there is an appeal.

Also, the terminology in Rule 26.2(c) has been changed. The rule now speaks in terms of a "redacted" statement instead of an "excised" statement. No change in practice is intended.

Finally, the order of the list of proceedings has been placed in numerical order in Rule 26.2(g).

Rule 26.3. Mistrial	Rule 26.3. Mistrial
Before ordering a mistrial, the court shall provide an opportunity for the government and for each defendant to comment on the propriety of the order, including whether each party consents or objects to a mistrial, and to suggest any alternatives.	Before ordering a mistrial, the court must give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives.

Committee Notes
Rule 26.3
December 1, 1999

COMMITTEE NOTE

The language of Rule 26.3 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 27. Proof of Official Record	Rule 27. Proof of Official Record
An official record or an entry therein or the lack of such a record or entry may be proved in the same manner as in civil actions.	A party may prove an official record, an entry in such a record, or the lack of a record or entry in the same manner as in a civil action.

Committee Notes
Rule 27
December 1, 1999

COMMITTEE NOTE

The language of Rule 27 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 28. Interpreters	Rule 28. Interpreters
The court may appoint an interpreter of its own selection and may fix the reasonable compensation of such interpreter. Such compensation shall be paid out of funds provided by law or by the government, as the court may direct.	The court may select, appoint, and fix the reasonable compensation for an interpreter. The compensation must be paid from funds provided by law or by the government, as the court may direct.

Committee Notes
Rule 28
December 1, 1999

COMMITTEE NOTE

The language of Rule 28 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 29. Motion for Judgment of Acquittal	Rule 29. Motion for Judgment of Acquittal
(a) Motion Before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If the defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.	**(a) Before Submission to the Jury.** After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense as to which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.
(b) Reservation of Decision on Motion. The court may reserve decision on a motion for judgment of acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves a decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.	**(b) Reserving Decision.** The court may reserve decision on a motion for judgment of acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.
(c) Motion After Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.	**(c) After Jury Verdict or Discharge.** **(1)** ***In General.*** A defendant may move for judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the court discharges the jury, whichever is later, or within any other time the court fixes during the 7-day period. **(2)** ***Ruling on Motion.*** If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter judgment of acquittal. **(3)** ***No Prior Motion.*** A defendant is not required to move for judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.

(d) Same: Conditional Ruling on Grant of Motion. If a motion for judgment of acquittal after verdict of guilty under this Rule is granted, the court shall also determine whether any motion for a new trial should be granted if the judgment of acquittal is thereafter vacated or reversed, specifying the grounds for such determination. If the motion for a new trial is granted conditionally, the order thereon does not affect the finality of the judgment. If the motion for a new trial has been granted conditionally and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. If such motion has been denied conditionally, the appellee on appeal may assert error in that denial, and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.	**(d) Conditional Ruling on a Motion for a New Trial.** **(1)** ***Motion for a New Trial.*** If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed. The court must specify the reasons for that determination. **(2)** ***Finality.*** The court's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal. **(3)** ***Appeal.*** (A) *Grant of a Motion for a New Trial.* If the court conditionally grants a motion for a new trial, and an appellate court later reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise. (B) *Denial of a Motion for a New Trial.* If the court conditionally denies a motion for a new trial, an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial court must proceed as the appellate court directs.

Committee Notes
Rule 29
December 1, 1999

COMMITTEE NOTE

The language of Rule 29 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

In Rule 29(a), the first sentence abolishing "directed verdicts," has been deleted because it is unnecessary. The rule continues to recognize that a judge may sua sponte enter a judgment of acquittal.

Rule 29(c)(1) addresses the issue of the timing of a motion for acquittal. The amended rule now includes language that the motion must be made within 7 days after a guilty verdict or after the judge discharges the jury, whichever occurs later. That change reflects the fact that in a capital case or in case involving criminal forfeiture, for example, the jury may not be discharged until it has completed its sentencing duties. The court may still set another time for the defendant to make or renew the motion, if it does so within the seven-day period.

Rule 29.1. Closing Argument	29.1. Closing Argument
After the closing of evidence the prosecution shall open the argument. The defense shall be permitted to reply. The prosecution shall then be permitted to reply in rebuttal.	Closing arguments proceed in the following order: (a) the government argues; (b) the defense argues; and (c) the government rebuts.

Committee Notes
Rule 29.1
December 1, 1999

COMMITTEE NOTE

The language of Rule 29.1 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 30. Instructions	Rule 30. Jury Instructions
At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to all parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court may instruct the jury before or after the arguments are completed or at both times. No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.	**(a) In General.** Any party may request in writing that the court instruct the jury on the law as specified in the request. The request must be made at the close of the evidence or at any earlier time that the court reasonably directs. When the request is made, the requesting party must furnish a copy to every other party. **(b) Ruling on a Request.** The court must inform the parties before closing arguments how it intends to rule on the requested instructions. **(c) Time for Giving Instructions.** The court may instruct the jury before or after the arguments are completed, or at both times. **(d) Objections to Instructions.** A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objections and the grounds for the objection before the jury retires to deliberate. An opportunity must be given to object out of the jury's hearing and, on request, out of the jury's presence.

Committee Notes
Rule 30
December 1, 1999

COMMITTEE NOTE

The language of Rule 30 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 30(d) has been changed to clarify what, if anything, counsel must do to preserve error regarding an instruction or failure to instruct. The rule retains the requirement of a contemporaneous and specific objection (before the jury retires to deliberate). As the Supreme Court recognized in *Jones v. United States*, 119 S.Ct. 2090, 2102 (1999), read literally, current Rule 30 could be construed to bar any appellate review when in fact a court may conduct a limited review under a plain error standard. The topic of plain error is not addressed in Rule 30; it is already covered in Rule 52. No change in practice is intended by the amendment.

Rule 31. Verdict	Rule 31. Jury Verdict
(a) Return. The verdict shall be unanimous. It shall be returned by the jury to the judge in open court.	**(a) Return.** The jury must return its verdict to a judge in open court. The verdict must be unanimous.
(b) Several Defendants. If there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.	**(b) Partial Verdicts, Mistrial, and Retrial.** **(1)** ***Multiple Defendants.*** If there are multiple defendants, the jury may return a verdict at any time during its deliberations as to any defendant as to whom it has agreed. **(2)** ***Multiple Counts.*** If the jury cannot agree on all counts as to any defendant, the jury may return a verdict on those counts as to which it has agreed. **(3)** ***Mistrial and Retrial.*** If the jury cannot agree on a verdict as to all counts, the court may declare a mistrial as to those counts. The government may retry any defendant on any count as to which the jury could not agree.
(c) Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.	**(c) Lesser Offense or Attempt.** A defendant may be found guilty of any of the following: **(1)** an offense necessarily included in the offense charged; **(2)** an attempt to commit the offense charged; or **(3)** an attempt to commit an offense necessarily included in the offense charged, if the attempt is an offense in its own right.
(d) Poll of Jury. After a verdict is returned but before the jury is discharged, the court shall, on a party's request, or may on its own motion, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.	**(d) Jury Poll.** After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.
(e) Criminal Forfeiture. [Abrogated][2]	**(e) Criminal Forfeiture.** [Abrogated]

[2] Judicial Conference approved amendment in March 1999. The amendments take effect on December 1, 2000, if approved by the Supreme Court and Congress takes no action otherwise.

Committee Notes
Rule 31
December 1, 1999

COMMITTEE NOTE

The language of Rule 31 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 31(b) has been amended to clarify that a jury may return partial verdicts, either as to multiple defendants or multiple counts, or both. *See, e.g.*, *United States v. Cunningham*, 145 F.3d 1385, 1388-89 (D.C. Cir. 1998) (partial verdicts on multiple defendants and counts). No change in practice is intended.

Item 8B

Report to Standing Committee
Criminal Rules Committee
December 1999

EXHIBIT B

[Minutes of Meeting]

MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

June 21-22, 1999
Portland, Oregon

The Advisory Committee on the Federal Rules of Criminal Procedure met at Portland, Oregon on June 21 and 22, 1999 to discuss style changes to the Rules of Procedure. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Davis, Chair of the Committee, called the meeting to order at 8:30 a.m. on Monday, June 21, 1999. The following persons were present for all or a part of the Committee's meeting:

Hon. W. Eugene Davis, Chair
Hon. Edward E. Carnes
Hon. David D. Dowd, Jr.
Hon. D. Brooks Smith
Hon. John M. Roll
Hon. Susan C. Bucklew
Hon. Tommy E. Miller
Mr. Robert C. Josefsberg, Esq.
Mr. Darryl W. Jackson, Esq.
Mr. Henry A. Martin, Esq.
Mr. Laird Kirkpatrick, designate of the Asst. Attorney General for the Criminal Division
Professor David A. Schlueter, Reporter

Also present at the meeting were: Mr. Roger Pauley, Jr. of the Department of Justice, Mr. Peter McCabe and Mr. John Rabiej from the Administrative Office of the United States Courts; Ms. Laurel Hooper from the Federal Judicial Center; Judge Davis, the Chair, welcomed the attendees.

II. APPROVAL OF MINUTES OF APRIL 1999 MEETING

After several corrections were made to the minutes of the April 1999, the Committee voted unanimously to approve those minutes.

III. CRIMINAL RULES CURRENTLY UNDER CONSIDERATION BY ADVISORY COMMITTEE

A. Proposed Style Amendments to Rules 1-9, Rules of Criminal Procedure (Second Draft)

The Reporter discussed a status report/chart on the restyling project. That chart will provide an updated reference on the status of each of the restyled rules and will highlight significant changes to each rule. He noted that in reviewing Rules 1 through 9 there were a significant number of changes that might be considered by some to be "substantive" amendments, even though in effect, many are clarifying changes.

The Reporter also noted that he had prepared draft Committee Notes for Rules 1 through 9 and that he had bracketed issues or language that should be further discussed by the Committee.

Judge Smith, Chair of Subcommittee A, indicated that after the full Committee meeting in April in Washington, D.C., the subcommittee had reviewed the proposed style changes and had conducted a conference call to review those changes and resolve a number of issues that had been raised at the April meeting.

1. Rule 1. Scope.

Judge Smith explained that the Subcommittee had addressed the unresolved issue of defining terms such as "court," "magistrate," and "federal judge." Professor Stith had conducted an analysis of the first nine rules and had proposed uniform changes to the rules regarding use of those terms. Judge Miller also noted that an increasing number of courts were using magistrate judges to take guilty pleas and that it might be appropriate for the rules to reflect the actual practice in those courts. On the other hand, some members of the Committee expressed concern about whether the rules should expressly authorize justices of the Supreme Court or judges of the appellate courts to act on particular matters. In the end, the Subcommittee recommended that a provision be added to Rule 1 that would explicitly recognize that if a particular rule authorizes a United States magistrate judge to act, a justice or judge of the United States could also act. That change was approved by the Committee.

Regarding the draft Committee Note for Rule 1, several suggestions were made regarding the inclusion of standard language that would inform the reader of the purpose of the restyling effort. In addition, there was discussion concerning use of the word "unnecessary" with regard to the omission of definitions formerly located in Rule 54(c). The Committee indicated a preference for describing terms such as "demurrer," as being antiquated or anachronistic.

2. Rule 2. Purpose and Construction.

No additional changes were made to restyled Rule 2 or the accompanying note.

3. Rule 3. The Complaint.

In discussing the proposed Committee Note to Rule 3, several members of the Committee offered suggested language for the first paragraph, that could be used to describe the global style changes to the Rules.

4. Rule 4. Arrest Warrant or a Summons on a Complaint.

Discussion regarding Rule 4 focused on language in Rule 4(d)(3) concerning the issue of whether the arresting officer must have a copy of the warrant at the time of the arrest. An earlier restyled version of the rule had omitted any reference to whether the officer must have a copy. Following additional discussion, however, the Committee decided to restore language in the current rule to the effect that the officer need not have a copy but upon the defendant's request, must show the warrant as soon as possible.

The Committee suggested that the Committee Note include some discussion about use of the word "judge" in the Rule to make it clear that that term refers to the judicial officer referenced in Rule 3. Finally, several members suggested that the discussion in the Note regarding the deletion of current Rule (b)—which notes that hearsay evidence may be used to establish probable cause —should be expanded.

5. Rule 5. Initial Appearance.

The Committee discussed proposed language in Rule 5(b)(4), dealing with initial appearances in felony cases, and agreed to include language that reflects current practice, that a defendant may not be called to enter a plea before arraignment. The Committee also indicated that the accompanying Note should include a reference to the fact that the term "judge" in the Rule refers to a United States magistrate judge or a state or local officer.

6. Rule 5.1. Preliminary Hearing in a Felony Case.

The Reporter indicated that the proposed Note reflected an issue addressed earlier by the Committee—whether a magistrate judge should be permitted to grant a continuance in a preliminary hearing where the defendant objects. Under the current rule only a district judge may do so. However, acting on suggestion from the Standing Committee, the Committee had decided to amend the rule to permit the magistrate judge to do so; that amendment however, would conflict with 18 USC § 3060. Thus, the

Committee indicated that the Note should include reference to the Rules Enabling Act and the Supercession Clause.

The Committee also indicated that the Note should include additional discussion on the deletion of the reference to relying upon hearsay for probable cause.

7. Rule 6. The Grand Jury.

Judge Smith indicated that Subcommittee A had studied further the question of whether the reference in current Rule 6(e)(2) to contempt should be extended to any violation of Rule 6. He reported that Professor Stith had researched the issue and that the Subcommittee had recommended that the rule remain as it is, with the reference to contempt remaining in Rule 6(e)(7).

Addressing Rule 6(e)(3), Judge Roll raised the question whether under 6(e)(3)(C)(ii), a defendant must articulate a particularized need for the grand jury information. Following discussion, a consensus emerged that an amendment to rule was not necessary, Judge Roll indicated that he would draft suggested language to include in the Committee Note.

8. Rule 7. The Indictment and the Information.

Judge Smith indicated that after further study of the issue, the Subcommittee had recommended that the reference to "hard labor" should be eliminated. Also, additional research had led the Subcommittee to conclude that no amendment should be made to rule regarding amendments to indictments. The rule is well-settled that an indictment may not be amended unless it is resubmitted to the grand jury.

9. Rule 8. Joinder of Offenses or Defendants.

No additional changes were made to Rule 8 or the accompanying Note.

10 Rule 9. Arrest Warrant or Summons on an Indictment or Information.

Judge Smith indicated that some changes had been made to Rule 9 to conform it to similar changes in Rules 4 and 5. The Reporter noted that as with other rules, the term "court" had been bracketed pending further discussion on whether that term should be further defined or whether the term "judge" could be used instead.

B. Proposed Style Amendments to Rules 10-22, Rules of Criminal Procedure (First Draft)

The Chair asked Judge Dowd, Chair of Subcommittee B, to lead the discussion on the Style Subcommittee's proposed changes to Rules 10 through 22. Judge Dowd indicated that the Subcommittee had met in Washington, D.C. on May 25th to discuss the changes.

1. Rule 10. Arraignment & Rule 43. Presence of Defendant.

Judge Dowd noted that Rule 10 is currently being reviewed by a Subcommittee to determine whether any amendment should be made concerning arraignment by teleconferencing; nonetheless, several minor style changes were considered by the Committee.

2. Rule 11. Pleas

Judge Dowd noted that after the Subcommittee's meeting in May, that the Reporter had drafted a complete revision of Rule 11 to conform it structure and flow with actual practice in taking pleas and considering plea agreements. Following discussion on whether to continue to use the term "nolo contendere," the Committee voted (4-3-2) to change that term to "no contest."

The Committee also discussed the issue of whether to include within the rule specific guidance on what should be covered by the judge in addressing a defendant desiring to plead guilty or no contest. The Committee ultimately decided set out the specific elements of the court's advice. In particular, it decided to include in revised Rule 11(b) the requirement that the defendant be placed under oath before conducting any inquiry concerning the factual basis for the plea. Several members noted that currently, many judges place the defendant under oath and that it tends to impress upon the defendant the need to be truthful in his or her answers to the court.

There was some discussion on whether to address the practice in some courts of using judges to facilitate plea agreements. The current rule indicates that "the court shall not participate in any discussions between the parties concerning such plea agreement." Some courts believe that that language acts as a limitation only upon the judge taking the defendant's plea and thus permit other judges to serve as facilitators for reaching a plea agreement between the government and the defendant. Following discussion, the Committee decided to leave the Rule as it is, including continued use of the term "court." The Committee also asked that the Reporter include a reference in the Committee Note to the effect that it intended to make no change in existing law interpreting that provision.

In addressing proposed Rule 11(c)(2) (former Rule 11(e)) regarding disclosure of a plea agreement, Mr. Josefsberg raised the question regarding whether there might be

cases where either the government or the defense might have a legitimate need or desire not to disclose the existence of a plea agreement to the court. Following discussion, the Committee decided to leave the language as drafted, with a recommendation that the Note address Mr. Josefsberg's point.

The Committee discussed the proposed modifications to Rule 11(c)(3) to (5) concerning consideration, acceptance, and rejection of a plea agreement. Following discussion concerning the structure and flow of the subdivisions, the Committee decided to address those topics individually. The Committee further indicated that the Note accompanying Rule 11(d) (Withdrawing a Plea) should address the fact that the Rule deals separately with rejection of pleas and rejection of plea agreements.

The Committee considered a proposal by Judge Sedwick (Alaska) to amend Rule 11 to add a third exception to current (e)(6)(D). That exception would have permitted use of any government offer of a conditional plea where such was relevant at sentencing to a defendant's claim after trial that he or she was entitled to acceptance of responsibility under the Sentencing Guidelines. Following discussion of the issue, the Committee concluded that the issue does not arise with great frequency and decided not to include the new exception in the rule.

Finally, the Committee added a new subdivision, Rule 11(e) to address the issue of finality of a guilty or no contest plea after the court imposes sentence.

3. Rule 12. Pleadings and Motions Before Trial; Defenses and Objections

Although the Style Subcommittee had recommended the deletion of Rule 12(a) from the rule, the Committee decided to retain the first sentence and a portion of the second sentence of that subdivision which indicates what documents and pleas constitute "pleadings." Judges Roll and Miller will continue to research this issue to determine whether there might be other matters within that definition.

The Committee generally agreed with the Style Subcommittee's recommended revision of the Rule, including moving what is currently in Rule 12(b) to new Rule 12(d)(2).

Following discussion on the issue of whether Rule 12(c) should address setting of motions dates, the Committee indicated that the Note should make it abundantly clear that judges should schedule dates for hearings and motions. The reference to local rules was deleted from that subdivision. The Committee further indicated that the Note accompanying new Rule 12(e) (current Rule 12(f)) should reflect that the Committee intends to make no change to the current law regarding waiver of motions or defenses.

4. Rule 12.1. Notice of Alibi

The Committee generally accepted the draft revision submitted by the Restyling Subcommittee. Current Rule 12.1(d) and (e) have been switched in the restyled version. Following discussion, the Committee voted 6 to 1 to include a requirement in the rule that in providing the names and addresses of alibi and any rebuttal witnesses, the parties must also provide the phone numbers of those witnesses.

5. Rule 12.2 Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition

Discussion concerning the restyling of Rule 12.2 was deferred to a later meeting, after pending major substantive changes have been discussed and resolved.

6. Rule 12.3. Notice of Defense Based Upon Public Authority

Judge Dowd noted that there had been some discussion at the Subcommittee meeting concerning the issue of whether (as currently provided in Rule 12.3) a defendant could invoke the defense of public authority on either an actual or believed exercise of public authority. The Subcommittee had concluded that the language suggested by the Style Subcommittee might be read to provide the defendant with a "right" to assert the defense —a matter not within the purview of the Committee under the Rules Enabling Act. Thus, the Subcommittee had decided to retain the current language which recognizes, as a nonsubstantive matter, that if the defendant intends to raise the defense, notice must be given. Following discussion of the matter, the Committee decided not to make any changes in the current rule regarding the availability of the defense. The Committee decided to include in the restyled rule the requirement that the parties provide the telephone numbers of any witnesses disclosed under the rule.

7. Rule 13. Trial Together of Indictments or Informations

Judge Dowd noted that the Subcommittee had made minor changes to the restyled version of Rule 13; the last sentence of the proposed restyled version had been eliminated. That sentence read: "The government must then proceed as though it were prosecuting under a single indictment or information." The Committee concurred.

8. Rule 14. Relief From Prejudicial Joinder

The Committee briefly discussed the proposed restyling changes to Rule 14 and concurred with Subcommittee B's recommendation to adopt those changes.

9. Rule 15. Depositions

Judge Dowd noted that Subcommittee B had redrafted the proposed changes to Rule 15(a), without making any substantive changes. Instead of referring generally to "unprivileged documents or materials," the Subcommittee recommended that the following be substituted for greater clarity: "any designated book, paper, document, record, recording, data, or other material not privileged." The Committee agreed to the more inclusive language.

He noted further that new Rule 15(b) consisted of the first three sentences of current Rule 15(b). The last sentences of current (b), which address the topic of the defendant's presence at a deposition, are now located in restyled Rule 15(c). The remaining subdivisions have been renumbered.

The Committee discussed the issue of payment of expenses raised in restyled Rule 15(d). Under the current rule, if the government requests the deposition or if the defendant requests the deposition and is unable to pay for it, the court may direct the government to pay for travel and subsistence for both the defendant and his or her attorney. In either case, the current rule requires the government to pay for the transcript. The restyled rule would make some slight changes. If the deposition was requested by the government, the court *may* require the government to pay subsistence and travel expenses and the cost of the deposition transcript. On the other hand, where the defendant is unable to pay the deposition expenses, the court *must* order the government to pay subsistence, travel, and the deposition transcript costs —regardless of who requested the deposition.

With regard to restyled Rule 15(f)(2), the Committee decided to amend the rule to comport with the familiar rule of optional completeness in Federal Rule of Evidence 106. Under that rule, once a party introduces a portion of a piece of evidence, the opponent may require the proponent to introduce other parts of the evidence which ought in fairness be considered. In making this change, the Committee intended to make no substantive change and noted that the revision parallels similar language in Civil Rule 32(a)(4).

10. Rule 16. Discovery and Inspection

Judge Dowd informed the Committee that the Style Subcommittee had reorganized Rule 16 and that Subcommittee B had made minor changes to that draft. The Committee discussed restyled Rule 16(a)(2) and the question of whether the reference to 18 USC 3500 in the last sentence of that provision should be deleted as recommended by

the Style Subcommittee. Following discussion of the matter, the Committee indicated that the reference should remain; Mr. Schlueter and the Reporter will continue to review this provision.

Regarding restyled Rule 16(b) (Defendant's Disclosure) the Committee indicated that the language in that provision should track similar language in Rule 16(a)(1). In Rule 16(b)(1)(B)(ii), the Committee changed the current provision which reads: "the defendant intends to *introduce* the item as evidence" to the "defendant intends to *use* the item as evidence..." The Committee recognized that this might constitute a substantive change in the rule but believed that it was a necessary conforming change with a similar provision in 16(a)(1)(E) regarding use of evidence by the government.

In restyled Rule 16(d)(1), the Committee decided to delete the last phrase in the subdivision which refers to a possible appeal of the court's discovery order. In the Committee's view, no substantive change results from that deletion; the language is unnecessary because the court, regardless of whether there is an appeal, will have maintained the record.

11. Rule 17. Subpoena

In discussing Rule 17, members of Subcommittee B observed that in the Style Subcommittee's original draft, the word "oppressive" had been deleted from Rule 17(c)(2). After discussing the issue, the Committee decided to retain the word, so the provision will read: "On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive."

The Committee discussed the question of who may hold a person in contempt of court for refusing to comply with a subpoena under Rule 17(g). The current rule indicates that "the district court may hold in contempt [a person who disobeys] a subpoena issued by that court or by a magistrate judge of that district." Professor Schlueter will research this issue further.

12. Rule 17.1 Pretrial Conference

The Reporter noted that current Rule 17.1 prohibits the court from holding a pretrial conference where the defendant is not represented by counsel. The Committee discussed whether to remove that limitation and ultimately decided to change the rule by deleting the last sentence of the rule. Recognizing that this was a major substantive change, the Committee believed that the to leave the limitation in place might unnecessarily restrict the defendant's constitutional right to self-representation. In addition, several members noted that pretrial conferences might be particularly useful in those cases where the defendant is proceeding pro se.

13. Rule 18. Place of Prosecution and Trial

The Committee discussed the proposed style changes submitted by the Style Subcommittee and following brief discussion changed the phrase "fix the place of trial" to "set the place of trial."

14. Rule 19. [Rescinded]

There was no discussion regarding Rule 19, which has been rescinded.

15. Rule 20. Transfer From the District for Plea and Sentence

The Committee reorganized Rule 20 by blending current subdivisions (a) and (b) into new Rule 20(a). New subdivision (b) addresses the topic of the clerk's duties. After an extensive discussion regarding Rule 20(d), which deals with trials of juveniles, the Committee decided not to blend that provision in with the other provisions. Instead, the provision remains. But it has been restyled to reflect a list of procedural requirements for prosecuting a juvenile.

16. Rule 21. Transfer From the District for Trial

The Committee discussed and approved the style changes to Rule 21. After discussion concerning Rule 22, which addresses the question of the timing of motions to transfer, the Committee decided to add that rule as subdivision (d) in Rule 21.

17. Rule 22. Time of Motion to Transfer

As noted, supra, the Committee discussed a proposal from the Style Subcommittee that Rule 22 be moved to Rule 21. The Committee agreed with that proposal and redesignated Rule 22 as Rule 21(d).

VI DESIGNATION OF TIME AND PLACE OF NEXT MEETING.

The next meeting of the Committee is scheduled for October 7 and 8, 1999 in Williamsburg, Virginia.

Respectfully Submitted,

David A. Schlueter
Professor of Law
Reporter, Criminal Rules Committee

MINUTES [DRAFT]
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

October 7-8, 1999
Williamsburg, VA

The Advisory Committee on the Federal Rules of Criminal Procedure met at Williamsburg, Virginia on October 7 and 8, 1999. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Davis, Chair of the Committee, called the meeting to order at 8:30 a.m. on Thursday, October 7, 1999. The following persons were present for all or a part of the Committee's meeting:

Hon. W. Eugene Davis, Chair
Hon. Edward E. Carnes
Hon. David D. Dowd, Jr.
Hon. John M. Roll
Hon. Susan C. Bucklew
Hon. Paul L. Friedman
Hon. Tommy E. Miller
Hon. Daniel E. Wathen
Prof. Kate Stith
Mr. Darryl W. Jackson, Esq.
Mr. Lucien B. Campbell, Esq.
Mr. Roger Pauley, designate of the Asst. Attorney General for the Criminal Division
Professor David A. Schlueter, Reporter

Also present at the meeting were: Hon. Anthony J. Scirica, Chair of the Standing Committee; Mr. Peter McCabe of the Administrative Office of the United States Courts, Mr. John Rabiej and Mr. Mark Shapiro from the Rules Committee Support Office of the Administrative Office of the United States Courts; Ms. Laurel Hooper from the Federal Judicial Center; and Mr. Joseph Spaniol, consultant to the Standing Committee. Professor Stephen A. Saltzburg, consultant to the Style Subcommittee of the Standing Committee, participated by telephone conference call.

Judge Davis, the Chair, welcomed the attendees and on behalf of the Committee acknowledged the dedicated work of Judge Brooks Smith and Mr. Henry Martin, the two outgoing members of the Committee, who were not able to attend the meeting. He also

welcomed the two new members, Judge Paul Friedman, United States District Court, Washington, D.C. and Mr. Lucien Campbell, Federal Public Defender of the Western District of Texas.

II. APPROVAL OF MINUTES OF JUNE 1999 MEETING

Professor Stith moved that the Minutes of the Committee's June 1999, meeting in Portland, Oregon be approved. Following a second by Judge Miller, the motion carried by a unanimous vote.

III. RULES PENDING BEFORE CONGRESS

The Reporter indicated that the following rules were had been approved by the Supreme Court and were pending before Congress:

1. Rule 6. Grand Jury (Presence of Interpreters; Return of Indictment);
2. Rule 11. Pleas (Acceptance of Pleas and Agreements, etc.);
3. Rule 24(c). Alternate Jurors (Retention During Deliberations);
4. Rule 30. Instructions (Submission of Requests for Instructions);
5. Rule 54. Application and Exception.

IV. RULES PENDING AT THE SUPREME COURT

The Reporter informed the Committee that both the Standing Committee (at its January 1999 meeting) and Judicial Conference (at its Spring 1999 meeting) had approved the following rules, and that they were pending at the Supreme Court:

1. Rule 32.2. Criminal Forfeitures
2. Rule 7. The Indictment and Information (Conforming Amendment);
3. Rule 31. Verdict (Conforming Amendment);
4. Rule 32. Sentence and Judgment (Conforming Amendment); and
5. Rule 38. Stay of Execution (Conforming Amendment).

V. CRIMINAL RULES CURRENTLY UNDER CONSIDERATION BY ADVISORY COMMITTEE

A. Proposed Substantive Amendments to Rules 10 and 43; Video Teleconferencing.

Judge Roll, Chair of the Subcommittee on Video Teleconferencing, reported that the Subcommittee had considered amendments be made to Rules 10 and 43 to permit video teleconferencing for arraignments. He provided some background information on

the Subcommittee's consideration of the issue and noted that the principal impediments to using video teleconferencing had been the current language of Rules 10 and 43. He noted that pilot projects had been implemented in the Eastern District of Pennsylvania and in the District of Puerto Rico, but that those projects had not provided much data on whether video teleconferencing was beneficial. That was due in part to the fact that the not very many defendants in those districts had consented to the procedure. In addition, he noted that the Subcommittee had considered the statutory provisions in a number of state jurisdictions that permit video teleconferencing and that several members had received a briefing from Professor Lederer on "Courtroom 21," a state-of-the-art courtroom at the William and Mary School of Law.

Mr. Rabiej informed the Committee that research had indicated that video teleconferencing was being used in jurisdictions such as Los Angeles and in Hawaii with some success.

The Reporter provided additional background information, noting that the Committee had discussed the issue off and on for the past seven years. In 1993 the Committee published a proposed amendment that would have permitted video teleconferencing for arraignments, if the defendant waived personal appearance. That particular proposal had been driven in large part by the Bureau of Prisons which was interested in reducing the costs and security risks posed by transporting prisoners long distances for what in many instances was a very brief and pro forma appearance before the court. The Reporter added that that proposal was tabled in 1994 when it learned that at least two FJC pilot projects were being planned—the same programs mentioned by Judge Roll.

Judge Friedman questioned whether a proposed amendment should address the question of the location of the defense counsel. He noted that while some state statutes seem to address the issue, others do not. In his opinion, there would be value in requiring that the defendant and counsel meet together. Judge Miller observed that one statute provides that a secured communications link must be made between the defendant and the defense counsel. Mr. Campbell indicated that the defendant and counsel should stand together and that the proposal would result in shifting the costs from the Executive Branch to the Judiciary. He also stated that it would send the wrong message to have the defense counsel in court, but the defendant at some remote location.

Judge Miller indicated that if the Committee was inclined to adopt video teleconferencing for arraignments, that Rule 5 could be amended to provide for the same procedures for initial appearances. Mr. Campbell replied that in Texas some sentencing had been done by teleconferencing and that it did not provide the same quality of justice. Judge Bucklew added that Florida has been using teleconferencing.

Judge Roll indicated that the Subcommittee had not reached a consensus to change the rule, in particular the Subcommittee had not been able to agree on whether an accused could be arraigned by teleconferencing, even over his or her objection.

Judge Wathen indicated that the courts in Maine had participated in a pilot program using video teleconferencing which had not been very successful and that the courts were now opposed to it.

Judge Dowd commented that the issue was currently before the Committee because some courts could make good use of teleconferencing and that he thought the proposed amendment would be beneficial. Professor Stith indicated that she favored the method used in Hawaii. But Mr. Campbell expressed concern that permitting teleconferencing was another sign of what he called "creeping waiverism." Mr. Pauley reminded the Committee of the background of the original proposal in the early 1990's and that those concerns still existed.

Judge Roll moved to amend Rules 5, 10, and 43 to permit video teleconferencing for initial appearances and arraignments, tracking the earlier language published by the Committee in 1993. Judge Miller seconded the motion, which carried by a vote of 9 to 2.

B. Proposed Substantive Amendment to Rule 41. Search and Seizure.

Mr. Pauley explained that the Department of Justice had given lengthy consideration to a proposal that would amend Rule 41 to address specifically so-called "covert" warrants. In particular, he noted that there are several types of searches that would require delayed notice to the owner of property that a search has occurred. First, he noted, searches involving video surveillance might require a delay in notice, and second, in recent years the Department has found covert entries helpful in the area of drug investigations. Finally, he stated that tracking device warrants might also require some delay. He noted that there is an absence of clear caselaw on these types of searches and whether delay is permitted and that the circuits have not been uniform in the way they approach these types of searches. Mr. Pauley indicated that while there was no urgency to this substantive amendment, it would be helpful to consider it now, in light of the fact that Rule 41 would be reviewed as part of the restyling effort.

Professor Stith agreed that the issue was worthy of attention and that there was a gap in the law. Judge Dowd agreed with that assessment. Judge Miller indicated that he had polled some magistrate judges and that there was positive interest in pursuing the issue insofar as it might address the "sneak and peak" warrants, which might be helpful, for example, in environmental crimes cases. On the other hand, there was less interest in addressing the issue of tracking device warrants.

Judge Davis appointed a subcommittee consisting of Judge Miller (Chair), Professor Stith, Mr. Pauley, and Mr. Campbell to study the issue and make any recommendations to the Committee.

C. Proposed Substantive Amendments to Rule 12.2. Notice of Insanity Defense.

Judge Carnes indicated that a subcommittee consisting of himself, Mr. Pauley, and Mr. Campbell had studied proposed changes to Rule 12.2, that had been discussed at the last several meetings of the Committee. He indicated that the subcommittee had resolved several issues and was prepared to offer suggested changes to the rule. The Subcommittee had agreed that the results of a compelled sanity examination should be sealed, a procedure already used in some federal courts. Second, the Committee decided to limit the Government's use of an accused's statements made during an examination; under the amendment, the government would not be able to introduce those statements until the defendant has introduced expert evidence.

Finally, the Committee discussed whether some provision could be made for requiring reciprocal discovery for any defense-generated sanity reports and decided to amend the rule. Such defense disclosure would be mandatory if the defendant intends to introduce expert evidence relating to the defense examination.

Following additional discussion, the Committee voted unanimously to approve the amendments to Rule 12.2.

D. Restyling Project: In General.

Judge Davis asked the Committee to comment on proposed schedules for completing the restyling project. He noted that Mr. Rabiej and the Reporter had addressed the issue in separate memos. Under one proposal, the Committee would complete its initial review of the rules in Spring 2000 and publish them for public comment in Summer 2000. Under another plan, the Committee would complete its work later in 2000 or possibly in 2001 and then publish the rules for public comment in 2001.

He pointed out that Judge Scirica had asked that the Advisory Committee present its proposed revisions to the Standing Committee in at least two installments. The current plan was to present Rules 1-31 to the Standing Committee at its January 2000 meeting in Coral Gables, Florida. If the Committee was inclined to move ahead, the second and final installment (Rules 32-60) would be presented to the Standing Committee at its June 2000 meeting.

Mr. Rabiej and the Reporter added that although that schedule would mean additional meetings and place an increased administrative load on the Rules Committee Support Office that it would be possible to stay with the shorter schedule. Under that plan, the subcommittees would meet in November to review the first draft of Rules 32-60 and present those to the full Committee at the special full committee meeting in Orlando, Florida in January 2000. They noted, however, that additional subcommittee meetings might be required in the Spring, however, before the Committee's regularly scheduled April 2000 meeting.

Following additional discussion, there was a consensus among the members that the Committee should attempt to present Rules 1 to 31 to the Standing Committee at its

January 2000 meeting and the remainder of the Rules at the Standing Committee's June 2000 meeting.

E. Proposed Style Amendments to Rules 1-9, Rules of Criminal Procedure

The Committee discussed a number of style changes to Rules 1 to 9. Regarding Rule 1, Mr. Spaniol suggested that the Rules make no reference to Supreme Court. He believed that the reference was no longer necessary in light of the appellate rules and because the Criminal Rules, for all practical purposes, would not be used by the Supreme Court. Following discussion, the Committee voted 9 to 1 to leave the reference in the Rules.

Mr. Pauley stated that he had conducted further research on the question of whether the references to "government attorney" should be used. He noted that a number of statutes use the term "attorney for the government", the term currently used in the Rules and was concerned that changing the term in the Rules would make them inconsistent with those statutes. Following additional discussion, the Committee voted unanimously to use the term, "attorney for the government" in the restyled rules.

The Committee also included a new provision in Rule 1 that was intended to include within the definition of "Federal Judge," any federal judicial officer who is empowered by statute to act as a federal judge, e.g., certain Article 1 federal judges.

The Reporter encouraged the Committee to provide its comments and suggestions on any changes or corrections to the Notes for Rules 1 to 9. Several members suggested changes to the first paragraph of each note, that is intended to briefly explain the style changes to the Rules. The Reporter responded that he would continue to work on standardized language. Several members also indicated that it would be helpful if the Notes more clearly highlighted "substantive" changes to the Rules.

F. Proposed Style Amendments to Rules 10-21, Rules of Criminal Procedure.

The Committee also discussed proposed style changes to Rule 10 to 21 and the proposed Committee Notes. Following discussion, the Committee voted 9 to 1, with one abstention, to use the term "no contendere" instead of "no contest" in the Rules.

The Committee also voted unanimously to remove a provision in redrafted Rule 11 that would have required the judge to place a defendant under oath in every plea colloquy. Following a report from the Reporter on his research on the issue, the Committee voted by a margin of 9 to 1 to delete a provision from the redrafted Rule 11 that would have required the parties to disclose to the court the existence of a plea agreement prior to trial.

G. Proposed Style Amendments to Rules 22-31, Rules of Criminal Procedure.

The Committee discussed proposed style amendments to Rules 22 to 31. With regard to Rule 24, there was some discussion about whether the Rule should explicitly address the issue of permitting a pro se defendant to conduct voir dire. As restyled, Rule 24(a) refers to "attorneys for the parties." The Committee determined that the language was adequate and suggested that the Committee Note emphasize that the new language was not intended to change current practice of permitting pro se defendants to participate.

VI. RULES GOVERNING HABEAS CORPUS PROCEEDINGS

Judge Miller reported that although the Committee had considered a number of amendments to the Rules Governing § 2254 Proceedings and Rules Governing § 2255 Proceedings at the Fall 1998 meeting, the Habeas Rules subcommittee (Judge Miller, chair, Judge Carnes, Mr. Jackson and Mr. Pauley), believed that several additional amendments were in order. First, he suggested that the term "petitioner" in Rule 2(b), Rules Governing § 2255 Proceedings be changed to "movant." Second, the subcommittee had recommended that the term "Magistrate" be changed to "Magistrate Judge" in Rules 8(b) and 10 of both the § 2254 and § 2255 Rules. The proposals were adopted by the Committee by a unanimous vote.

Finally, he noted that in the amendments approved by the Committee, Rule 1(b) of the § 2255 Rules would be amended to also govern proceedings filed under 28 U.S.C. § 2241 by a federal prisoner or detainee. After conducting a word-by-word study of both sets of rules, he believed that § 2241 proceedings are more similar to § 2254 proceedings. He recommended that for now the change should be published for comment as is.

VII. RULES AND PROJECTS PENDING BEFORE THE STANDING COMMITTEE

A. Rules Governing Attorney Conduct.

Judge Scirica informed the Committee of recent developments concerning the adoption of a rule or rules that might govern attorney conduct in federal courts. He provided a brief background on the local rules project that had begun in the 1980's to determine whether, and to what extent, local court rules might be in conflict with the national rules and even state rules. As the initial phase of the project came to a conclusion, Professor Dan Coquillette continued with studying the conflicts in the local and state rules governing attorney conduct, particularly in light of the Department of Justice's position at one point that federal prosecutors were not subject to sanction by

state courts or agencies. The Standing Committee had appointed a special subcommittee to study the problem and as a result there had been a number of meetings and consultations on possible solutions. In the meantime, he reported, Congress had passed the McDade amendment which provided that government attorneys were subject to state disciplinary rules. Now, Congress is considering possible changes to that law.

Judge Scirica indicated that the process is at a cross-roads. Although the Standing Committee will continue to study the issue, there was no intent to interpose the judicial branch between the Department of Justice and Congress. But, if Congress delegates the issue to the judiciary, the Standing Committee is prepared to deal with it. He also noted that at present there seems to be some consensus that if a rule is to be drafted, it would be a single rule, applicable to all federal proceedings, trial and appellate.

Judge Davis called for a sense of the Committee as to whether anyone wished to offer a different perspective or objection. No member voiced objection.

B. Rules Governing Financial Disclosure.

Judge Scirica also informed the Committee that a continuing issue facing the Standing Committee is an issue raised at the Judicial Conference meeting in September 1999—the issue of financial disclosure. There is a growing interest in devising a rule that insures that a judge does inadvertently sit on a case where he or she has a financial interest. He noted that the Code of Conduct Committee was addressing the issue and that the current plan is to circulate a proposed Appellate Rule 26.1 as a possible model.

Mr. Rabiej provided additional background information on the various issues involved. During the discussion by the Committee, Professor Stith raised the question of whether a judge might be disqualified in a criminal case if he or she has a financial interest in a business entity that is the victim in the case. Following additional discussion on that point, Judge Carnes moved that the Committee recommend to the appropriate committees address the problem of financial disclosure vis a vis victims in criminal cases. Judge Dowd seconded the motion, which carried by a unanimous vote.

C. Rules Governing Electronic Filing.

Mr. Rabiej reported that the Civil Rules Committee had taken the lead in proposing several amendments to Civil Rules 5, 6, and 77 that would govern electronic filing of papers and pleadings. He noted that the proposed amendments had been published on August 15, 1999. The Reporter added that Criminal Rule 49 simply cross-references the Civil Rules, it would be helpful to first see what, if any, comments are received on the proposed Civil Rules. Following additional discussion, the Committee agreed that no further action was required at this point on potential amendments to the Criminal Rules.

VIII. DESIGNATION OF TIME AND PLACE OF NEXT MEETINGS

Judge Davis announced that the next meeting would be held on January 10-11, 2000 in Orlando, Florida. The Spring 2000 meeting was tentatively set for San Antonio, Texas in April, subject to availability of meeting locations and dates.

Respectfully submitted

David A. Schlueter
Reporter, Criminal Rules Committee

Item 9

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

TO: Honorable Anthony J. Scirica, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Milton I. Shadur, Chair
Advisory Committee on Evidence Rules

DATE: December 1, 1999

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules met on October 25th in Washington, D.C. It reviewed a number of possible long-term projects, but it is not proposing any amendments to the Federal Rules of Evidence at this time or in the near future. Part III of this Report provides a summary discussion of these long-term projects, which is more fully elaborated in the draft minutes of the October meeting attached to this Report.

II. Action Items

No Action Items

III. Information Items

A. Committee Report on Case Law Divergence From Rules or Notes

The Committee is considering whether to prepare a report that would inform judges and practitioners of case law under the Evidence Rules that diverges materially from the text of a particular Rule, or from the accompanying Committee Note, or both. The Committee believes

that divergent case law presents a trap for the unwary, not because the case law is wrongly decided but simply because the text of the Rule or the Note would not necessarily lead to an investigation of the case law. In a report to the Evidence Rules Committee, the Reporter noted that there are more than 30 examples of Rules in which there is substantial case law divergence from the text.

The Committee does not intend to propose new Committee Notes. The goal of the project would be to publish the Committee report alongside the Rules themselves, for example in the publications of the Evidence Rules prepared each year by West Group. The report would make clear that there is no intent on the part of the Committee to imply that courts have reached the wrong result in diverging from the text of any Rule. Instead the goal is to provide information to the bench and bar.

The Committee has directed the Reporter to sample entries for a possible report, focusing on three rules where the case law diverges significantly from the text: Evidence Rules 803(8), 804(b)(1), and Rule 1101. The Reporter will also prepare an introduction to the possible report. This introduction would set forth the goals of the report and emphasize that the report does not draw conclusions on the merits of the case law, and is designed only to assist the bench and bar by highlighting the situations in which the case law diverges from the Rule. The Evidence Rules Committee will consider this report at its next meeting.

B. Privileges

The Subcommittee on Privileges has begun a long-term project to prepare provisions that would state, in rule form, the federal common law of privileges. This project will not necessarily result in proposed amendments, however. The Committee believes that an attempt to state the federal law of privileges would be useful even if amendments are never proposed or adopted, because the effort would at any rate be useful to the bench and bar for guidance on the current state of privilege law. The Subcommittee will start with attorney-client privilege, using the new ALI Restatement provision as a guideline. The Committee has resolved that any codification effort must include a residual provision (much like current Rule 501) that would permit federal courts to adopt and develop new privileges in light of reason and experience.

C. Other Evidence Rules

At its October meeting the Committee discussed whether there are any other Evidence Rules that are in need of amendment. The Committee determined that no Rules are in need of amendment at this time. However, the Committee did resolve to investigate certain problems that might be arising under three Evidence Rules, to determine whether amendments to these Rules might be justified in the long-term. These three Rules are:

1. Rule 608(b) — The Reporter was directed to investigate whether courts are reaching inconsistent results in applying the exclusion on extrinsic evidence set forth in Rule 608(b). The Rule precludes extrinsic evidence when offered to prove "credibility", but the Supreme Court has construed the limitation to apply only when the proponent is attacking the witness' character for veracity. The Reporter will investigate whether lower courts have reached disparate results despite the Supreme Court's decision.

2. Rule 804(b)(3) — Courts have reached different results on whether the corroboration requirement of the Rule applies to declarations against penal interest offered by the prosecution. There is also a difference of opinion over the degree of corroboration required under the Rule. The Reporter will prepare a report on these matters for consideration by the Committee at the next meeting.

3. Rule 902 — The Rule provides for authentication of public documents by the use of a seal. Many states have discontinued the use of seals, however. This has created problems for the Justice Department when it is necessary to enter a state public record into proof. The Committee will consider whether Rule 902 should be amended to provide for an "update" of the provisions concerning seals.

D. Attorney Conduct Rules

The Evidence Rules Committee was asked to provide guidance to the Subcommittee on Attorney Conduct Rules. The specific question was whether the Subcommittee should continue its project. The Committee agreed that the project should continue. The Committee recognized that problems can arise from a proliferation of local rules when they conflict with state rules of professional responsibility. It also recognized the concerns of the Justice Department over state variations in Rule 4.2 and their potential effect on federal prosecutors. But the Committee expressed reservations about the draft rule of attorney conduct insofar as it 1) created a distinction between matters of professional responsibility and matters of procedure and 2) provided for preemption of state rules of professional responsibility in certain circumstances.

The first concern is in part that all of the current local rules could simply be recharacterized as rules of procedure rather than rules of attorney conduct; thus, the draft rule might not result in any meaningful change. Even in the absence of such a recharacterization, the absence of any bright line between the two categories would be problematic, given the purpose of such rules to provide clear standards for attorney conduct.

The second concern about supremacy of federal "procedure" is that states have a strong interest and expertise in regulating attorney conduct. These state interests must not be lightly disregarded, as may be the case if the term "procedure" is construed too broadly.

The Committee unanimously supports the Subcommittee's decision to investigate further whether local rules on attorney conduct are in fact creating a problem in practice. It is important to determine whether a real problem exists before any decision is made to propose a federal rule.

IV. Minutes of the October, 1999 Meeting

The Reporter's draft of the minutes of the Evidence Rules Committee's October, 1999 meeting are attached to this report. These minutes have not yet been approved by the Evidence Rules Committee.

Attachment:

Draft Minutes

Advisory Committee on Evidence Rules

Draft Minutes of the Meeting of October 25, 1999

Washington, D.C.

The Advisory Committee on the Federal Rules of Evidence met on October 25th, 1999 at the Thurgood Marshall Federal Building in Washington, D.C..

The following members of the Committee were present:

Hon. Milton I. Shadur, Chair
Hon. Jerry E. Smith
Hon. David C. Norton
Hon. Jeffrey Amestoy
Laird Kirkpatrick, Esq.
Frederic F. Kay, Esq.
John M. Kobayashi, Esq.
David S. Maring, Esq.
Professor Daniel J. Capra, Reporter

Also present were:

Hon. Anthony J. Scirica, Chair of the Standing Committee on Rules of Practice and Procedure
Hon. Richard Kyle, Liaison to the Civil Rules Committee
Hon. David D. Dowd, Liaison to the Criminal Rules Committee
Hon. Fern M. Smith, Director of the Federal Judicial Center and former Chair of the Evidence Rules Committee
Professor Kenneth Broun, former Member of the Evidence Rules Committee and Consultant to the Subcommittee on Privileges
Professor Leo Whinery, Reporter, Uniform Rules of Evidence Drafting Committee
Roger Pauley, Esq., Justice Department
Peter G. McCabe, Esq. Secretary, Standing Committee on Rules of Practice and Procedure
John K. Rabiej, Esq., Chief, Rules Committee Support Office
Mark Shapiro, Esq. Rules Committee Support Office
Joe Cecil, Esq., Federal Judicial Center
Jennifer Evans Marsh, Esq. Federal Judicial Center
Joseph Spaniol, Consultant to the Standing Committee on Rules of Practice and

Opening Business

Judge Shadur opened the meeting by conveying his sense of honor at being appointed the new Chair of the Committee. He noted that the terms of three members had expired--Greg Joseph, Ken Broun, and Judge James Turner. He expressed the Committee's gratitude for the excellent contributions and dedicated service of these three members. He also expressed his thanks, on behalf of the Committee, to Judge Fern Smith, the Committee's previous Chair, who provided remarkable leadership in obtaining approval by the Standing Committee and the Judicial Conference of the recent package of proposed amendments to the Evidence Rules.

Judge Shadur noted that the three vacant Committee positions had not been filled. He expressed the hope that these positions might be filled in the near future, and stated the Committee's interest in selecting outstanding female candidates for membership.

Judge Shadur asked for approval of the minutes of the April, 1999 meeting. Three stylistic changes were made to the draft, and then these minutes were unanimously approved.

Judge Shadur then brought the Committee up to date on the status of the proposed amendments to Evidence Rules 103, 404(a), 701, 702, 703, 803(6) and 902. The proposals were approved by the Standing Committee and the Judicial Conference and will soon be forwarded to the Supreme Court. Unless the Supreme Court or Congress disapproves of the proposals, they will become effective on December 1, 2000. Judge Shadur observed that the Reporter had prepared a short summary of the proposed amendments, and that this summary will be forwarded to the Supreme Court along with the package of proposed amendments.

Report on Case Law Divergence From the Rules

At the April, 1999 meeting the Committee agreed to consider whether it would be useful to prepare a report highlighting the Evidence Rules in which the case law diverges from the text of the Rule. For the October meeting the Reporter prepared a memorandum highlighting the Rules that might be treated in such a report. The problems of case law divergence arise in two situations: 1) Some case law is simply inconsistent with the text of the Rule; and 2) some case law concerns matters on which the Rule is silent.

Judge Shadur observed that any project to highlight case law divergence from the Rules would not result in the promulgation of new Committee Notes, nor would it result in formal

amendment or revision of old Committee Notes. Judge Shadur noted that the relevant statute, 28 U.S.C. § 2073, contemplates that Committee Notes cannot be promulgated independently of a rule change. Instead, the goal of a report would be to have it published wherever the Rules themselves are published, as an entry after the Committee Note to each treated Rule. The Reporter noted that West Group has already agreed in principle to the publication of such a Report prepared by the Advisory Committee. Also, the publisher of Weinstein's treatise on Evidence included the previous report on misleading Advisory Committee notes at appropriate places in the treatise, and would likely do the same with a report on case law divergence.

A discussion then ensued on whether the project should be continued. It was asked whether the Evidence Rules are going to be restylized in the near future--if so, any case law divergences might be taken care of simply by amending the affected Rule. The Committee was informed, however, that there are no current plans to restylize the Evidence Rules.

One member's comment indicated that he favored the project but was concerned that pointing up situations where the case law was different from the Rule amounted to a criticism that the courts had misconstrued the Rule. This was recognized as a legitimate concern. It was agreed that the project to highlight case law divergences would be reportorial only. The introduction to the report would emphasize that no inference should be drawn as to the merits of the case law divergence. It was remarked that many of the divergences in fact seem to reach a fair result in the face of rigid statutory language.

Another member expressed his strong support for preparing a report on case law divergence from the text of the Rules and Committee Notes. He noted that many Magistrate Judges have relied on the original Committee Notes concerning confrontation, even though the current law on confrontation is far different from that stated in the Note. He observed that the project might be a useful way of determining which Rules should be amended in light of their divergence from the current case law.

Judge Scirica noted that the Standing Committee is understandably reluctant to approve amendments to Committee Notes without an accompanying rule change. But he stated that a pilot project to prepare a report on case law divergence from the Rules and Notes could provide an important service to the bench and bar.

After this discussion, there was general agreement that the Committee should proceed with the project to prepare a report on case law divergence from the Rules. The Reporter was instructed to prepare the following for the next meeting: 1) An introduction to the report, which would indicate the goals of the report and provide a caveat that the report does not draw conclusions on the merits of the case law and is designed only to assist the bench and bar by highlighting the situations in which the case law diverges from the Rule; 2) a full write-up of case law divergence from Evidence Rules 803(8), 804(b)(1), and Rule 1101.

Privileges

Judge Shadur expressed his gratitude that Judge Jerry Smith has agreed to chair the Subcommittee on privileges. He also noted that Professor Ken Broun had been appointed as a consultant to the Subcommittee. Judge Smith reported on the meeting of the Subcommittee that took place the day before the full Committee meeting. The Subcommittee was unanimously of the view that any proposed codification of the privileges would be a very long-term project. At this stage, no final decision has been or need be made on whether amendments would actually be proposed. The Subcommittee believes that drafting privilege rules that would codify existing Federal common law would be a useful project even if amendments are never proposed. For example, the Committee might, independently of any rule change, find it useful to prepare a report for the bench and bar setting forth the current state of privilege law.

Judge Smith indicated that the Subcommittee agreed that its first step was to prepare, in draft form, four rules on privilege: 1) an initial Rule, such as the originally proposed Rule 501, which would state that privileged information is excluded unless otherwise provided; 2) a codification of the attorney-client privilege; 3) a waiver rule; and 4) a catch-all provision, similar to current Rule 501, which would provide for "reason and experience" development of privileges not covered by other specific privilege rules. The goal is to circulate a draft of these provisions within the Subcommittee, and to report on developments to the full Committee at the next meeting.

Subcommittee members emphasized that the goal of the privilege project is to fashion rules that would codify existing privilege law. The goal is not to make law or to decide policy questions.

A Committee member noted that conflict of laws issues often arise with privileges, and expressed the hope that the Subcommittee would deal with that problem. The Subcommittee was of the view, however, that the Evidence Rules are not the place to set forth conflict of laws principles.

Attorney Conduct Rules

Judge Scirica reported on the work of the Standing Committee Subcommittee on Attorney Conduct Rules. He noted that the Subcommittee's work stemmed from the local rules project, which uncovered a plethora of local rules governing attorney conduct. A good number of these local rules appear to conflict with the pertinent state rule of professional conduct. Judge Scirica noted that the Subcommittee had considered several alternatives: 1) do nothing; 2) provide a single federal rule of dynamic conformity (i.e., the applicable rule is that which governs in the state in which the district court sits); 3) promulgate a number of "core" federal rules; and 4) promulgate an entire federal code of attorney conduct. After extensive discussion,

the Subcommittee reduced the alternatives to two: 1) do nothing; 2) promulgate a rule of dynamic conformity, while recognizing that federal courts have the power to control their own procedure, even if inconsistent with a state disciplinary rule.

Judge Scirica emphasized that no final decision had been made to opt for a "dynamic conformity subject to federal procedure" rule. The draft that had been circulated to the Advisory Committees was for discussion purposes only. The Advisory Committees were being asked, at this point, to express their views on whether the attorney conduct rules project should continue or be abandoned. He stated that the Subcommittee on Attorney Conduct Rules will meet early in 2000 to survey whether a problem really exists that needs to be addressed. While it is clear that there are local rules in conflict with state disciplinary rules, this might not really be a problem if 1) the federal courts are not enforcing their rules in cases of real conflict, and 2) the state disciplinary authorities are being sensitive to federal interests. Judge Scirica noted that the Subcommittee plans to hear from people in the field, including state disciplinary counsel, in order to assess whether a substantial problem exists.

The Justice Department representative observed that the real problem occurs with the state variations in Rule 4.2 (the no contact rule). Some states construe their version of Rule 4.2 to prohibit investigative contacts by prosecutors, including federal prosecutors. This creates a risk that federal prosecutors will be disciplined for conduct in one state that is permissible in another. The concern over discipline has been heightened by the McDade amendment, which provides that federal prosecutors are governed by the relevant state ethics rules.

Judge Scirica noted that the Rule 4.2 problem is a serious one, but that it is possible that the problem might be addressed outside the Rules process. For example, the ABA 2000 project might propose a Rule 4.2 that could accommodate DOJ interests; or Congress might intervene. The Council of State Chief Justices might be another avenue of resolution.

Judge Shadur and other Committee members expressed reservations about any rule that would attempt to preempt state regulation of attorney conduct--an area that traditionally has been left to the states. They also noted that the distinction in the draft rule between matters of professional responsibility and matters of procedure was vague and problematic. Some concluded that it was likely that the proposed rule would do no good, because local district courts could simply reconstitute all of their local rules on "professional responsibility" as local rules of "procedure." While many Committee members maintained serious reservations about the proposal, it was generally agreed that the project should continue, in order to allow the Subcommittee to determine: 1) whether serious problems of state-federal conflict really exist, and 2) whether the draft rule (or something like it) could do anything to solve such problems without treading inappropriately on important state interests.

Rules That Warrant Further Study

The Committee engaged in a general discussion to determine whether there are any rules that are so problematic in operation as to warrant further study, and possible amendment in the long-term. Some rules were considered and determined by the Committee to be not proper subjects for further study at this point. Other rules were considered to be possibly problematic, so that further study was warranted.

1. Rule 1101--The argument was made that Rule 1101 should be amended to codify the case law holding that certain proceedings are not subject to the Evidence Rules (e.g. juvenile transfer proceedings, suppression hearings), even though they are not specifically exempt under the terms of Rule 1101. The Committee determined, however, that the courts have not had a problem in determining which proceedings are covered by the Rules and which are not. The danger is that by specifying some specific proceedings as exempt, other proceedings might be deemed inadvertently covered by the Rules. The Committee resolved not to proceed with any amendment to Rule 1101. It was determined that the best course is to mention Rule 1101 as one of the Rules in the proposed report concerning case law divergence from the Rules.

2. Technological Advances in the Presentation of Evidence: The Committee reconsidered whether the Evidence Rules should be amended to accommodate changes in technology that impact the presentation of evidence. The Reporter referred the Committee to his previous memorandum on the subject. If the goal is to modify all references to "paper evidence" in the Rules, this would require either 1) the amendment of more than 25 rules; or 2) the amendment of Article 10 to apply the definition in the Best Evidence Rule to all the Rules. It was determined that either change would be costly and potentially confusing, and that change was unwarranted given the fact that courts and litigants have had no problem in handling technological advances under the current Evidence Rules.

3. Rule 801(d)(1)(B): The Committee considered a proposal that Rule 801(d)(1)(B) be amended to provide that a prior consistent statement is admissible for its truth whenever it is admissible to support the witness' credibility. After discussion, it was determined that this proposal might have some merit as a narrow and technical amendment to an Evidence Rule, but that the problems currently arising under the Rule are not so serious as to require proposing an amendment at this time. Consideration was deferred, with the understanding that the proposal might be considered more fully should other proposed amendments to the Rules be necessary at some time in the future.

4. Rule 706: The Committee noted that there is uncertainty of definition among the roles of special master, court-appointed expert witness and technical adviser. Most of the questions of definition, however, arise over the role of the special master. The Committee was informed that the Civil Rules Committee has a Subcommittee considering the role of the special master and the possibility of amending Civil Rule 53. It was determined that an amendment to Evidence Rule 706 was not necessary at this time. Instead, the Committee would keep apprised of any developments with respect to Civil Rule 53.

5. Rule 608(b): A Committee member observed that as written, Rule 608(b) precludes extrinsic evidence when offered to prove a witness' "credibility." The Rule is intended, however, to limit extrinsic proof only when it is offered to attack the witness' character for veracity--so the Supreme Court held in *United States v. Abel*. The Committee member suggested that the Rule might be amended to change the word "credibility" to "character." He stated that despite the Court's ruling in *Abel*, many lower courts have construed Rule 608(b) to preclude extrinsic proof when offered for such not-for-character purposes as bias and contradiction. Some reservations were expressed about a possible amendment, however. Specifically, to change the text to preclude extrinsic evidence only when offered to prove a witness' character would constitute a value judgment that this form of impeachment, and no other, should be subject to the exclusion. It is unclear why this should be so. Thus, any amendment would require more than a simple substitution of one word for another. It would require a merits analysis as to why extrinsic evidence cannot be offered for character impeachment but can be offered for other forms of impeachment. The Committee instructed the Reporter to prepare a report assessing whether there are a large number of courts that are misconstruing Rule 608(b) despite the Supreme Court's ruling in *Abel*. The Reporter stated that he would submit the report for the next Committee meeting.

6. Rule 804(b)(3): A Committee member observed that the Rule requires criminal defendants to proffer corroborating circumstances clearly indicating trustworthiness for statements against penal interest made by a declarant that exculpate the accused. In contrast the rule does not by its terms require a similar showing by the government when a declaration against penal interest is offered to inculpate the accused. Given this seeming unfairness, many courts have required the government to provide corroborating circumstances even though that is not required by the text of the Rule. Others have not. Also, courts appear to be in disarray over the degree and nature of the corroborating circumstances that must be provided under the Rule. Given the degree of discord in the courts, as well as the potential unfairness of the Rule as written, the Committee agreed to consider, at least on a preliminary basis, whether Rule 804(b)(3) should be amended. No timetable was set for any proposed amendment and no agreement was reached on whether the rule should in fact be amended. The Reporter was instructed to provide a background report for the Committee in time for the next Committee meeting.

7. Rule 902: The Justice Department representative pointed out a problem in applying Rule 902 when used to authenticate state official records. Rule 902 provides for authentication through the use of a seal. Yet many states no longer use a seal for authenticating their public documents. Other Committee members noted that the very concept of a seal may be outmoded, at least insofar as it might be considered an important or exclusive means of self-authentication of official records. The Committee resolved to consider, at least on a preliminary basis, whether Rule 902 should be amended to modify the reference to a government seal. No timetable was set for any proposed amendment and no agreement was reached on whether the rule should in fact be

amended. The Reporter was instructed to provide a background report for the Committee in time for the next Committee meeting.

Technology

The Chair noted that Judge Turner, who was the Evidence Rules Committee's representative on the Technology Subcommittee of the Standing Committee, how now gone off the Evidence Rules Committee. The Chair appointed Judge Norton as Judge Turner's replacement. Judge Scirica informed the Committee that the Technology Subcommittee has done important work in the area of electronic filing, and would consider other matters, such as privacy concerns, in the near future.

Uniform Rules

Professor Whinery, the Reporter for the Uniform Rules of Evidence Drafting Committee, reported on developments in the Uniform Rules project. The Drafting Committee's proposals have been accepted by the Conference and will be referred to the States. The Uniform Rules Committee has generally followed the Federal Rules of Evidence, but Professor Whinery noted that there are some marked differences. For example, Proposed Uniform Rule 702 establishes a presumption of admissibility for expert testimony that passes the *Frye* test, and a presumption of inadmissibility for expert testimony that does not. Then the Rule provides a number of factors that would be relevant to overcoming the presumption one way or another. Also, the Uniform Rules have been amended throughout to update language that might not accommodate the presentation of evidence in electronic form.

Next Meeting

The next meeting of the Evidence Rules Committee is scheduled for April 17th in Chicago.

The meeting was adjourned at 12:20 p.m., Monday, October 25th

Respectfully submitted,

Daniel J. Capra
Reed Professor of Law

Item 10

Memorandum

To: Committee on Rules of Practice and Procedure (Standing Committee)

From: Daniel R. Coquillette, Reporter

Date: December 7, 1999

Re: Subcommittee on Attorney Conduct Rules

Introduction

The Subcommittee on Attorney Conduct was established by this Committee at its January 7-8, 1999 meeting. It consists of two representatives from each Advisory Committee, plus liaison members from the Federal-State and Court Administration and Case Management Committees and the Department of Justice. This Committee is represented by Chief Justice Norman Veasey and Geoffrey Hazard. Since our last meeting on June 14-15, 1999, the Subcommittee has met on September 29, 1999 in Philadelphia. (It met previously on May 4, 1999 in Washington.) The minutes of the September 29th meeting are attached as Appendix I.

Current Proposals

The Subcommittee was established for two purposes: 1) to see if the hundreds of inconsistent federal local rules on attorney conduct can be reduced to one or more uniform rules (returning most of the regulated issues to state control), and 2) to address concerns raised in Congress about attorney conduct in federal courts. At both the May and September meetings available options were narrowed considerably. At the conclusion of the September 29th meeting, the Subcommittee voted, with only one dissent, to recommend careful ongoing consideration of a draft uniform rule prepared by Professor Edward H. Cooper, Reporter for the Civil Rules Advisory Committee. That rule, known as "Federal Rule of Attorney Conduct Rule 1," is attached as Appendix II. (It is in a slightly updated version, reflecting suggestions at the September meeting.)

The only dissenting vote to continuing consideration of this "Federal Rule of Attorney Conduct Rule 1" ("FRAC 1"), was that of the Department of Justice representative, who believed that the draft rule did not go far enough in establishing a national system of federal rules governing attorney conduct, at least in areas of particular concern to the Department. FRAC 1, with only narrow exceptions, establishes "dynamic conformity" between federal court standards of attorney conduct and relevant state standards.

There was also a broad consensus that consideration of FRAC 1 should be very careful and deliberate, given the intensely controversial nature of attorney conduct rules. It was thus decided to have another meeting at the beginning of the year, now scheduled for February 4, 2000 in Washington, D.C.

The purpose of the February 4th meeting is to invite a wide range of interested parties to comment on the Subcommittee's agenda, with a particular focus on FRAC 1. The central question will be "Is there a problem?", and, if so, whether it is a problem that warrants adoption of a uniform rule through the Rules Enabling Act process. Among the parties invited are leading academic commentators, judges and practitioners, including representatives of the American Bar Association, the Federal Bar Association, the National Association of Bar Counsel, the National Conference of Chief Justices, the Department of Justice, the National Association of Criminal Defense Lawyers, the National District Attorneys Association, the American Academy of Trial Lawyers, and the American Trial Lawyers Association, and others. A complete invitation list is attached as Appendix III.

Next Steps

Assuming that support for action remains strong following the February 4th invitational meeting, the Subcommittee will meet again to approve specific proposals for consideration by the Advisory Committees and the Standing Committee. It is also possible that the Subcommittee will consider a "FRAC 2," addressing special issues confronting federal government attorneys, and a "FRAC 3," addressing issues of particular concern to bankruptcy lawyers. Any approval of a rule or rules by the Standing Committee, including approval of publication for comment under the Rules Enabling Act, is still well in the future, and is unlikely to occur before the January, 2001 meeting of the Standing Committee.

This schedule, however, assumes that Congress will not require more immediate action. Two bills filed this year directly addressed the question of federal rules governing attorney conduct, the "Federal Prosecutors Ethics Act" (Senate 250, January 17, 1999) and the "Professional Standards for Government Attorneys Act of 1999" (Senate 855, April 21, 1999). The latter bill would require a report from the Judicial Conference "not later than 1 year after the date of enactment" which would "include recommendations with respect to amending the Federal Rules of Civil and Criminal Procedure" to provide for "a uniform national rule governing attorneys for the Government with respect to communications with represented persons and parties." A third bill, drafted by Senator Leahy's office and still unfiled, would have also required that:

> "(b) Not later than 2 years after the date of enactment of this Act, the Judicial Conference of the United States shall submit to the Chairman and Ranking Members of the Committees on the Judiciary of the House of Representatives and the Senate, a report, which shall include—
>
> (1) a review of any areas of actual or potential conflict between specific Federal duties related to the investigation and prosecution of violations of Federal law and the regulation of Government attorneys (as that term is defined in section 530B of title 28, United States Code) by existing standards of professional conduct, and
>
> (2) recommendations with respect to amending the Federal Rules of Practice and Procedure to provide for additional rules governing attorney conduct to address any areas of actual or potential conflict pursuant to the review under paragraph (1)."
>
> *Id.* Section 3(b).

None of these bills are likely to pass this year, but we are told that similar bills will be filed in the next session of Congress.

Conclusion

The Subcommittee has been making slow, but steady, progress toward bringing order out of the chaos of existing federal local rules governing attorney conduct. Its goal is to act only when a full consensus has been reached, after broad consultation with the effected interest groups, both federal and state. It also will be fully prepared to consider any requests for action by Congress, such as those proposed this year.

Daniel R. Coquillette
Reporter, Committee on Rules of
Practice and Procedure,
Judicial Conference of the United States

December 7, 1999

Appendix I: Minutes of the September 29, 1999 meeting of the Subcommittee on Rules of Attorney Conduct

DRAFT MINUTES

Standing Committee Attorney Conduct Rules Subcommittee

The Attorney Conduct Rules Subcommittee of the Standing Committee on Rules of Practice and Procedure met in the United States Courthouse in Philadelphia on September 29, 1999. Judge Anthony J. Scirica was present as chair of the Standing Committee. Professor Daniel R. Coquillette was present as Standing Committee Reporter. Subcommittee members who attended included Judge Samuel A. Alito, Jr.; Professor Daniel J. Capra; Darryl W. Jackson, Esq.; Judge John W. Lungstrum (as liaison from the Committee on Court Administration and Case Management); Myles V. Lynk, Esq.; Judge Lee H. Rosenthal; Gerald K. Smith, Esq.; Hon. John Charles Thomas; Chief Justice E. Norman Veasey; and Judge Ewing Werlein, Jr. Advisory Committee reporters present included Edward H. Cooper (Civil Rules), Patrick J. Schiltz (Appellate Rules), and Jeffrey W. Morris (Bankruptcy Rules). The Department of Justice was represented by Juliet Eurich, Esq. Julie Katzman, Esq., a Senate Judiciary Committee staff member, also attended. Representatives of the Administrative Office of the United States Courts included John K. Rabiej, Karen Kremmer, and Mark Miskovsky. Marie C. Leary represented the Federal Judicial Center. Roland E. Dahlin, Federal Public Defender for the Southern District of Texas, also participated.

Introduction

Judge Scirica opened the meeting by noting that the first inquiry must be whether there is a problem that deserves further study, and then defining the scope of that problem. There are conflicts in regulating attorney conduct in federal court, both "vertical" and "horizontal." Many federal districts have adopted local rules that apply standards of professional responsibility different from those applied in local state courts. And there is no uniformity among districts. These conflicts are, in the abstract, unseemly. The conflicts create problems for conscientious lawyers, although we do not have rigorous information about how extensive these problems are in practice. And even if there are present or impending problems that deserve consideration, the problems may prove less unattractive than any available cure.

The most pointed specific question that must be asked in contrast to these broad general questions is whether the § 2072 Enabling Act process can adopt rules that govern the responsibility of United States government attorneys, or whether § 530B supersedes national rules. This question is particularly pointed as to a national rule that would oust application of state professional responsibility standards. Even if § 2072 confers authority to adopt a national rule that supersedes § 530B, it is a separate question whether the authority should be exercised.

The result of deliberations at the May meeting seems to have been to leave two and one-half options. The half option is to do nothing. The other two options may blend. One is to adopt a rule that, for all questions, invokes state professional responsibility rules; this rule has come to be called the "dynamic conformity" rule. The second is to adopt a dynamic conformity rule as a general principal, but to supplement it with a small number of rules that establish specific federal standards to govern specific issues of special interest to the federal courts. Issues frequently mentioned for special federal interest include disqualification for conflicts of interest, confidentiality, and candor to the tribunal. The "Rule 4.2" question of contact with represented persons also has been the focus

of much discussion, but presents such unique considerations that it may better set apart for separate discussion.

The May discussion also left open an "Erie" question, whether federal courts should adopt state-court interpretations of state rules. There are good reasons to believe that this question is better left to judicial development in applying any national rule that might be adopted.

Attorney Rules Impetus

Professor Coquillette described the process that led to creation of this subcommittee.

The Standing Committee came to be involved with questions of attorney conduct in federal courts as part of the Local Rules project. The Standing Committee never set out to expand the federal role in governing attorney conduct. If anything, the continuing concern has been that federal courts should draw back from the level of regulation now practiced.

The Local Rules Project was launched in 1988 with a request by Congress that the Standing Committee study the proliferation of local rules. The Project found thousands of local rules. Many of the local rules were inconsistent with national court rules, some were inconsistent with federal statutes, and a small number were unconstitutional. The first Local Rules Project proved a great success. The number of local rules was reduced, and a uniform numbering system was adopted to help guide practitioners to the relevant local rules.

The Local Rules Project also found hundreds of local rules on professional responsibility. One district had a rule that incorporated the 1907 Canons of Professional Ethics. More than twenty districts had complete sets of rules — inevitably, the complete rules were often inconsistent with the rules of the local state. Other local rules adopted state rules, or some combination of state rules with a federal overlay. The situation was so complicated and confusing that the Project decided to put aside any study of professional responsibility. A study of these problems threatened to swamp the rest of the Project work.

The Standing Committee also has heard many arguments whether federal courts have authority to adopt attorney conduct rules. The simple fact is that "federal courts" — the individual district courts and circuit courts — have adopted hundreds of attorney conduct rules. They have adopted rules that intrude on state interests. Some of the rules are substantive. Many of the rules "are wretched as a matter of drafting."

One of the reasons why the proliferation of inconsistent local rules has not become an acute problem is that "in large part the federal courts ignore their own local rules." It is common for one federal court to follow an attorney-conduct decision in another federal court, in blithe disregard of the fact that the decision being followed turns on a local rule that is inconsistent with the local rule of the court deciding the present case.

An illustration of the problems that local rules can present to practitioners is provided by the District of Colorado. The District of Colorado has behaved as a model citizen in the local-rule world. Its local rule for attorney conduct, uniformly numbered, adopts the Colorado state standards, D.Colo. Rule 83.6. But after recent amendments of three Colorado rules of professional responsibility and one Colorado rule of procedure, the District of Colorado adopted an administrative order that states that these four state rules will not be followed. The administrative order is not

readily available to lawyers; there is no indication that it was adopted according to the procedures that must be used to amend a local rule. Another illustration is provided by California: the four federal districts there differ among themselves. The Northern District of Illinois has a comprehensive set of rules that do not adhere to any of the ABA models. The Southern District of New York has local rules that are quite different from New York state rules, and it is clear that the district wants to adhere to rules that it believes are best suited to the pattern of litigation in that district without regard to consistency with state courts or any other federal court. And so the problems go.

Another set of problems is illustrated by the Tenth Circuit decision on September 1 in U.S. v. Colorado Supreme Court, recognizing the adoption through the McDade Amendment, § 530B, of the Colorado rule on subpoenaing an attorney as a grand-jury witness.

The Court Administration and Case Management Committee tried to do something about the bewilderment of local rules in 1978. It promulgated a Model Local Rule. Seventeen districts adopted it. This experience suggests that a Model Rule approach will not be effective in reducing local variations.

There is, in sum a local rules problem. The purpose of addressing the problem is to reduce the involvement of federal courts in regulating professional responsibility.

In addition to these origins for the current study, Congress is concerned. There has been a lot of action on these topics this year, and the concern is not new. The bills that have been introduced have not always reflected great sophistication — one bill, introduced a few years ago, would have required a criminal defendant's attorney to decide whether the defendant is guilty, and if the decision should be for guilt to turn over to the prosecution all evidence that the prosecution does not already have. It is desirable for the Judicial Conference committee structure to see what it can do to assist Congress.

Congress is now considering bills that react to the McDade Amendment. Section 530B has drafting errors that call out for correction. It applies state laws and rules, and also local federal court rules, without accounting for the fact that frequently the local federal rules are inconsistent with the state rules. United States Attorneys are particularly troubled about clashes between state rules and federal local rules.

There is a strong argument that § 530B should be interpreted to include uniform national federal court rules, so that compliance with a national rule of professional responsibility would satisfy § 530B. But it is difficult to show that Congress in fact was thinking about this issue, making it difficult to predict a secure interpretation of the statute.

Possible approaches to solving the problems created by § 530B are reflected by bills introduced by Senators Hatch and Leahy. As always, however, it is difficult to predict the evolution and legislative future of such bills.

These problems have become more pressing since we met in May. In June, the Standing Committee concluded that the local rules situation has again become severe. A new Local Rules Project has been launched. The ABA Litigation Section has drafted a resolution, to be submitted to the House of Delegates, calling for fewer local rules and for more consistency of local rules. They

are concerned, among other things, about the impact of local rules on interstate practice.

If the subcommittee can come to an agreement today on a general course of action, the next step will be informal discussion at the fall meetings of the various rules advisory committees. The Standing Committee will consider the question at its January meeting, aiming at a specific rule draft that can be submitted to the advisory committees for their spring committees. The deliberations of these several committees may support a draft that the June Standing Committee meeting could approve for publication. Publication and later steps would follow the usual, careful process. All of this will take time.

It was asked what is happening with legislation in the House. The only known bill pending in the House is § 114 of the Senate-passed Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act. This bill directs the Attorney General to "establish by plain rule that it shall be punishable conduct for any Department of Justice employee, in the discharge of his or her official duties, intentionally to" engage in any of the acts specified in nine numbered paragraphs.

A committee member suggested that the "heart and soul" of the reasons for considering federal rules of attorney conduct is the fear that federal attorneys are at risk of discipline, or worse, for violating Model Rule 4.2.

Professor Coquillette responded that Rule 4.2 is indeed a big controversy. But the Standing Committee was involved in this issue long before there was a Rule 4.2 problem. The local rules problem and congressional interest were the reason for acting long before Rule 4.2. We should not let the Rule 4.2 thing distract our attention from the central question. The approach finally chosen may reach Rule 4.2 issues, but it also may not. The contentiousness of Rule 4.2 should not be allowed to impede progress on the central problem.

Another committee member observed that it is apparent that the local rules are a mess. But he asked whether there is a practical problem for lawyers other than those who practice with the Department of Justice. Professor Coquillette responded that there are lots of federal cases dealing with attorney conduct. But there are patterns in them. (1) The courts of appeals have practically no problem at all. They have Appellate Rule 46; although the language of the rule itself adopts a "conduct unbecoming" standard that probably is void for constitutional vagueness, the circuits have adopted local rules that give sufficiently concrete meaning to the standard to pass constitutional muster. There have been 22 cases in the courts of appeals in a five-year period of study. Attorneys do not often misbehave in the courts of appeals. (2) There is a problem in the district courts. We have an empirical study suggesting there are lots of problems that do not appear in reported opinions. There is a pretty high degree of anxiety. Big law firms that handle multistate cases are particularly apt to encounter problems, particularly with conflict-of-interests issues that give rise to disqualification questions. And there are signs that the problems are getting worse: consolidation of practices and the growth of tactical motions to disqualify are exacerbating things.

The same committee member asked whether there are any cases where an attorney has been disciplined for conduct that violates one rule but not the other. Professor Coquillette responded that there are no known cases. Both federal and state authorities recognize how unfair that would be. "We make the system work by ignoring the conflicts." The problems arise in the context of

regulating the progress of a specific litigation, through such motions as those to disqualify or to exclude evidence. The Department of Justice representative, who is acting as head of the Office of Professional Responsibility, added that she advises Department attorneys across the country. There is at least one state that interprets the state's Rule 4.2 to bar contacts with former employees, while there are both district court opinions and a court-of-appeals opinion that permit these contacts. Nothing has been referred to the state bar. But Department attorneys have to face the question. The effect of the state rule may be that United States Attorneys do not do things they think it appropriate and desirable to do.

Another committee member observed that the Arizona Supreme Court has twice approved Model Rule 1.7 sanctions for filing a voluntary case in bankruptcy that involves a former client as a creditor. This result is in conflict with what many bankruptcy lawyers believe to be the "federal rule."

A different committee member asked "how frightened is" the Department of Justice? The answer was that there are consequences to the case in failing to pursue appropriate lines of inquiry, but a danger of consequences to the attorney if they are pursued. There have been a number of cases in the last few months since the McDade Amendment took effect. Sometimes it is possible to adjust to the problem by assigning a different attorney who may work under a different set of state rules.

Draft "FRAC 1"

Professor Cooper was asked to introduce the draft "Federal Rule of Attorney Conduct 1" that was included in the agenda book. He explained that he had been asked to create a draft that would reflect the apparent direction of the discussion at the May meeting. Because Professor Coquillette was unable to attend the May meeting due to an accident, Cooper became heir to the job of preparing minutes and moved on from that chore to the chore of drafting a new Rule 1 that would embody the sense of the May meeting.

This draft Rule 1 derives immediately from the draft Rule 1 prepared by Professor Coquillette and included in the May materials. That draft in turn derived in part from the Model Local Rule prepared in 1978 and from Model Rule 8.5. Model Rule 8.5 is a choice-of-law provision that has been adopted by some number of states. This draft is, as the earlier Rule 1, a rule of "dynamic conformity" to state law. Although drafted to accommodate additional Federal Rules of Attorney Conduct, it comes without any additional rules. There is no proposed federal rule on contact with represented persons, nor any proposed federal rule for other problems that may deserve uniform national rules. The approach is to preempt local district rules, establishing "vertical" uniformity between federal courts and state law in each state. National uniformity would await further experience and additional deliberation.

This Rule 1 establishes a central distinction between matters of "professional responsibility" on one hand and matters of "procedure" and "privilege to practice in federal court" on the other. State law governs professional responsibility. State law is absorbed as a matter of dynamic incorporation, not a moment frozen in time upon adoption of the federal rule. The administration of state law is left to state authorities when the stakes are imposition of professional responsibility sanctions, ensuring accurate understanding and application of state principles. Federal law governs procedure in federal courts, and the right to practice in federal court. In order to make this allocation

effective, state authorities would be barred from imposing professional discipline for conduct ordered by a federal court or authorized by federal procedure.

This model attributes critical importance to a familiar, and familiarly uncertain, distinction. Many aspects of lawyer behavior involve both judicial procedure and professional responsibility. One way of drawing the line is to reflect on the remedies in issue. If the purpose is to affect a lawyer's right to practice in state court, by revocation or suspension, the proceeding clearly involves professional responsibility. Such sanctions as censure or reprimand also are clearly matters of professional responsibility if the proceeding is conducted by state disciplinary authorities. Administration by state disciplinary authorities also makes restitution a matter of professional responsibility. If the purpose is to resolve an issue in pending litigation, on the other hand, the question often will be one of procedure. The question whether an attorney may subpoena another attorney to testify before a grand jury without court permission, for example, involves a matter closely bound up with federal grand-jury practice and incidental to Criminal Rule 6. Or, to take another example, a federal court might conclude that as a matter of federal evidence law, applicable to a federal claim pending before it, a communication with an attorney is not protected by privilege. The possible conclusion that the communication remains confidential under state responsibility rules does not oust the procedural character of the question before the federal court. A federal order to reveal the communication should protect against state discipline even if the state rules do not make an exception for testimony provided in obedience to a court order.

This approach makes it necessary to identify the sources of federal "procedure." Beyond the formal national rules of procedure, procedural rules may be embodied in valid local court rules, in common-law development, and in ad hoc invocations of inherent power. Any of these sources may do.

The model in the agenda book was supplemented by adding a new subdivision (d) that explicitly recognizes the power of a federal court, drawing from 28 U.S.C. § 1654, to regulate admission to practice before the court. There is a compelling federal interest in these questions. A federal court, for example, must be able to decide whether an attorney who is the subject of a federal grand-jury investigation or indictment should be allowed to continue to practice before the court while the proceeding remains pending. Representation of a federal criminal defendant while the lawyer is also being prosecuted by the same United States Attorney's office presents problems that may not be adequately addressed by state rules.

The model in the agenda book also has been modified by adding two words to the preemption provision, making it clear that a state may not impose civil liability on a lawyer for conduct authorized by federal court order or by federal procedure. This provision underscores a question that must be addressed also in considering the proposal to preempt state disciplinary sanctions or "other consequences." The state law governing lawyers is clearly substantive, perhaps most clearly when it is implemented through imposition of civil liability. A federal rule that announces preemption of this state law may seem to violate the Enabling Act limit that prevents a federal rule from abridging, enlarging, or modifying a substantive right. This preemption, however, is an inherent consequence of federal power to regulate federal procedure. State law is preempted; the rule that announces it simply underscores the conclusion that must be reached in any event.

The first observation made on the draft rule was that the state preemption provision should

be found within the Enabling Act structure. It is designed to make effective the federal authority to regulate procedure; all control is lost if a state remains free to impose professional discipline for acts taken in compliance with federal rules of procedure.

It was asked whether it is a matter of "procedure" if a federal court simply announces that it "will not enforce" a state rule regulating grand-jury subpoenas addressed to attorneys. It was suggested that a local rule to this effect could be enforced as a matter of federal procedure. Even without a local rule, federal approval of a subpoena practice should protect against state discipline for adhering to the practice.

It was then stated that this draft rule simply follows what federal courts and state authorities are in fact doing now. Instinctively, the federal courts know that their local rules go far too far into the state field. Federal courts in fact cede to local authorities everything that deals with attorney conduct. Federal courts address only core matters: admission to federal court and practice in the federal court. These questions arise on motions that seek procedural rulings on issues that directly affect a case in the federal court. The draft carves out the area of professional responsibility and expressly "returns" to the states authority that federal courts now seem, through local rules, to have taken to themselves. State authorities, on the other hand, do not attempt to impose professional responsibility sanctions on behavior undertaken under the aegis of federal rules of procedure or court order.

The draft does not even open up the question whether specific areas should be addressed by uniform federal rules.

As an example of the working allocation, federal courts — no matter how comprehensive the local rules may seem to be — do not generally care to police the details of fee contracts when there is no question of fee-shifting. Regulation by state law is adequate. It also is recognized that fee contracts often are made at a time when it is not clear whether any eventual litigation will be brought in state or federal court; insistence on divergent standards could create deep practical problems when fee arrangements are first made, and might distort the choice between state and federal court when the time actually arrives to choose.

The draft distinction between professional responsibility and procedure will be drawn more sharply over time, as courts consider this distinction in applying the national rules of procedure, in developing local rules, in applying common-law rules, and in exercising inherent power. If the question involves discipline and management of the profession, it is for the states.

It was observed that the proposed subdivision (e) preempts state discipline if a federal court order authorizes the underlying conduct. One way to relieve doubts about the line that divides substance from procedure would be to apply for an order authorizing a course of desired conduct. In deciding whether to make the order, the federal court will take account of the interests reflected in the state rule.

The preemption provision is explained in the draft Committee Note by only one illustration. This illustration states that a federal court, faced with a motion to disqualify based on a conflict of interests, may conclude that there is no conflict, but also may conclude to deny disqualification even if it finds there is a conflict. The second branch of this illustration was challenged. It was urged that a federal court should not refuse disqualification that would be required by state courts, however

great its own interest in continuing the representation so that a proceeding might be fairly and efficiently concluded. The federal interest in good procedure does not extend to an interest in the identity of the lawyers who practice the good procedure. This question was taken up and explored in later discussion.

Draft Rule 1(a)(1) and (2) refers to professional responsibility "for conduct in connection with an action or proceeding in" a federal court. It was asked whether "conduct" is too broad. No satisfactory substitute was suggested, but it was recognized that this drafting issue must remain open.

It also was asked how this draft rule would address the District of Colorado administrative order described earlier in the meeting. It was suggested that the administrative order would not be an effective method of distinguishing between professional responsibility and procedure.

Bankruptcy practice has special problems, most identifiably with conflicts of interest. It was observed that these problems might well be recognized in a FRAC 2, perhaps drafted as specific answers to specific bankruptcy questions but perhaps drafted simply to invoke provisions that could be incorporated in the Bankruptcy Rules themselves.

A committee member observed that in the Fifth Circuit questions of disqualification for conflicts of interest are addressed in civil litigation by looking beyond state standards of conduct. The district court is to look for a "national standard," including the ABA models. In criminal cases, there is a body of Supreme Court decisions on disqualifying; courts are to make inquiries at an early stage in the prosecution. Are these questions of "procedure" within the intendment of draft Rule 1(c)? If so, would it be better to draft a uniform federal rule than to leave these common questions for uneven development by federal case law? "Why wait to fill in the blanks later"?

Professor Coquillette responded that the Standing Committee studies and his own work show that this question accurately reflects current federal-court practice. A national federal jurisprudence is slowly emerging. It pays little attention to state rules, and less to local district court rules. This Rule 1, as drafted, would leave discipline to the states. But to the extent that if falls in Rule 1(c), the "hole" in the rule that refers to procedure only in general terms, the national development process would continue.

The alternative to the draft Rule 1, standing alone, is to do something like the draft set of Federal Rules 1 through 10 included in the May agenda materials. Although these rules have been developed only as discussion draft materials, they have drawn a quick and antagonized response from many lawyers. The report from the Federal Bar Council Committee on Second Circuit Courts, included in the agenda materials, is a good example. It may be too early yet to attempt to fill the gap in this way. Opposition would be encountered even by federal rules that, as the draft rules, seek to incorporate the mode of state rules.

So for the disqualification question, if the state code on conflicts of interest is inconsistent with the federal view, the issue could be characterized as a matter of procedure and thus governed by federal law under draft Rule 1(c). Alternatively, it might be decided that the question is so purely a question of professional responsibility that it is governed by state law under Rule 1(a)(1). If this uncertainty seems undesirable, or if the pace of developing uniform federal principles by the decisional process seems to take too long, a consensus version of Model Rule 1.7 could be adopted as a FRAC "2."

It was asked whether the Committee Note could provide more examples of the division between procedure and professional responsibility. The Note says that the distinction is clear at the "core" — how about some clear core illustrations? It was responded that it is difficult to give examples; there may be agreement on the core, but it is difficult to state in precise words. Courts can develop the distinction for this purpose, just as they distinguish between "substance" and "procedure" for other purposes. As with the distinction between substance and procedure, the distinction between professional responsibility and procedure would be developed for the specific purpose of allocating authority between federal courts and state courts. As experience showed the way, it could become possible to develop additional and explicit federal rules to govern the most commonly encountered issues of attorney conduct.

The suggestion that the process of deciding cases would generate better guidance was met with the question whether, given so many circuits, the result would be any improvement on the present situation. The response was that it is an improvement to establish a framework that will help move toward uniformity on national issues. Meanwhile, the same framework confirms state primacy in an area that is in fact ceded to the states, but that on the face of many local rules has been occupied by federal law. Confirming the present de facto division is real advantages — attorneys need not worry about the ability to rely on the unspoken division. Until there is a reliable allocation of authority, any prudent attorney must continue to consider and attempt to comply with both federal and state rules, and to experience deep concern when it seems impossible to comply with both. As law firms have continued to grow in size and geographic scope, there is a continuingly greater need to provide guidance and reassurance.

In addition to the process of deciding cases, local rules can provide further guidance so long as they remain consistent with the national rules and federal statutes.

Continued drift along present lines will lead to more and more diversity among federal courts, and will do nothing to reconfirm the dominant role of state authorities with respect to professional responsibility.

Further examples were provided of the proposition that many matters may involve both procedure and professional responsibility. The truth-in-pleading requirements of Civil Rule 11, for example, permit a pleading based on a "nonfrivolous argument * * * for reversal of existing law." State rules governing the responsibility for identifying adverse authority to the court might be implemented by specific law-pleading requirements that are not imposed by Rule 11. Compliance with Rule 11 and federal pleading standards clearly involves procedure. Current Civil Rule 26(a)(1)(A) and (B) disclosure provisions — recommended to be replaced on December 1, 2000 — require disclosure of adverse information on terms that might well seem to violate state confidentiality and loyalty requirements. This disclosure practice clearly regulates procedure. Incredibly intricate problems arise from class-action settlement practices. The two asbestos settlements that reached the Supreme Court in 1997 and 1999 grew out of negotiations that recognized the need to have the most experienced plaintiffs lawyers represent the classes, and at the same time had to cope with the potential conflicts of representing both class and individual plaintiffs. Whatever answers may be best for these problems, the answers very much involve class-action procedure as well as professional responsibility. The appropriate rules of professional responsibility, indeed, cannot be shaped until we have a clear procedural concept of the nature of class representation. Bankruptcy practice, which includes statutory provisions on "adverse interest" and

like matters, may provide other illustrations of overlap between professional responsibility and procedure.

It was asked again whether the Committee Note should provide more guidance, so as not to make matters worse? The approach might well be to make an even more open confession that the distinction between professional responsibility and procedure is uncertain, and to offer some illustrations of situations that admit of certain answers.

The ambiguity problem was then approached from a different direction. There are some questions that seem purely questions of professional responsibility, divorced from any procedural overlap. Rules about soliciting clients may provide good examples, although even here there may be significant federal interests if the solicitation is aimed at a matter that can be brought only in exclusive federal jurisdiction or is aimed at an action specifically headed for federal court. There are some questions that are purely questions of procedure. Draft Rule 1 is inconsequential for these pure situations. But there are many areas in which professional responsibility and procedure overlap. When a given matter is procedure in part, the draft rule bars state discipline unless the state rule accords with federal law. Is it proper to preempt state law when there is "some connection" to federal procedure?

Professor Coquillette responded again that this allocation of authority simply embodies what is done today. State authorities do not seek to impose discipline for conduct authorized by federal practice (remembering the perhaps contrary example involving Arizona discipline for conduct that many bankruptcy lawyers believe is authorized by federal law). It was asked whether an otherwise valid local rule can establish federal "procedure" to which a state must cede? The answer was yes.

It was asked whether there are issues as to who imposes the discipline, not as between federal courts and state authorities, but as between the Department of Justice and state authorities. If the Office of Professional Responsibility imposes punishment on a Department attorney, can a state also impose sanctions for the same conduct? And it was further observed that the draft Rule 1(d) provision for local rules governing the right of an attorney to appear in court might conflict with the Attorney General's authority to send people into court to represent the United States. This problem has arisen in West Virginia: the federal district court has concluded that its local rules require that an attorney be admitted to practice in West Virginia, and has refused to permit an appearance by an Assistant United States Attorney from another state. This ruling is on appeal to the Fourth Circuit. It was noted that 28 U.S.C. § 1654 expressly provides for local court rules governing appearance by counsel. The Enabling Act process should not be used to determine the validity of a local rule that interferes with the statutory powers of the Attorney General; see § 2071(a) and, e.g., Civil Rule 83(a)(1).

It was asked whether the provision for preemption of state law can be policed effectively. Draft Rule 1(b) provides that state authorities are to enforce state rules of professional responsibility. A state determination of the line between professional responsibility and federal procedure may not be sufficiently sensitive to the needs of federal courts. One way to guard against this risk would be to generalize a provision found in some draft bills that, of themselves, would apply only to government attorneys: a state can undertake disciplinary proceedings for conduct in connection with proceedings in federal court only if the federal court refers the matter to state authorities.

It was suggested that a less intrusive alternative would be to emphasize that an attorney who wishes to engage in conduct that may be prohibited by state rules can apply to the federal court for an order authorizing or directing the conduct. The order, when entered, must protect against state discipline. There should not be a second state inquiry into the same conduct.

It also was suggested that to the extent that federal courts are given power to carve exceptions out of state professional responsibility requirements, they will be lobbied to do so. And incentives may be created to file in federal court. The Sentencing Guidelines create incentives to cede some prosecutions to federal authorities to win stiffer sentences. Similar incentives could be created here, influencing the choice between state and federal courts according to the more attractive combination of responsibility and procedure rules. The prospect of such incentives, however, should not deter us from recognizing federal power to deal with "anomalous" situations by specific court order.

Local rules, moreover, will respond to local practices. There is not necessarily a problem with local rules that respond to recurrent issues under local professional responsibility doctrine, whether the response is to adopt the local doctrine or to provide an express procedure that ousts the local doctrine.

It might be useful to find a means of guiding local rules committees, urging them to adhere to state responsibility rules unless circumstances suggest needs of federal procedure that justify superseding federal rules. It also might be useful to call attention to the rules that require public notice and opportunity to comment before adopting or amending a local rule, see § 2071(b) and, e.g., Civil Rule 83(a)(1).

But with these protections, the basic approach to balancing seems right. We start with state law. If we want a change for federal court, the court can decide. There is a framework in draft Rule 1 that channels the discussion.

Professor Coquillette seconded these observations. The argument that state rules should apply without limitation to all aspects of attorney conduct in connection with federal-court proceedings "does not sell." The alternative of developing detailed federal rules for a number of frequently-encountered problems, however, also is not popular. The compromise of this draft, balancing dynamic conformity to state law against recognition of federal procedural interests, is wise.

An alternative approach might be to encourage states to formalize the practice that seems to prevail. General provisions that legitimate professional conduct "otherwise required by law" could be developed to recognize the propriety of conduct authorized by federal procedure.

It was observed that a lawyer may become entangled with state disciplinary proceedings because of an independent state investigation or because another lawyer — not the federal court — refers the matter. Suppose the state imposes discipline. Will a federal court "review" the state order in proceedings to enjoin enforcement? It was responded that the Rooker-Feldman doctrine ousts federal subject-matter jurisdiction to undertake appellate review of state decisions in lower federal courts. Review of the state disciplinary proceedings will lie only in the United States Supreme Court.

It also was suggested that there are a number of reasons why it may be sensible to provide

by legislation that only referral from a federal court can support state discipline of federal attorneys for conduct in federal court, while referral is not needed as to other federal litigation. The federal government has a special interest in being able to allocate the efforts of its attorneys to whatever section of the country seems most useful. At the beginning of an investigation, moreover, it may be quite uncertain what states will, in the end, be involved. There is always a risk, seemingly at low level now but perhaps resurgent in the future, that some particular federal program may encounter bitter resistance in some states. Annually renewed statutory provisions require only that a United States government attorney be a member of the bar of some state, not any particular state in which the attorney may discharge government duties.

A committee member asked Chief Justice Veasey for a state-court perspective on the draft Rule 1(c) provision recognizing federal control of the professional responsibility consequences of conduct that conforms to federal procedure.

Chief Justice Veasey began his response by observing that those who approach common problems from different perspectives commonly see different things. A compromise of the sort embodied in draft Rule 1 is just that — a compromise. And it is a compromise that, as often happens, involves ambiguities. Ambiguities can create problems, leaving uncertainty as to just what balance is proper between the recognized but competing interests. The perspective as a member of the Standing Committee suggests that the local rules situation with respect to professional responsibility is bad. But from the perspective of the Conference of Chief Justices, the attempted preemption of state professional responsibility also seems bad — from this perspective, the best approach would be complete dynamic conformity to state law, unalloyed by any reservation of federal authority to regulate the responsibility consequences of adherence to federal procedure. A compromise may indeed be the only solution. This draft compromise might work, at least if some of the language were tightened.

The question was then made more specific: does it trouble state courts that a federal court might authorize continued representation in a federal proceeding, even though state law would disqualify the attorney for a conflict of interests?

Chief Justice Veasey responded that his personal view, drawing from years of experience as a litigator in many courts, is that a federal judge should be free to disqualify, or to refuse to disqualify. This is a matter of the integrity of the court's proceeding, in this case a federal court's proceeding. But if the state wants to do something about professional discipline, "I have a problem with preemption."

This response was met with the question: "If there is no protection against state discipline, where is federal power?" Suppose, for example, counsel concerned about the prospect of state discipline expressly moves to withdraw from the federal representation, and the federal court refuses to permit withdrawal?

Chief Justice Veasey replied that, as a matter of state law, the state should refuse to find any violation. There should be a "safe harbor" for compliance with the federal ruling.

This reply was met with the observation that protection against state discipline does not, of itself, ensure protection against civil liability. The attorney continues to be in a "real jam." And it was further observed that apart from uncertainty, the process of federal consideration and potential

state proceedings "adds a lot of time to the process."

The discussion returned to the question whether it is appropriate to rely on state enforcement if the line between procedure and responsibility is adopted. There will be no more than very limited opportunities for federal review; will there be adequate assurances of protection for the interests of federal courts and the lawyers who appear before them?

Professor Coquillette suggested that most questions will never become the subject of state disciplinary proceedings. The distinction will in fact be drawn in federal proceedings on motions, such as motions to disqualify, to testify although a lawyer in the proceeding, to exclude testimony, and so on. There is a practical accommodation today, and it will continue under this more explicit federal rule. States will undertake disciplinary proceedings only in rare circumstances.

The possibility of seeking protection by application for an express federal court order returned to the discussion, with the question whether the result will be a lot of applications for protective rulings? And with the renewed observation that surely the federal order should be effective to establish protection.

The impact of the line that refers to conduct in connection with a proceeding in a federal court, and to procedure "in" the federal court, was tested by asking about conduct before there is an action or proceeding in federal court. State law seems, under the draft rule, to govern everything that happens before there is a proceeding in the federal court. On filing, a divided allocation is effected. So, for example, if a federal court decides not to disqualify for a conflict of interest, the attorney is protected as to conduct after filing in federal court, but remains subject to state discipline for the period before filing. Does this indeed mean that there can be two different sets of standards applicable to the same course of conduct as it continues from a general phase to actual filing in federal court?

It was suggested that yes, two standards may apply. But the circumstances also may have been so clearly directed to filing in federal court from the outset that the prefiling conduct should be found to be "in connection with" the proceeding that actually was filed in federal court. A bankruptcy filing, for example, could be filed only in federal court. Or clients might be solicited for a securities law action aimed, from the beginning, only at federal filing.

The complication was pushed one step further. A single action may be first in state court and then in federal court, as by removal; and there may be still further complications if removal is followed, either promptly or after protracted federal proceedings, by remand. And it may be that a single representation will lead to simultaneous proceedings in both state and federal courts. Clear answers cannot be given even for the situations that are easily anticipated. But it is difficult to believe that state authorities will impose harsh sanctions on lawyers in these circumstances.

Chief Justice Veasey suggested a second possible use for notice and opportunity to be heard. These procedures are required for local rulemaking. It would be nice to devise a system in which state disciplinary authorities could be given notice of federal proceedings that may implicate state standards of professional responsibility, so that they may advance the state view before entry of a federal order that will grant immunity against state enforcement. It is not clear, however, how often this course will be feasible. For the sake of the parties and the federal court, it would not be possible to afford much time to prepare before the federal proceedings continue. Indeed, as a federal judge

observed, the federal court will want to move with dispatch. But the federal order (or procedure) may be too broad in seeking to immunize behavior offensive to the state. To allow for any preemption, the opportunity for the state to be heard could be valuable. For most circumstances, the practical answer will that the state authorities do not care; the opportunity to be heard will not often be followed by actual participation. The fear of delay may not be real.

It also was suggested that a hearing requirement must be administered in a way that is sensitive to the need to protect confidential information. There are substantial differences, for example, in the extent to which different professional responsibility systems permit a lawyer to disclose a client's fraud. Some states have strong disclosure provisions and feel strongly about them. If these limits are to be explored by a federal court, it is essential that privacy be protected. And it may be desirable to provide a preliminary federal court screen that protects the lawyer against an obligation to provide notice to state authorities of a lawyer's suspicion that a client is a crook.

"Rule 4.2"

Discussion then turned to the "Rule 4.2" problem of contact with represented persons. This problem had determinedly been held off for separate discussion. Judge Scirica opened the discussion by noting that § 530B has changed the landscape. This statute, invoking state standards as well as local federal rules, must be recognized as long as it continues on the books. Lengthy negotiations among the Department of Justice, the ABA, and the Conference of Chief Justices failed to produce agreement on a common rule. The tentative draft that would have been presented to the ABA annual meeting in August was withdrawn without any consideration.

Chief Justice Veasey noted that the background of the Rule 4.2 problem is described in the minutes of the May meeting. Since May, the ABA "Ethics 2000" committee and standing committee tried to work with each other and with the Department of Justice to shape the proposal for the annual meeting. Chief Justice Veasey recused himself from the Ethics 2000 deliberations on this subject, as noted in the May minutes, and Professor Hazard acted as chair for this purpose. The Conference of Chief Justices maintained an independent position, but hoped that the other groups could come to some agreement. That was not to be. Many members of each of the ABA committees did not like the compromise proposal that was crafted in the hope of winning agreement from the Department of Justice. The compromise was supported only as the limit of what was acceptable as a compromise. The Department wanted more, and the committees said "no more." "That deal is a dead letter." The Attorney General, however, has said that she hopes to continue to work with the ABA and the Conference of Chief Justices. No firm forecast is possible, but the single most likely outcome is that the ABA committees will draft a rule that they like, and it will become part of the revised Model Rules. The Ethics 2000 Committee hopes to complete its drafting work by October 2000. The work will include a new look at conflicts of interest, particularly the rules on imputation and screening. It will be four to six months before Rule 4.2 is reconsidered. And the Conference of Chief Justices is not likely to "pick up the cudgel" on Rule 4.2 until someone else moves.

As to the draft Rule 1, Chief Justice Veasey thinks it is not a bad idea to keep working on it. The present draft, however, causes concern that the "procedure" exception may swallow the dynamic incorporation of state rules. The intent is said to be that the exception will remain narrow. But from a state perspective, "I bridle at any use of the word 'preemption.'" Preemption on the scope and terms of present draft Rule 1(e) is not attractive. The reach to all conduct "in connection with" a

federal proceeding is too broad. Still, it would be desirable to have the draft's approach studied by a committee of the Conference of Chief Justices. A committee should be formed. It is good to keep talking, although "I could not bring myself to vote for this now."

Judge Scirica agreed that this further involvement of the Conference of Chief Justices would be welcome.

The failed compromise draft Rule 4.2 included a provision authorizing contact with a represented person "on court order." This provision was intended to be a "safe harbor," establishing that there is no violation and thus no occasion for professional responsibility sanctions.

Professor Coquillette noted that if agreement could be reached on the substance of the provision, a "Rule 4.2" provision could be adopted as a separate Federal Rule of Attorney Conduct. A draft was included as Rule 10 in the May agenda materials. But it was noted that even if the ABA should approve a provision, and it were to be adopted as a Federal Rule, there still could be friction with states that choose not to adopt the new ABA rule, either in the short term or ever.

It was asked, referring to the failed compromise draft, what would be the mechanism for a prosecutor to go to a judge to get an order approving contact with a represented person? The problems encountered by the Department of Justice typically arise before indictment, during the investigation phase. There is no formal proceeding pending before the court. Why would a judge issue an order? It was answered that this procedure in fact has been used. The Ninth Circuit "Lopez" decision is an example. Usually what happens is that a person who is represented by a lawyer wants a new lawyer. The Department of Justice advises an in camera inquiry by a magistrate judge to explore the independent wishes of the person. It was further suggested that the contemplated procedure would be expedited, much on the model of an application to approve a wiretap or to issue a search warrant. But a federal judge observed that many judges are not sure what authority they have in these circumstances. Nor are prosecutors sure what they can ask for. And there are persistent doubts about ex parte proceedings; many fear that they simply rubber-stamp the application, despite the opposing view that investigators seek help from a prosecutor only when there are good reasons to expect approval, and that prosecutors weed out all but the strongest applications. Frequent approval may reflect only care in the process of seeking approval.

Chief Justice Veasey noted that the court-order provision in the compromise Rule 4.2 draft was very controversial. The objection is that the present rule is good. There is no convincing showing that there are problems that need to be addressed. Why add a provision that will only raise questions whether — and how — a court can claim this authority? The court-order provision may well be dropped from Rule 4.2 as it proceeds through the committee process, unless the Department of Justice somehow bargains successfully for its retention.

Back to "Rule 1"

It was suggested that the subcommittee should vote on the central concept illustrated by the draft Rule 1. The vote should not be on the actual draft. The intention would be that the "procedure exception" be narrow. There will be many opportunities to narrow the exception as the development process continues. There are many steps, and many committee considerations, yet to come.

It should be remembered that there are four surviving choices. One is to do nothing. A

second is to establish dynamic conformity with state law, without any exception for overriding federal interest. A third is to establish dynamic conformity with state law, but to supplement this approach with a number of additional federal rules that establish uniform federal answers on a number of specific questions frequently encountered in federal courts. The fourth is this compromise — strong dynamic conformity to state rules of professional responsibility, saving out a small exception to ensure federal control over federal procedural interests.

Judge Scirica stated that in addition to consideration by the five rules advisory committees and the Standing Committee, it would be desirable to have consideration by the Court Administration and Case Management Committee and by the Federal-State Jurisdiction Committee. And the subcommittee should meet again in late January or early February to review the progress made by all of these committees, and also to consider whatever has happened in Congress by then.

It was asked whether it would be possible to arrange participation by a representative from the national organization of state bar counsel. It would be good, for example, to get a well-informed view on the extent and reliability of the reputed "safe harbor" for conduct that is taken in compliance with federal procedure or federal court order. It was responded that the subcommittee is part of the Judicial Conference committee structure. Advisory committee an standing committee meetings are open meetings. Subcommittee meetings, and meetings of other Judicial Conference committees, traditionally are not open. Once a meeting is opened up, many groups are likely to seek inclusion. Rather than seek direct participation in subcommittee deliberations, a process that could risk fractionalization and ultimate interference with the good progress that is being made, the views of outsiders may be sought in writing. Before any rule is finally proposed to the Judicial Conference, there will be a months-long period for public comment on a specific and carefully developed proposal. It need not be feared that any views will be excluded. The only question is how to make optimal use of the help that may be available in the process of developing a published proposal.

It was noted that the Bankruptcy Rules Advisory Committee will not be able to consider these matters until the March meeting.

A motion was made to approve the present Rule 1 draft as an appropriate vehicle to move discussion in the advisory committees, the Committee on Court Administration and Case Management, and the Federal-State Jurisdiction Committee. The subcommittee should urge this step now, at the same time making it clear that the subcommittee is not endorsing this draft for approval. A further draft may be possible after consideration by all of these committees.

It was observed that the option is either to move this draft forward or to do nothing. The "10-rule approach is not viable." Neither will total dynamic uniformity be acceptable. So the important question is to identify the reasons to reject the "do nothing" option. Is the only reason to act an aesthetic distaste for the mess of local rules on attorney conduct? Are those rules valid — can the § 1654 authority to regulate the right to appear as counsel in federal court stretch to cover detailed codes of regulation? Does inherent power supplement § 1654 in these matters? And if the local rules are valid, why do we wish to expunge them by a superseding national rule?

Professor Coquillette observed that if some form of "Rule 1" is adopted, all local rules that govern in a broad way will be flagged by the Local Rules project. Then, when inconsistent with the national rule, they will be dropped by the districts. A "Model Local Rule" approach has been tried.

It failed. The national rule would be a strong force; it would mean that to be valid, a local rule would have to fit within the "subdivision (c)" preservation of federal authority over federal procedure.

The member who made the motion to approve the Rule 1 concept for further consideration suggested that one of the most important things to be done by the rule is to protect lawyers who rely on federal court rules or orders. That is the best attribute of this rule. This aspect does go beyond where we are today. And it does more than clean up a messy local rules situation. Of course this protection against state discipline underscores the need to obtain broad-based advice from state disciplinary authorities.

It was further observed that from the perspective of bankruptcy practice, it would be very useful to deal with the "bilateral litigation" problem. Bankruptcy practitioners need a rule on disqualification; a rule would avoid many problems.

Another member observed that the chart of local rules shows, for example, that the Southern District of Texas rule adopts Texas Rules and says that violations are ground for discipline. Draft Rule 1 seems to say that professional discipline is reserved to state authorities, and is not the business of federal courts. It was responded that professional discipline as such is indeed reserved to state authorities. At the same time, a federal court continues to have all its present powers to impose procedural sanctions, to suspend or revoke the privilege to practice in that court, and to enforce contempt sanctions. The procedural and contempt powers are limited to proceedings in the federal court, an admittedly but perhaps necessarily vague term. The draft rule does not say it, but it intends that state rules alone apply to conduct that is not "in connection with" a federal-court proceeding.

It was asked again whether solicitation of clients to be plaintiffs in a securities law action to be brought in federal court is conduct in connection with a federal proceeding. That it might well be found conduct in connection with a federal proceeding only means that Rule 1(a) invokes state rules of professional responsibility. The solicitation is not likely to be found a matter of procedure in the federal court, so there is no preemption of the state rules. At the same time, the federal court might invoke its power to deny the right of a soliciting attorney to appear in the federal court.

Professor Coquillette observed that the Local Rules Project has been successful in persuading district courts to repeal local rules that are inconsistent with national rules. Adoption of a national rule of dynamic conformity would be a big step toward eliminating the local rules. For that matter, most federal courts would like to get out of the business of seeming to regulate attorney conduct. They do want to continue to regulate procedure. The District of Colorado administrative order described earlier, for example, reacts to a perception that the new Colorado Rule 11 is inconsistent with Federal Civil Rule 11.

It was asked whether a grand jury is a "proceeding" in a federal court. The answer is that Rule 1 clearly is intended to include grand jury activities as a proceeding. There may be a variety of other events in federal court that also qualify as "proceedings," even though they are not clearly actions or prosecutions.

A separate question asked how far the policy of dynamic conformity embraces state interpretations of state rules. It was suggested that the Department of Justice objects to incorporating state interpretations, and that the subcommittee should avoid making any premature resolution of

this issue. It should be allowed to percolate for a while.

The question returned whether it is worthwhile to take on the local district rules regulating attorney conduct if Congress should be successful in addressing the concerns of the Department of Justice and if the Local Rules Project is successful on other fronts.

Professor Coquillette responded that unless Congress adopts legislation of a sort that does not now seem likely, a need will remain. Without a national dynamic conformity rule, an effort to persuade the districts to surrender the present rules will go nowhere.

Another subcommittee member urged that apart from Rule 4.2, there is no great evidence of attorney concern with the local district rules on attorney conduct. The Southern District of Texas is not going to discipline an attorney for advertising, soliciting, or similar offenses. Indeed, there is no known instance of an attempt by a federal court to revoke or suspend an attorney's license to practice in a state court.

Professor Coquillette responded that many lawyers have indeed expressed concern with the local rules. Special concern has focused on conflicts-of-interest and related disqualification issues. It may indeed prove desirable in the future to adopt a uniform federal rule on this specific subject. There is a problem. It has not yet come to full flower, but it will. We have an increasingly nationalized practice, and an increasingly nationalized system of legal education. Balkanized local rules are not desirable.

It also was observed that the "safe harbor" remains important to lawyers. The draft gives protection.

The options, then, seem to lie between doing nothing or going ahead with this draft. Going ahead will bring more input, reevaluation, and a firmer basis for deciding whether to do nothing. The draft will be taken to the advisory committees as a concept, subject to perhaps extensive changes. And it will not be asked that any advisory committee commit itself this fall even to approval of the concept. The Standing Committee and this subcommittee should only ask for advice whether it is worthwhile to pursue this draft further. The purpose is to seek comment as part of the process. Special attention must be paid to finding any possible improvements in the attempt to identify the area of federal "procedure" that permits lawyers in federal court to rely on federal rules and practice.

As thus defined, the subcommittee voted to send the draft Rule 1 forward for review and comments by the advisory committees on the terms just described. The vote was unanimous except for the Department of Justice representative, who did not believe the proposed Rule went far enough to protect the Department's interests.

It was agreed that the subcommittee should meet again in late January or early February 2000.

Respectfully submitted,

Edward H. Cooper

Appendix II: Proposed "Federal Rule of Attorney Conduct 1" ("FRAC 1"). Professor Edward H. Cooper, Reporter, Civil Rules Advisory Committee

Preface

My charge was to draft a model Civil Rule 83(c) establishing dynamic conformity with state rules of professional responsibility. I have chosen instead to frame this draft as a revised Rule 1, FRAC. It will be easy to revise it as a Civil Rule provision if that is the course to be taken in the end. On the other hand, if a decision is made to go forward with additional national rules addressing the concerns of bankruptcy practice or the concerns of the Department of Justice, for example, there could be "FRAC 2" and "FRAC 3" and so forth.

It may make sense to have a single Federal Rule of Attorney conduct even if it is decided not to have any additional rules; the "except as provided in these rules" preface in Rule 1(a)(1) and (2) is easily deleted. One reason not to have any additional rules may be that only clear procedural policies justify adoption of specific federal rules. These procedural policies might better be reflected in specific procedural rules — grand-jury problems, for example, could be addressed in the Criminal Rules. Bankruptcy problems provide a general example. On the other hand, there may be specific topics that cut across the various bodies of procedural rules and that should become FRAC 2 et seq.

The approach taken in this draft includes a thought that may not hold up to close scrutiny by professional responsibility experts. The starting point must be identification of the needs that prompt federal courts to ignore state rules of professional responsibility. As near as I can make out, the needs are procedural. The decisions that have been examined in depth do not involve efforts by federal courts to impose professional discipline. Instead, they involve procedural problems — a conflict of interests is asserted as a basis to disqualify counsel, confidential information arguments are advanced in addressing problems of evidentiary privilege, and so on. It seems to me that federal courts have some interests in these questions that should not be controlled by state rules of professional responsibility. And so, even when local rules invoke state rules of professional responsibility, federal courts often undertake an independent examination of the procedural problems they confront. At the same time, federal judges do not license attorneys, do not want to license attorneys, and have no interest in establishing independent disciplinary bureaucracies.

A recent Law Week summarizes a case that seems a good illustration. Roughly rendered: A law firm (1) is counsel in a subrogation action brought for the insurance company in the name of the insured, and (2) is counsel for the insurance company in a coverage action against the insured. Acting in the coverage action, a federal court refused to disqualify the firm. Although there is a per se rule that bars a lawyer from participating in an action against a client, the relationship to the insured as nominal plaintiff in the subrogation action is too attenuated to invoke the rule. Whether the ruling is wise or not, the federal court's interest in controlling its own proceeding justifies an independent determination. This interest increases as the length and complexity of the proceedings increases the costs of changing counsel. The federal court's ruling, moreover, should protect the law firm against state discipline. See Commercial Union Ins. Co. v. Marco Internat. Corp., S.D.N.Y. No. 98 Civ. 6424 (LAK), 3/30/99, 15 ABA/BNA Lawyers' Manual on Professional Conduct 156, from 67 USLW 1671.

FEDERAL RULES OF ATTORNEY CONDUCT

Rule 1. Applicable Rules.

(a) Rules of Professional Responsibility

(1) District court. Except as provided in these rules, the professional responsibility of an attorney for conduct in connection with any action or proceeding in a United States District Court is governed by the rules that apply to an attorney admitted to practice in the state where the district court sits.

(2) Court of Appeals. Except as provided in these rules, the professional responsibility of an attorney for conduct in connection with any appeal or proceeding in a United States Court of Appeals is governed:

(A) With respect to any appeal from a district court, and any other proceeding directed to a district court, by the rules that apply to an attorney admitted to practice in the state where the district court sits.

(B) With respect to any other action or proceeding:

(i) if the attorney is admitted to practice only in one state, by the rules of that state, or

(ii) if the attorney is admitted to practice in more than one state, by the rules of the state in which the attorney principally practices, but the rules of another state in which the attorney is licensed to practice govern conduct that has its predominant effect in that state.

(b) Enforcing Professional Responsibility. The rules of professional responsibility that govern under subdivision (a) are enforced by the proper state authority. A United States District Court or Court of Appeals may initiate an investigation of an alleged infraction of a rule of professional responsibility, and — with or without an investigation — may refer any question of professional responsibility to the proper state authority.

(c) Procedure. Federal law governs all matters of procedure in the United States District Courts and Courts of Appeals[, whether addressed by the Federal Rules of *Attorney Conduct*, Appellate Procedure, Bankruptcy Procedure, Civil Procedure, Criminal Procedure, or Evidence; by judicially developed rules; by local court rules; or by the court in its inherent power]. The court may, after notice and opportunity to be heard, enforce the procedural rules and its orders by all appropriate sanctions, including forfeiture of fees, reprimand, censure, or suspension or revocation of the privilege to appear before the court.

(d) Practice in United States Court. A court of the United States may establish and enforce rules governing the right to appear as counsel in that court.

(e) State Sanctions Preempted. No state authority may impose any sanction, civil liability, or other consequence on an attorney for conduct in connection with an action or proceeding in a United States District Court or Court of Appeals if the

conduct is authorized by order of the United States court or by the federal law of procedure that applies under subdivision (c).

Committee Note

The purpose of these rules is to separate issues of professional responsibility from control of the procedure in the United States District Courts and Courts of Appeals. Matters of professional responsibility are allocated to state law. Matters of procedure are controlled by federal law.

Attorneys are licensed by state authorities, not by the United States nor by United States courts. By continuing tradition, rules of professional responsibility have been a matter of state responsibility, not federal responsibility. This tradition has become threatened, however, by the adoption of hundreds of local rules in the district courts and courts of appeals. These rules provide a crazy-quilt pattern that defeats any possibility of national uniformity and that often defeats uniformity within a state. See the extensive studies by the Reporter of the Standing Committee and the Federal Judicial Center published as: *The Working Papers of the Committee on Rules of Practice & Procedure: Special Studies of Federal Rules Governing Attorney Conduct*, September, 1997. [Hereafter *"Working Papers."*] Some local rules are drafted in opaque terms that defy understanding and — if enforcement is attempted — threaten to deny due-process principles of fair notice. See *Working Papers* 3-121. When the time comes for enforcement, moreover, some courts invoke authority outside their local rules and on occasion simply ignore the local rules. See *Working Papers* 3-44, 99-121, 187-193, 235-244. This rule preempts all of these local rules by occupying the field of professional responsibility in the district courts and courts of appeals.

Subdivision (a). The rules that apply with respect to a district court are the rules that would be applied by the state in which it sits. This approach means that all attorneys involved in any proceeding are governed by the same rules; there is no risk that an attorney for one party may win an advantage over an attorney for another party by exploiting differences in the rules of the different states by which the attorneys are licensed.

This rule does not address all choice-of-law questions. An attorney's involvement with the issues that eventually appear in litigation commonly begins before litigation. This rule does not choose the law that governs before an action comes to the federal court. Local state rules apply from the moment an action or proceeding comes before the district court. The local rules include local choice-of-law rules. If the local state would choose the rules of a different state to govern a particular situation, those are the rules that govern. Removal from a state court presents no difficulty — the same rules as would be applied by the state court carry over. If a case is transferred to a district court from another federal court, the rules that would be applied by the receiving court's state apply after the transfer becomes effective. If actions are consolidated in a single district for pretrial purposes under 28 U.S.C. § 1407, the rules of the multidistrict court's state apply to all proceedings in the multidistrict court. Other situations must be addressed as they arise.

The rules that apply with respect to a court of appeals depend on the nature of the proceeding in the court of appeals. If the proceeding is an appeal or is otherwise directed to a district court, as on petition for an extraordinary writ, the rules are those that apply in the district court. This approach prevents the confusions that might arise when there is a change of counsel or when the parties choose attorneys from different

states. Some proceedings in a court of appeals, however, are not directed to a district court. Review of an administrative agency is the most common example, but there are other examples such as contempt proceedings arising from an order entered by the court of appeals. A three-part test applies to these proceedings. If the attorney is admitted to practice in only one state, that state's rules apply. If the attorney is admitted to practice in more than one state, the rules that apply are those of the state where the attorney principally practices, unless the attorney's conduct has its principal effect in another state where the attorney is also licensed.

Subdivision (b). Enforcement of state rules of professional responsibility remains with the proper state authority. Ordinarily the state will be the state whose rules apply under subdivision (a). Only that state can provide an expert and authentic interpretation and application of the controlling rules. If the attorney is licensed in that state, other states should defer to its enforcement decisions to the same extent as they would defer if the attorney's conduct had been undertaken in connection with a court of that state. If another state initiates disciplinary proceedings because the attorney is not admitted to practice in the state of the district court, or does so even though the attorney is admitted to practice in the district court's state, the enforcing state is bound by the choice-of-law rule in subdivision (a).

In considering whether to investigate or refer a professional responsibility question, a district court must be sensitive to the consequences that flow even from an investigation or referral. The court should make its investigation as discreet as possible, and should seize every opportunity for confidentiality in state referral procedures.

Subdivision (c). Subdivision (c) recognizes the fundamental imperative that the federal government must be able to control the procedure in federal courts. A state may not regulate federal procedure through the guise of state rules of professional responsibility. The distinction between matters of procedure and matters of professional responsibility is as clear at the core, and as uncertain at the edges, as the familiar distinctions that draw lines between procedure and substance. The distinction between procedure and substance reflects different policies, and may yield different results, in such separate contexts as state-state choice of law, federal-state choice of law, and determining the retroactivity of legislation. The policies that separate federal control of federal procedure from state regulation of professional responsibility also are different, although quite similar to the policies that distinguish "substance" from "procedure" under the doctrine of *Erie R.R. v. Tompkins*, 1938, 304 U.S. 64.

Although a federal court is free to regulate its procedure in ways that require departure from the state rules of professional responsibility that govern under subdivision (a), the state rules should be considered in making procedural rulings. Needless affront to state principles should be avoided.

A federal court may enforce procedural requirements by all appropriate sanctions. The sanctions may be those expressly provided in a rule of procedure, such as Appellate Rule 38, or Civil Rules 11, 26(g), and 37. The sanctions also may be contempt sanctions or other sanctions supported by inherent power. These sanctions may include those that often are invoked for professional-responsibility violations, including disqualification, fee forfeiture, reprimand, censure, or suspension or revocation of the privilege to appear before the federal court. These sanctions are appropriate remedies for procedural violations, necessary to deter such violations and

to protect the court against recidivism by attorneys whose conduct has threatened to disrupt or subvert proper procedure.

Requirements of notice and opportunity to be heard apply to the imposition of procedural sanctions. Such requirements are already familiar through the developed procedures used to adjudicate contempt issues or to impose procedural sanctions. Subdivision (d). 28 U.S.C. § 1654 establishes the right of parties in the courts of the United States to plead and conduct their cases "by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." Subdivision (d) recognizes that the power to establish these rules includes the power to provide for enforcement. Enforcement may include such measures as limitation, suspension, or revocation of the right to appear as counsel in the court, or before a particular judge of the court. Enforcement by suspension or revocation may be based on acts that do not relate directly to the attorney's conduct in the proceedings. Examples include disbarment by state authorities or criminal prosecution or conviction. Such steps are designed to protect the court's interest in regulating the right to practice before the court, not to impose professional discipline as such.
Subdivision (e). The principle that federal law must control federal procedure must not be defeated by imposition of state standards for attorney conduct authorized or required by federal procedure. This preemption of state sanctions includes conduct undertaken to comply with a specific federal court order.

The need to preempt state sanctions can be illustrated by one example. Thirty months into a complex litigation, a motion is made to disqualify opposing counsel for violations of professional responsibility rules relating to confidential client information and conflicts of interest. The federal court determines that there is no violation, or that a violation does not warrant disqualification in light of the costs that disqualification would entail. The federal court's interest in regulating its own proceedings supersedes the interest of any state in imposing sanctions for the conduct approved by the federal court.

The law governing lawyers may impose civil liability for conduct that also violates the disciplinary rules of professional conduct. The federal interest in enforcing federal procedure requires that a lawyer who complies with federal procedure in federal-court proceedings be protected against civil liability as well as against disciplinary sanctions.

Memorandum

To: John K. Rabiej

From: Daniel R. Coquillette

Date: November 11, 1999

cc: Honorable Anthony J. Scirica

Here is a proposed invitational list. Of course, the Subcommittee on Attorney Conduct Rules would also be invited, together with the Subcommittee's usual liaisons with Federal-State, Court Administration and Case Management, the Federal Judicial Center (Marie Leary), and the Senate Judiciary Committee (Julie Katzman). The organizations listed at numbers 16-24 have suggested names attached, based on prior attendance, but new people may now be more appropriate. I would address these invitations to the president of the organization. Almost all of the addresses should be on your data base from the last invitational session.

The invited participants should be sent:

1) A cover memo from me, with the latest version of Cooper's rule, together with the minutes of the Sept. 29, 1999 meeting. (I will prepare the memo by December 28. Cooper is finishing an "updated" rule.)

2) *The Working Papers*

3) The Sept. 29, 1999 Meeting Book

The letter of invitation should come from Judge Scirica. Every group or individual mentioned, except the "Big Firm" group, was also invited to at least one of the prior Invitational Conferences, so this can be described as a "follow up."

ABA

1. Larry J. Fox (Drinker, Biddle, Philadelphia). Chair, ABA Standing Committee; Former President, Litigation Section, Ethics 2000 Commission.

2. Jeane P. Gray. Director, ABA Center For Professional Responsibility, ABA Committee on Discipline.

3. Margaret Love. Former Chair, ABA Standing Committee, Former (?) Presidential Pardoner.

4. Nancy J. Moore. (Boston University) Chief Reporter, ABA Ethics 2000.

DOJ

5. Eric Holder (Deputy AG)

6. David Ogden (Civil Division)

7. Juliet Eurich (Ethics Office. Still there?)

8. Douglas Letter (Appellate Advisory Committee)

"Big" Firms

9. Sheila Birnbaum (Skadden). Civil Advisory Committee.

10. Tom McGough, Jr. (Reed Smith). Appellate Advisory Committee.

11. Gregory P. Joseph (Fried Frank). Evidence Advisory Committee.

Bankruptcy

12. Kenneth Klee. New Chair, Attny. Conduct Subcommittee, Bankruptcy Advisory Committee.

13. Gerald K. Smith (Old Chair).

14. Patricia Shannon (AO).

National Org. Bar Counsel/ Comm. on Attorney Registration and Discipline

15. Last time, Jerome Lankin

Conference of Chief Justices

16. Last time, Chief Justice Michael D. Zimmerman (Utah).

Federal Bar Association

17. Last time, The Honorable Marvin Morse.

National Assoc. of Crim. Defense Lawyers

18. Last time, William J. Genego.

Nation District Attnys. Assoc.

19. Last time, Newman Flanagan.

Amer. Academy of Trial Lawyers	20. Michael Mone (Boston), President-Elect.
American Trial Lawyers Assoc.	21. Leo Boyle, President-Elect.
	22. Last time, Robert S. Peck.
Fed. Bar Council, Committee on the 2nd Circuit and Assoc. of the Bar of the City of New York	23. Robert L. Begleiter
	24. Guy Struve (?)
Academic Experts	25. Prof. Stephen B. Burbank (Penn)
	26. Prof. Linda Mullenix (Texas)
	27. Prof. Roger Cranton (Cornell)
	28. Prof. Bruce A. Green (Fordham)

Memorandum

To: John K. Rabiej

From: Daniel R. Coquillette

Date: November 29, 1999

I omitted two names from the "invite" list. Both were included last time and have asked to be included again.

1.) Guy Miller Struve, Esq. Committee on Federal Courts, The Association of the Bar of the City of New York, 42 West 44th Street, New York, NY 10036-6689.
2.) Alan B. Morrison, Esq. Public Citizen Litigation Group, 1600 20th Street N.W., Washington, D.C. 20009-1001.

I promise no more!

Very best,

Dan Coquillette

Item 11

Financial Disclosure Drafts

The three drafts set out below are both drawn as a new Civil Rule 7.1. Other locations may be better. The most obvious would be as a Rule 8.1, following the basic pleading requirements, but this is an interjection in a series of pleading rules. Any location later in the rules seems out of place. The proper location in the Bankruptcy and Criminal Rules is better left to those committees to decide.

The first model is a modest adaptation of Appellate Rule 26.1. The timing requirement is taken from the "approved form" draft. The "local rule" timing provision is omitted because the purpose is to require filing as soon as a party does anything else. But we should consider whether to require a party to file within X days whether or not it intends to do anything else. I have doubts about requiring that a copy be filed, but have included it in subdivision (a), deleting all of Appellate Rule 26.1(c) .

Rule 26.1 Adapted

Rule 7.1. Corporate Disclosure Statement

(a) Who Must File. Any nongovernmental corporate party to an action or proceeding in a district [bankruptcy] court ~~of appeals~~ must file two copies of a statement identifying all its parent corporations and listing any publicly held company that owns 10% or more of its ~~the party's~~ stock.

(b) Time for Filing. A party must file the statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court ~~the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents.~~ A supplemental statement must be filed promptly upon any change in the circumstances that Rule 7.1(a) requires the party to identify.

~~**(c) Number of Copies.** If the statement is filed before the principal brief, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.~~

Committee Note

This rule is adapted from Appellate Rule 26.1. When Rule 26.1 was added in 1989, the Committee Note explained that the rule "represents minimum disclosure requirements," and observed that a court of appeals could "require additional information * * * by local rule." Rule 26.1 was amended in 1998 to delete the former requirement that a corporate party disclose also its "subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public." The Committee Note to the 1998 amendment expressed the belief that such disclosure is unnecessary, although required by several circuit rules. The disclosures required by new Rule 7.1 are, as with the Appellate Rule 26.1 model, minimal. Districts remain free to adopt local rules that require additional disclosures by corporate parties, by other parties, or by attorneys.

Reporter's Comment

There has been substantial interest in reconsidering the 1998 amendment of Appellate Rule 26.1. Several district judges want disclosure at least as to a party's subsidiaries, and perhaps also affiliates. That change is easily made without undertaking the responsibility of a full-blown inquiry into the "ideal" disclosure rule.

Administrative Form Alternative

Rule 7.1. [Financial] Disclosure

(a) [Financial] Disclosure. Each party that appears in a civil action [or proceeding] must file with the [district] court a [financial] disclosure form approved by the Judicial Conference of the United States unless the action [or proceeding] is in a category of actions excused from filing by the Judicial Conference.

(b) Time for filing. A [financial] disclosure form required under Rule 7.1(a) must be filed at the time of the party's earliest filing or appearance in the action [or proceeding]. A supplemental form must be filed whenever there is any change in the information to be disclosed.

[Alternative (b) Time for filing. A [financial] disclosure form required under Rule 7.1(a) must be filed with the party's first appearance, pleading, petition, motion, response, or other request addressed to the court.]

Committee Note

Rule 7.1 is new. It is designed to establish a uniform national standard of financial disclosure, replacing the quite variable disclosure requirements now exacted by formal and informal practices in the many districts.

The Judicial Conference, working on the advice of relevant committees and the Administrative Office of the United States Courts, will be able to adapt disclosure requirements to developing experience with the need for disclosure and to emerging technological capabilities. It will not be possible to require complete disclosure of every possible bit of information that might bear on disqualification of a judge. It will be important, however, to exact as much information as seems feasible in relation to all common bases for disqualification. Developing technology should make it easier for litigants to provide information, and for a court to compare litigants' information with individual disqualification profiles for each of the court's judges. The first screening, based on information provided by the plaintiff or petitioner, might be accomplished automatically as part of a random assignment process.

Rule 7.1 requires "each party" to file a disclosure form. In adopting forms, the Judicial Conference will determine the contents of the required disclosures. It seems likely that many parties, and particularly individual parties, will not have any information that falls within the required categories. The Rule 7.1(a) requirement is satisfied by filing a form that indicates that there is nothing to disclose as to any of the required categories.

The Judicial Conference is authorized to excuse categories of actions or proceedings from the filing requirement. The categories may be drawn in terms that focus directly on the nature of the proceeding, such as a petition for habeas corpus. Or the categories may be drawn in terms of parties, such as actions that involve only

natural persons or an action brought by a pro se litigant.

Reporter's Notes

Should the requirement extend beyond the parties to include attorneys? How about amici curiae?

By addressing only parties that appear, this draft does nothing about the defaulting defendant. That could be a real problem. But doing something about defaulting defendants would be very difficult — do we even want to try to force a defaulter to file a disclosure? If yes, why not also a formal statement of default?

This does not catch disclosure of nonfinancial information if we include the bracketed "financial."

Local Rule Alternative

Rule 7.1. Disclosure

(a) Disclosure. Each party that appears in a civil action or proceeding must file with the court a disclosure statement on the form required by local rule unless the action or proceeding is in a category excused from filing by the local rule.

(b) Time for filing. The disclosure form required under Rule 7.1(a) must be filed at the time of the party's earliest filing or appearance in the action or proceeding. A supplemental form must be filed whenever there is any change in the information to be disclosed.

Committee Note

The number of cases that come before an individual judge in any year is high, and may grow still further. The numbers of parties and others involved in these cases is higher still. Often the judge may be called upon to act in an essentially ministerial role, entering orders or attending to case management in ways that do not focus attention on the facts that might call for recusal. It is important to secure from the parties the best recusal information possible, and to find methods to compare the parties' information quickly and accurately with information about the individual judge. As important as these goals are, they remain difficult to attain. It is not possible to gather all information that might bear on recusal, either from judge or litigants. The compromises that will shape a good working system have proved elusive.

The difficulty of the task suggests that for the time being it is better to experiment with local district rules than to attempt to frame a uniform national disclosure system. It is intended that every court act promptly to adopt a local rule. An effort will be made to provide a model local rule for consideration by the district courts, but it is expected that some courts will fashion different rules, adapted in part to differences in local circumstances. Over time experience with these rules may provide a foundation to develop national disclosure standards for uniform application in all federal courts.

Catalogues of local district rules and circuit rules have been prepared by the Federal Judicial Center. See _____. These rules illustrate the many different approaches that have been taken in defining who must file disclosure information and what information must be provided. Disclosure may be limited to some category of parties, such as nongovernmental corporations, or it may be extended to all parties and such nonparties as attorneys or amici curiae. The information required may be as narrow as identification of a corporate party's parents or as broad as information about attorneys who have participated in advising about matters connected to the litigation but who are not appearing in the litigation.

Rule 7.1 does establish a uniform time for filing, designed to be as early as

possible for each person who files. The prospect that a judge may be required to act in a case at the outset makes it important to have the information available for matching within the court's system from the very commencement of the action.

Federal Judicial Center
Research Division

tel. 202-502-4068
fax 202-502-4199

memorandum

DATE: September 22, 1999

TO: Honorable Paul V. Niemeyer

FROM: Carol Krafka

SUBJECT: Rules Governing Party Disclosure of Financial Interests Information

---

I understand from Judge Scirica of the Standing Committee that the Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules will soon evaluate whether a national rule on disclosure of corporate affiliations and other interested parties is necessary, and if so, how the rule should be structured. In anticipation of the Advisory Committees' work, Judge Scirica asked the FJC to report on local rules currently used to collect financial information from parties, and to make preliminary materials available for the advisory committees' Fall 1999 meetings. To that end, I have attached summary tables of the local rules and general orders that are in use in federal bankruptcy and district courts. A brief description of the project, the tables, and findings precedes the tables.

The tables provide information on all of the bankruptcy and district courts that we have so far identified as having local rules. I do not expect to learn of additional courts with rules, but the possibility exists that the final report to the Standing Committee will contain information from more courts. The final report will be submitted in January 2000.

Please call on me if you have questions about the materials or if I can be of assistance. My phone number is 202-502-4068.

Attachment

cc: Honorable Frank W. Bullock, Jr.
Project Liaison from the Standing Committee

Interim Report

Informing Judicial Recusal Decisions:

Party Disclosure of Information Concerning Entities With a Financial Interest In the Outcome of Litigation

An Analysis of Local Rules and General Orders in the United States District and Bankruptcy Courts

Prepared for the Meeting of the Advisory Committee on Civil Rules

Federal Judicial Center
September 1999

An Analysis of Local Rules and General Orders in the United States District and Bankruptcy Courts

Introduction

Judge Scirica of the Standing Committee on Rules of Practice and Procedure advised the Federal Judicial Center (FJC) that the Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules will soon evaluate whether a national rule on party disclosure of corporate affiliations and other interested parties is necessary, and if so, how the rule should be structured. Federal Rule of Appellate Procedure 26.1 already provides for party disclosure of corporate affiliations to assist *appellate* judges in identifying financial conflicts of interest for recusal purposes. No corresponding provisions exist in the federal rules governing civil, criminal, and bankruptcy proceedings at the *trial* level.

In anticipation of the Advisory Committees' work, Judge Scirica asked the FJC to report on local rules and other procedures the district and bankruptcy courts use to collect financial information from parties. He asked, additionally, that we provide interim materials to the Advisory Committees for their Fall 1999 meetings.

To that end, we have prepared summary tables of the local rules and general orders that are in use in federal district and bankruptcy courts for you to consider. We have also included tables with information about circuit local rules governing bankruptcy appellate panels.

We searched published and electronic database collections, and surveyed clerks of courts in the courts of appeals, district courts, and bankruptcy courts to compile the local rules. Our survey additionally sought information about court-wide standing orders or standing orders in use by individual judges. The enclosed tables permit comparative analyses of the range of disclosure requirements in existence.

This report has 4 parts. The first reproduces FRAP Rule 26.1 for reference. The second summarizes major findings. The third contains summary tables in alphabetical order by district for each district and bankruptcy court with a rule akin to FRAP Rule 26.1. The fourth contains summary tables of the relevant BAP rules. The tables are preceded by a set of notes regarding their content and organization.

Part I. FRAP Rule 26.1

FRAP Rule 26.1 requires non-governmental corporate parties to identify their parents and affiliates. The rule reads as follows:

> Rule 26.1 Corporate Disclosure Statement
>
> (a) Who Must File. Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement identifying all its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.
>
> (b) Time for Filing. A party must file the statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents.
>
> (c) Number of Copies. If the statement is filed before the principal brief, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.

The purpose of the rule is to assist judges in determining whether they have financial interests in a case that should result in a decision to recuse from the case. The most recent amendments to the rule (1998 amendments) deleted a requirement that corporate parties identify subsidiaries and affiliates that have issued shares to the public. The amendment, however, added a requirement that corporate parties list all stockholders that are publicly held companies owning 10% or more of the stock of the party.

FRAP Rule 26.1 represents minimum disclosure requirements in the federal courts of appeals. Eleven of the thirteen courts of appeals have broader requirements by local rule. Most of the courts have either extended the group to which the rule applies or they require more disclosure information, or both.

Part II. Findings: District and Bankruptcy Courts

As noted, no *national* rule requires parties to disclose financial interests information in federal district and bankruptcy courts. We located nineteen district courts with relevant *local* rules controlling disclosure, however. The list includes the U.S. District Courts for the:

Central District of California;	District of Nevada;
District of Columbia;	District of New Hampshire;

Northern District of Georgia;
Southern District of Georgia;
Northern District of Illinois;
Southern District of Illinois;
Central District of Illinois;
District of Maine;
District of Maryland;
Eastern District of Missouri;
Southern and Eastern Districts of New York (uniform local rules);
Western District of Pennsylvania;
District of South Carolina;
District of Vermont;
Eastern District of Wisconsin; and the
Western District of Wisconsin.

Our search for local rules revealed noteworthy activity in a few other district courts as well. In the Middle District of Florida, two judges have fashioned alternative means for collecting financial information from parties. Judges in the Northern and Southern Districts of Mississippi have proposed a local disclosure rule that is awaiting court action (these districts operate under a uniform local rules provision). The judges in the District of Kansas recently enacted, and then repealed, a disclosure rule because of the administrative burden that its enforcement provisions imposed upon court staff.

The search for rules and procedures in bankruptcy courts revealed disclosure rules in only the U.S. Bankruptcy Courts for the:

District of Columbia;
Southern District of Georgia;
Central District of Illinois; and the
District of Maine.

With the exception of the bankruptcy court in Maine, these bankruptcy courts follow the disclosure rule in effect in the district court.[1] We found no bankruptcy courts or judges collecting relevant information through alternative means.

Rules and procedures associated with each of the district and bankruptcy courts are summarized in the tables included herein. The local rules in the courts differ from each other and from the national rule on a number of dimensions, the most significant being: (1) who must file the information, (2) the scope of applicability to various types of cases, and (3) what type of information is required.

Who Must File. Among the district court local rules, there is considerable variation in the requirements for who must disclose information. At one end of the range

[1] Local Rule 5004-1 of the U.S. Bankruptcy Court for the District of Columbia states that the applicable rule from the district court applies to adversary proceedings and contested matters in the bankruptcy court. The Uniformity of Practice Statement in the local rules of the U.S. Bankruptcy Court for the Southern District of Georgia directs that the relevant rule of the district court applies by incorporation to bankruptcy cases and proceedings. General Rule 1.1 of the District Court for the Central District of Illinois directs that the general and civil rules of the court apply in all of the courts in the district, including the U.S. Bankruptcy Court for the Central District of Illinois.

is the narrow requirement borrowed from FRAP 26.1 which obliges "non-governmental corporate parties" to file disclosure statements (see, e.g., ME, MO, VT). The requirement expands slightly to encompass a broader group of "corporate parties and corporate intervenors" in another court (DC).

The type of party required to file disclosure statements is more widely drawn in other courts. Several apply the requirement to other parties with an obvious business connection (see, e.g., PA-W ["a corporation, association, joint venture, partnership, syndicate, or other similar entity appearing as a party or amicus in any proceeding"], SC ["any party (plaintiff or defendant) that is either a publicly owned entity, or is a partner, parent, subsidiary or affiliate of a publicly owned entity"]).

The broadest rules require disclosure in civil cases from "all parties" (see, e.g., CA-C, KS, N/S MS), "all non-governmental parties and amicus curiae" (IL-C), "all non-governmental parties and amicus curiae, unless the party is a pro se litigant", "all private non-governmental parties" (see, e.g., GA-N, IL-S, S/E NY), and so on.

In a few instances, courts have specified particular exemptions or inclusions in the party types expected to disclose information. Pro se litigants, individuals filing habeas corpus petitions, and parties in bankruptcy are three exemptions seen in a few of the collected local rules. Amicus curiae parties and intervenors are two party types specifically noted as inclusions in a few of the courts' requirements to file.

Types of Cases. Some district courts limit the disclosure to civil litigants only. Some require disclosure in criminal cases, from either corporate defendants or the government. Bankruptcy proceedings are explicitly covered by the disclosure requirement in some of the district courts; applicability to bankruptcy proceedings in other district courts is ambiguous. Bankruptcy cases filed in bankruptcy courts are subject to this type of disclosure requirement only in the four bankruptcy courts identified earlier. The local rules in a few of the district courts note applicability to special case categories involving agency review and maritime proceedings.

Types of Information. The scope of information that parties are required to disclose is quite variable among the district courts. Essentially, however, each court requires parties to identify one or both of the following: (1) entities having specific financial connections with the party and (2) entities with a financial interest in the outcome of the litigation (and, additionally, the nature of the interest).

Information on financial connections typically involves a listing of parent corporations, subsidiaries not wholly-owned, and corporate stockholders that are publicly held (see, e.g., MO-E, ME, NH, VT). A second level of reporting exists in courts that require parties to identify affiliates (see, e.g., IL-N, PA-W). These affiliates may specifically include trade associations, partnerships, conglomerates, or other business entities related to the party.

Information on financial interests involves listing entities with "a substantial financial interest", or simply "an interest" in the outcome of the litigation. These clauses provide for the identification of insurers (see, e.g., CA-C) but are broadly defined in many courts to additionally include subgroups of such entities as associations of persons, firms, partnerships and corporations, unincorporated associations, and officers, directors, or trustees of parties. One of the broadest local rules simply requires parties to identify all public corporations with a financial interest in the outcome of the case (IL-S).

In addition to requiring information on financial connections and interests, local rules in several of the district courts require parties to identify past and present attorneys and law firms representing a party to a proceeding.

Part III. Summary Tables for Bankruptcy and District Courts

We have organized the bankruptcy and district court local rules into tables in alphabetical order by state. The tables summarize:

(1) the types of parties required to file (Who Must File);
(2) the type of information required (Required Information);
(3) the time for filing the information (Time of Initial Filing);
(4) the existence of a requirement that parties with nothing to disclose submit a negative report (Negative Report);
(5) the form of the disclosure (Disclosure Form);
(6) the number of copies required to be filed (Number of Copies);
(7) the applicability of the rule to various case types and proceedings (Scope of Applicability);
(8) the existence of a stated duty for parties to update disclosed information (Obligation to Update); and
(9) additional relevant information (Note).

Notes on table entries:

(a) Where a table entry is blank, the local rule is silent.

(b) Where a local rule refers to "counsel for the parties" or uses a similar phrase to identify who must file disclosure, we have substituted "parties" for the sake of brevity (see Who Must File).

(c) We use the phrase "identification of [e.g., parent companies, subsidiaries, and affiliates]" to summarize the type of information required of parties (see Required Information). Local rules may use more precise phrasing; counsel may be required, for example, to "certify" a list of the names of interested parties.

(d) Some courts require identification of law firms, partners, etc., that currently or previously represented the party in the issue before the court. These requirements are noted in the tables even though they are not directly related to the report (see Required Information).

U.S. District Court for the Central District of California

Local Civil Rule 4.6	Certification as to Interested Parties
Rule 2.2. of Ch.VI	Local Rules Governing Bankruptcy Appeals, Cases and Proceedings
Rule 6.1 of Ch.VI	Local Rules Governing Bankruptcy Appeals, Cases and Proceedings

Local Civil Rule 4.6

Who Must File	all parties
Required Information	identification of all persons, association of persons, firms, partnerships and corporations (including parent corporations) which have a direct, pecuniary interest in the outcome of the case, including any insurance carrier which may be liable in whole or in part (directly or indirectly) for a judgment that may be entered in the action or for the cost of defense
Time of Initial Filing	party's first appearance
Negative Report	
Disclosure Form	Notice of Interested Parties; (form prescribed in the local rule)
Number of Copies	original and 2 copies
Scope of Applicability	all civil actions and proceedings in the district court [by Local Rule 1.1] or matters of a civil nature [by Local Rule 1.3(c)]
Obligation to Update	
Note	

U.S. District Court for the Central District of California (continued)

Rule 2.2 of Chapter VI (applicable to bankruptcy appeals to the district court)

Who Must File	parties appealing to the district court from the bankruptcy court
Required Information	identification of interested parties (to be provided to the bankruptcy court clerk)
Time of Initial Filing	at the time the notice of appeal is filed
Negative Report	
Disclosure Form	
Number of Copies	
Scope of Applicability	bankruptcy appeals to the district court
Obligation to Update	
Note	

U.S. District Court for the Central District of California (continued)

Rule 6.1 of Chapter VI (applicable to pending bankruptcy cases and proceedings where a motion has been made to withdraw reference from the bankruptcy court to the district court)

Who Must File	parties moving to withdraw reference of matters pending in the bankruptcy court and parties opposing such a motion
Required Information	identification of interested parties (to be provided to the district court clerk and to the presiding bankruptcy judge)
Time of Initial Filing	with the motion to withdraw or with reply papers in opposition
Negative Report	
Disclosure Form	
Number of Copies	
Scope of Applicability	pending bankruptcy cases and proceedings
Obligation to Update	
Note	

U.S. District Court for the District of Columbia

Local Civil Rule 26.1 Disclosure of Corporate Affiliations and Financial Interests

Who Must File	corporate parties and corporate intervenors
Required Information	identification of any parent, subsidiary or affiliate of the party or intervenor which has any outstanding securities in the hands of the public
Time of Initial Filing	at the time the party's first pleading is filed
Negative Report	
Disclosure Form	form prescribed in the local rule
Number of Copies	
Scope of Applicability	civil, agency, and criminal cases [General Rule 109]; all other proceedings in the district court [General Rule 101(a)] (including, by inference, bankruptcy cases and other proceedings in the district court)
Obligation to Update	stated
Note	

U.S. Bankruptcy Court for the District of Columbia

Local Bankruptcy Rule 5004-1 — Disclosure of Corporate Affiliations and Financial Matters

The rule reads:
Local District Rule 109 applies to adversary proceedings and contested matters in the Bankruptcy Court, with the required certificate to be filed in contested matters with a party's paper commencing the contested matter or a party's paper opposing the relief sought in the contested matter.

Who Must File	corporate parties and corporate intervenors to adversary proceedings and contested matters in the bankruptcy court
Required Information	in conformance with General Rule 109 of the Local District Court, a party or intervenor must identify any parent, subsidiary, or affiliate of that party or intervenor which has any outstanding securities in the hands of the public
Time of Initial Filing	with a party's paper commencing the contested matter or a party's paper opposing the relief sought in the contested matter
Negative Report	
Disclosure Form	form prescribed is the same as for the district court
Number of Copies	
Scope of Applicability	bankruptcy cases
Obligation to Update	stated in the district court local rule, so applicable in bankruptcy matters as well
Note	Local Bankruptcy Rule 5004-1 applies the district court local rule on disclosure of corporate affiliations to apply to require application to bankruptcy proceedings and contested matters

U.S. District Court for the Middle District of Florida

Disclosure of financial interest information is required by Standing Order from one Middle District of Florida judge.

Who Must File	civil: all non-government corporate parties criminal: the government
Required Information	civil: identification of all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public criminal: identification of victims of the conduct alleged in the Indictment who are entitled to restitution; and for any non-government corporate victims, identification of all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public
Time of Initial Filing	within 11 days of the date of the Standing Order
Negative Report	
Disclosure Form	
Number of Copies	
Scope of Applicability	civil and criminal cases
Obligation to Update	stated
Note	

U.S. District Court for the Middle District of Florida (continued)

A second Middle District of Florida judge obtains disclosure of financial interest information through use of several case management tools. These include a Case Management Report (civil cases), Order Requiring [the] Government to File a Certificate of Interested Parties (criminal cases) and [Order titled] Notice to Counsel or Any Pro Se Party to Review and to Certify Compliance (bankruptcy cases).

Who Must File	civil: parties criminal: the government bankruptcy: parties, including pro se parties
Required Information	civil: identification of all attorneys, persons, associations of persons, firms, partnerships and corporations, including subsidiaries, conglomerates, affiliates, parent corporations, and other identifiable legal entities related to a party, or as to which such party has a controlling interest, that have an interest in the outcome of the case; criminal: identification of all persons, associations of persons, firms, partnerships, corporations, including subsidiaries, conglomerates, affiliates, and parent corporations and other identifiable legal entities related to each Defendant, or over which Defendant exercises a controlling interest and who or which may have a financial or monetary interest in the outcome of the case or whose stock or equity value may be substantially affected by the outcome of the case proceedings; identification of known victims, including those to whom restitution may be owed bankruptcy: identification of any person, associations of persons, attorneys, firms, partnerships, corporations, or entities whose stock or equity value may be substantially affected by the outcome of the proceedings, including subsidiaries, conglomerates, affiliates, parent corporations and other identifiable legal entities related to a party
Time of Initial Filing	criminal and bankruptcy: within 30 days of the date of the order
Negative Report	
Disclosure Form	
Number of Copies	

U.S. District Court for the Middle District of Florida (continued)

Scope of Applicability	civil, criminal, and bankruptcy cases
Obligation to Update	stated
Note	

U.S. District Court for the Northern District of Georgia

Civil Local Rule 3.3 Certificate of Interested Persons

Who Must File	all private (non-governmental) parties
Required Information	identification of persons, associations of persons, firms, partnerships, or corporations having either a financial interest in or other interest which could be substantially affected by the outcome of this particular case (the listing shall specifically include all subsidiaries, conglomerates, affiliates, and parent corporations, and any other identifiable legal entity related to a party); identification of each person serving as a lawyer in the proceedings
Time of Initial Filing	within 15 days after the first pleading is filed by any defendant or defendants
Negative Report	
Disclosure Form	Certificate of Interested Persons; form of the certificate prescribed in the local rule
Number of Copies	
Scope of Applicability	civil cases
Obligation to Update	stated
Note	counsel for all cases submit joint-certification; if the government is a party, however, certification is submitted only by the private party or parties; in cases of default, the moving party shall submit the required information before seeking any court action on the case

U.S. District Court for the Southern District of Georgia

Civil Local Rule 3.2 Disqualification of Judges
Local Rules for the Administration of Criminal Cases

Who Must File	all private (non-government) parties, both plaintiffs and defendants
Required Information	identification of all parties; officers, directors, or trustees of parties; and all other persons, associations of persons, firms, partnerships, corporations, or organizations which have a financial interested in, or another interest which could be substantially affected by, the outcome of the particular case
Time of Initial Filing	with the first filing (and any subsequent filing) of a complaint and answer
Negative Report	
Disclosure Form	Certificate of Interested Parties Form, located in the Appendix of Forms to the Local Rules
Number of Copies	
Scope of Applicability	civil cases (L.R. 3.2); criminal cases ["These Local Rules...are to be construed consistently with the generally applicable {Civil} Local Rules, supra."]; bankruptcy proceedings in the district court are presumed covered
Obligation to Update	
Note	

U.S. Bankruptcy Court for the Southern District of Georgia

Local Rules for Bankruptcy Cases: Uniformity of Practice

The Uniformity of Practice Statement directs that Civil Local Rule 3.2 of the U.S. District Court for the Southern District of Georgia applies by incorporation to bankruptcy cases and proceedings.

Who Must File	all private (non-government) parties
Required Information	in conformance with Local Rule 3.2 of the district court, parties identify all parties; officers, directors, or trustees of parties; and all other persons, associations of persons, firms, partnerships, corporations, or organizations which have a financial interest in, or another interest which could be substantially affected by, the outcome of the particular case
Time of Initial Filing	
Negative Report	
Disclosure Form	Certificate of Interested Parties, located in the Appendix of Forms to the Local Rules
Number of Copies	
Scope of Applicability	bankruptcy cases in bankruptcy court
Obligation to Update	
Note	

U.S. District Court for the Northern District of Illinois

General Rule 2.23 Notification as to Affiliates

The court is currently revising its local rules. General Rule 2.23 will be renumbered as General Rule 3.2 but the provisions will remain intact. A form titled "Disclosure of Affiliates Pursuant to Local Rule 3.2" will be provided counsel for reporting. The form includes space for counsel to furnish stock ticker symbols.

Who Must File	any party which is an affiliate of a public company
Required Information	identification of any public company of which the party is an affiliate, where: 1) The term "public company" means a corporation any of whose securities are listed on a stock exchange or are the subject of quotations collected and reported by the National Association of Securities Dealers Automated Quotations Systems (NASDAQ). 2) The term "affiliate of a public company" means another corporation that controls, is controlled by or is under common control with the public company. The term includes but is not limited to a corporation 10% percent or more of whose voting stock is owned by the public company. 3) The term "control" of a corporation means possession, direct or indirect, of the power to direct or cause the direction of the management and policies of that corporation through the ownership of voting securities or otherwise.
Time of Initial Filing	a plaintiff files notification with the complaint; a defendant files notification with the answer or with a motion in lieu of answer; if a party becomes a party after the filing of the complaint, the notification is filed with the first pleading filed on behalf of the party
Negative Report	
Disclosure Form	
Number of Copies	
Scope of Applicability	civil and criminal cases are presumed from the wording of the local rule, applicability to bankruptcy cases and other matters is not known

U.S. District Court for the Northern District of Illinois (continued)

Obligation to Update Note

U.S. District Court for the Southern District of Illinois

Rule 11.1.b Disclosure of Interested Parties/Affiliates

Who Must File	private (non-governmental) parties
Required Information	identification of any publicly owned corporation, not a party to the case, that has a financial interest in the outcome of the case
Time of Initial Filing	at the time of the initial pleading
Negative Report	
Disclosure Form	
Number of Copies	
Scope of Applicability	civil
Obligation to Update	
Note	

U.S. District Court for the Central District of Illinois

General Rule 11.3 Certificate of Interest

Who Must File	non-governmental parties and amicus curiae, unless the party is a pro se litigant
Required Information	identification, if party or amicus is a corporation, of its parent corporation, if any, and a list of corporate stockholders which are publicly held companies owning 10 percent or more of the stock of the party or amicus if it is a publicly held company; the name of all law firms whose partners or associates appear for a party or are expected to appear for the party in the case
Time of Initial Filing	with the complaint or upon the first appearance of counsel in the case
Negative Report	
Disclosure Form	Certificate of Interest; form of the certificate is prescribed in the local rule
Number of Copies	
Scope of Applicability	applicable in all proceedings in all of the courts in the district (CD-IL 1.1)
Obligation to Update	
Note	

U.S. Bankruptcy Court for the Central District of Illinois

General Rule 1.1 of the U.S. District Court for the Central District of Illinois directs that the general and civil rules of the court apply in all of the courts in the district.

U.S. District Court for the District of Kansas

Local Rule 3.2 Required Certification of Interested Parties

Adopted January, 1999
Repealed April, 1999

Local Rule 3.2 was adapted from Tenth Circuit Rule 46.1.3 entitled "Certification of Interested Parties and Rule 42.1 "Dismissal for Failure to Prosecute". The court adopted its local rule effective January 1, 1999 and repealed it in April 1999. Repeal was based on a finding that problems with the rule's enforcement outweighed any advantage the new procedure potentially offered over existing automated procedures for identifying conflicts of interest. Failure to comply with the provisions of the rule resulted in either dismissal or a default judgment (see Note 1, below). Enforcing compliance with the rule proved excessively burdensome for both Clerk's Office and chambers staff (see Note 2, below).

The structure of the original rule is summarized in the table that follows.

Who Must File	all parties
Required Information	identification of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, or other legal entities who are financially interested in the outcome of the litigation (if a large group of persons or firms can be specified by a generic description, no individual listing is required); identification of all parties not named in the caption of the initial pleading or paper; for corporate parties and interested entities, identification of all parent and subsidiary corporations; identification of attorneys not entering an appearance in the court who have appeared for any party in any administrative proceedings sought to be reviewed, or in any related proceedings that preceded the action being pursued in the court
Time of Initial Filing	with the initial pleading or other paper filed for a party
Negative Report	
Disclosure Form	form provided by the clerk and outlined in the local rule
Number of Copies	

U.S. District Court for the District of Kansas (continued)

Scope of Applicability	all proceedings
Obligation to Update	stated
Note 1	The repealed rule established the following consequences for failure to comply: "If a party fails to comply with the provisions of this rule, the clerk shall notify the party that unless the failure of compliance is remedied within 10 days from the date of the notice the following action will be taken: (a) If the party is a plaintiff, that the action will be dismissed as to that party plaintiff for lack of prosecution; (b) if the party is other than a plaintiff, that default will be entered against that party for lack of prosecution."
Note 2	Excerpt from a July 2, 1999 letter from Clerk of the Court Ralph L. DeLoach to Abel Mattos of the Administrative Office of the United States Courts, describing enforcement difficulties with the repealed rule: "[The ruled] required all parties to attach a certificate of Interested Parties to every initial pleading filed in every civil case. An issue quickly developed regarding what constituted an 'initial pleading.' An example would be whether a Motion for Extension of Time (to answer a Complaint) filed by a defendant would be considered an initial pleading. The docket clerks were overwhelmed with this issue as pleadings come with many different titles. If a party failed to attach the required Certificate, a notice was sent from the Clerk's Office to the assigned judge indicating non-compliance with the rule. The judge would then determine whether further action was necessary. When a Certificate was filed in compliance with the Rule it was then sent to the assigned judge for a determination of a possible conflict of interest. Needless to say, the amount of paperwork generated by this Rule was voluminous. It greatly impacted the workload of both Clerk's Office staff and chambers staff. A great deal of time was spent following up on non-compliance with the Rule. Special codes were created to enable reports to be generated from ICMS tracking delinquent Certificates filing status. The court determined that a lot of work was being done to find the one 'needle in a haystack.'"

U.S. District Court for the District of Maine

Civil Rule 83.7 Corporate Disclosure Statement

Who Must File	non-governmental corporate parties
Required Information	identification of all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public
Time of Initial Filing	with the party's first appearance
Negative Report	
Disclosure Form	
Number of Copies	
Scope of Applicability	civil cases
Obligation to Update	
Note	

U.S. Bankruptcy Court for the District of Maine

Bankruptcy Rule 1002-1(b)(3)	Disclosure Statement
Who Must File	non-governmental, non-individual debtors
Required Information	identification of all "affiliates" and "insiders", as defined in 11 U.S.C. §101(2),(31).4 Under 11 U.S.C. §101(2) "affiliate" means -- (A) entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities (i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or (ii) solely to secure a debt, if such entity has not in fact exercised such power to vote; (B) corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor, or by an entity that directly or indirectly owns, controls, or holds with power to vote 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities (i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or (ii) solely to secure a debt, if such entity has not in fact exercised such power to vote; (C) person whose business is operated under a lease or operating agreement by a debtor , or person substantially all of whose property is operated under an operating agreement with the debtor; or (D) entity that operates the business or substantially all of the property of the debtor under a lease or operating agreement. Under 11 U.S.C. §101(31) an "insider" includes— (A) if the debtor is an individual: (i) relative of the debtor or of a general partner of the debtor; (ii) partnership in which the debtor is a general partner; (iii) general partner of the debtor; or (iv) corporation of which the debtor is a director, officer, or person in control;

U.S. Bankruptcy Court for the District of Maine (continued)

	(B) if the debtor is a corporation: (i) director of the debtor; (ii) officer of the debtor); (iii) person in control of the debtor; (iv) partnership in which the debtor is a general partner; (v) general partner of the debtor; or (vi) relative of a general partner, director, officer, or person in control of the debtor; (C) if the debtor is a partnership: (i) general partner of the debtor; (ii) relative of a general partner in, general partner of, or person in control of the debtor; (iii) partnership in which the debtor is a general partner; (iv) general partner of the debtor; or (v) person in control of the debtor; (D) if the debtor is a municipality, elected official of the debtor or relative of an elected official of the debtor; (E) affiliate, or insider of an affiliate as if such affiliate were the debtor; and (F) managing agent of the debtor.
Time of Filing	with the petition or within 15 days thereafter
Negative Report	
Disclosure Form	
Number of Copies	
Scope of Applicability	bankruptcy cases and proceedings under Title 11 pending in the district court and in the bankruptcy court
Obligation to Update	
Note	

U.S. District Court for the District of Maryland

Civil Rule 103.3 Disclosure of Affiliations and Financial Interest

Who Must File	parties
Required Information	the identity of any parent or other affiliate, if the party is a corporation, and a description of the relationship between the party and such affiliates; the identity of any corporation, unincorporated association, partnership or other business entity, not a party to the case, which may have any financial interest whatsoever in the outcome of litigation, and the nature of the financial interest; the term "financial interest in the outcome of the litigation" includes a potential obligation of an insurance company or other person to represent or to indemnify any party to the case; information to be provided to the district court clerk
Time of Initial Filing	when filing an initial pleading or promptly after learning of the information to be disclosed
Negative Report	
Disclosure Form	
Number of Copies	2
Scope of Applicability	civil cases
Obligation to Update	
Note	

U.S. District Court for the Northern and Southern Districts of Mississippi (operating under uniform local rules)

(Proposed)

Local Rule 3.1(D) Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation

Who Must File	all parties (including amici) to a civil action, a maritime proceeding, or a bankruptcy proceeding filed in the district court, and all corporate defendants in a criminal prosecution; the rule does not apply to the United States, to state and local governments in cases in which the opposing party is proceeding without counsel, or to parties proceeding in forma pauperis
Required Information	a non-governmental corporate party must identify parent corporations, publicly held companies owning 10% or more of the party's stock, similarly situated master limited partnerships, real estate investment trusts, joint ventures, syndicates, or other legal entities whose shares are publicly held or traded; the disclosure form, but not the proposed rule, asks that grandparent and great-grandparent corporations be identified; the disclosure form, but not the proposed rule, asks that publicly held corporations or other publicly held entities that have a direct financial interest in the outcome of the litigation be identified, along with the nature of the interest
Time of Initial Filing	the clerk will deliver the disclosure form to parties with the notice of a case's having been assigned to a district judge; return filing is required within 10 days of receipt
Negative Report	required
Disclosure Form	Disclosure of Corporate Affiliations and Other Entities With a Direct Financial Interest in Litigation; the form is provided by the clerk
Number of Copies	
Scope of Applicability	civil actions, maritime proceedings, bankruptcy proceedings, and criminal cases

U.S. District Court for the Northern and Southern Districts of Mississippi (operating under uniform local rules) (continued)

Obligation to Update	stated
Note	proposed local rule

U.S. District Court for the Eastern District of Missouri

Local Rule 2.09 Disclosure of Corporation Interests

Who Must File	non-governmental corporate parties
Required Information	identification of all parent companies of the corporation, subsidiaries not wholly owned, and any publicly held company that owns 10% or more of the corporation's stock
Time of Initial Filing	first pleading or entry of appearance
Negative Report	required
Disclosure Form	
Number of Copies	
Scope of Applicability	civil and criminal cases
Obligation to Update	stated
Note	

U.S. District Court for the District of Nevada

Local Rule 10-6 Certificate as to Interested Parties

Who Must File	all private (non-governmental) parties in cases other than habeas corpus cases
Required Information	identification of all persons, associations of persons, firms, partnerships or corporations known to have an interest in the outcome of the case
Time of Initial Filing	at the time counsel enters the case
Negative Report	required
Disclosure Form	form prescribed in the local rule
Number of Copies	
Scope of Applicability	all cases except habeas corpus cases
Obligation to Update	
Note	The court finds the current form of the rule insufficient, and has asked the Standing Committee on the Local Rules to consider a proposal modifying the rule to additionally provide that "concurrent with the filing of a complaint or a responsive pleading the party shall be required to file a list of the names of any publicly traded subsidiary and/or parent companies and/or corporation of the party" [August 6, 1999 letter from District Court Executive/Clerk of the Court Lance S. Wilson]

U.S. District Court for the District of New Hampshire

Local Civil Rule 83.6(a)(4) — Appearances

Who Must File	non-governmental corporate parties and non-governmental corporate defendants
Required Information	identification of all parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates that have issued shares to the public
Time of Filing	at the time an appearance is filed
Negative Report	
Disclosure Form	
Number of Copies	
Scope of Applicability	civil cases, bankruptcy cases, agency review proceedings, and criminal cases
Obligation to Update	stated
Note	

U.S. District Court for the Southern and Eastern Districts of New York (operating under uniform local rules)

Civil Rule 1.9 Disclosure of Interested Parties

Who Must File	private (non-governmental) parties
Required Information	identification of any corporate or other parents, subsidiaries, or affiliates of the party, securities or other interests which are publicly held
Time of Initial Filing	filing of the initial pleading or other court paper on behalf of the party
Negative Report	
Disclosure Form	the reverse side of the civil cover sheet used in the Eastern District of New York has a section directing corporate parties to identify corporate parents, subsidiaries and affiliates
Number of Copies	
Scope of Applicability	civil actions
Obligation to Update	
Note	

U.S. District Court for the Western District of Pennsylvania

Local Rule 3.2 Disclosure Statement

Who Must File	a corporation, association, joint venture, partnership, syndicate, or other similar entity appearing as a party or amicus in any proceeding
Required Information	identification of all parent companies, subsidiaries, and affiliates that have issued shares or debt securities to the public, where: (1) "affiliate" means a person that directly or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, the specified entity, (2) "parent" means an affiliate controlling such entity directly, or indirectly through intermediaries, and (3) "subsidiary" means an affiliate controlled by such entity directly or indirectly through one or more intermediaries; identification of the represented entity's general nature and purpose; if the entity is unincorporated, identification of any members of the entity that have issued shares or debt securities to the public; no listing is required, however, of the names of members of a trade association or professional association, where "trade association" is defined as a continuing association of numerous organizations or individuals operated for the purpose of promoting the general commercial, professional, legislative, or other interests of the membership
Time of Initial Filing	filing of the initial pleading or other court paper on behalf of that party or as otherwise ordered by the court; where it is impossible or impracticable to file with the initial pleading or other court paper, the required Disclosure Statement must be filed within seven days of the date of the original filing
Negative Report	Disclosure Statement, but not the local rule, indicates that a negative report should be filed
Disclosure Form	form titled Disclosure Statement, located in Appendix A of the local rules
Number of Copies	

U.S. District Court for the Western District of Pennsylvania (continued)

Scope of Applicability	all proceedings
Obligation to Update	stated
Note	

U.S. District Court for the District of South Carolina

Local Rule — General Provisions Governing Discovery; Duty of Disclosure

Who Must File	any party (plaintiff or defendant) that is either a publicly owned entity, or is a partner, parent, subsidiary or affiliate of a publicly owned entity [except for parties in bankruptcy proceedings and other specifically exempted case types listed in Local Rule 26.01]
Required Information	identification of the publicly owned entity and its relationship to the disclosing party; identification of any publicly owned entity not a party to the case that has a significant financial interest in the outcome of litigation and the nature of the interest
Time of Initial Filing	a plaintiff files disclosure with the initial pleading; a defendant files within 30 days of the later of (1) defendant's responsive pleading or (2) the date on which the person asserting a claim against the defendant serves answers to interrogatories and produces documents pursuant to the local rule
Negative Report	
Disclosure Form	
Number of Copies	
Scope of Applicability	civil cases
Obligation to Update	
Note	

U.S. District Court for the District of Vermont

General Order No. 45 In Re: Disclosure of Corporate Interests

Who Must File	all non-governmental corporate parties
Required Information	identification of parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates that have issued shares of ownership to the public
Time of Initial Filing	with a party's first appearance
Negative Report	
Disclosure Form	
Number of Copies	
Scope of Applicability	all proceedings
Obligation to Update	
Note	

U.S. District Court for the Eastern District of Wisconsin

Local Rule 5.05 Certificate of Interest

Who Must File	all non-governmental parties and amicus curiae
Required Information	if the party or amicus is a corporation: identification of a parent corporation, if any; identification of corporate stockholders which are publicly held companies owning 10% or more of the stock of the party or amicus; the full name of every party or amicus represented in the case and the name of all law firms whose partners or associates appear for a party or are expected to appear for the party
Time of Initial Filing	with the appearance of the party or upon the first filing of a paper on behalf of the party, whichever occurs first
Negative Report	
Disclosure Form	form prescribed in the local rule
Number of Copies	
Scope of Applicability	
Obligation to Update	
Note	

U.S. District Court for the Western District of Wisconsin

The court has no local rule, court-wide standing order, or individual standing orders on the subject of party disclosure of financial interest information. Private parties that are businesses, companies, or corporations are expected, however, to provide such information at the outset of a case on a form provided by the clerk.

Who Must File	private (non-governmental) parties that are businesses, companies, or corporations
Required Information	identification of the parent corporation or affiliate and the relationship between such and the party, if the party is a subsidiary or affiliate of a publicly owned corporation; identification of any publicly owned corporation not a party to the case that has a financial interest in the outcome of litigation and the nature of the financial interest
Time of Initial Filing	at the time of initial pleading
Negative Report	
Disclosure Form	form titled Disclosure of Corporate Affiliations and Financial Interest is provided by the clerk
Number of Copies	
Scope of Applicability	civil cases
Obligation to Update	
Note	

Part IV. Summary Tables for Bankruptcy Appellate Panels

Four of the appellate courts with Bankruptcy Appellate Panels (BAP) have a relevant local rule. The rules apply to bankruptcy cases appealed from final judgements in bankruptcy courts to BAP. We have organized these rules into tables with a structure identical to the tables summarizing bankruptcy and district court rules. The courts included here are the U.S. Courts of Appeals in the:

Second Circuit;
Eighth Circuit;
Ninth Circuit; and
Tenth Circuit.

Bankruptcy Appellate Panels in the U.S. Court of Appeals for the Second Circuit

BAP Local Rule 8009.1(c) — Disclosure of Interested Parties

Who Must File	private (non-governmental) parties
Required Information	identification of persons, associations of persons, firms, partnerships and corporations which may have an interest in the outcome of the case; identification of the connection and interest in the appeal
Time of Filing	with the initial brief
Negative Report	
Disclosure Form	the general form of the disclosure certificate is prescribed in the BAP rule
Number of Copies	
Scope of Applicability	bankruptcy appeals before a bankruptcy appellate panel
Obligation to Update	
Note	The information is provided on the inside cover of the initial brief.

Bankruptcy Appellate Panels in the U.S. Court of Appeals for the Eighth Circuit

BAP Local Rule 8009.A(1) — Certification of Interested Parties

Who Must File	appellant (and appellee if the appellee exercises the option to prepare and file a separate appendix with its brief, Internal Operating Procedures Manual at IOP III.B.2)
Required Information	identification of parties that have an interest in the outcome of the appeal; identification of the connection and interest in the appeal
Time of Filing	at the same time as a party's brief (Internal Operating Procedures Manual at IOP III.B.2)
Negative Report	
Disclosure Form	the general form of the disclosure certificate is prescribed in the BAP rule.
Number of Copies	
Scope of Applicability	bankruptcy appeals before a bankruptcy appellate panel
Obligation to Update	
Note	The information is provided in an appendix to the appellant's brief.

Bankruptcy Appellate Panels in the U.S. Court of Appeals for the Ninth Circuit

BAP Local Rule 5(c) Certification as to Interested Parties

Who Must File	parties
Required Information	identification of all persons, associations of persons, firms, partnerships and corporations which have an interest in the outcome of the case
Time of Filing	
Negative Report	
Disclosure Form	the general form of the disclosure certificate is prescribed in the BAP rule
Number of Copies	
Scope of Applicability	bankruptcy appeals before a bankruptcy appellate panel
Obligation to Update	
Note	The information is provided on the inside cover of the initial brief.

Bankruptcy Appellate Panels in the U.S. Court of Appeals for the Tenth Circuit

BAP Local Rule 8001-2(b) — Certificate of Interested Parties

Who Must File	parties, including pro se parties (BAP Rule 8001-2(a))
Required Information	identification of all parties to the litigation not revealed by the caption of the notice of appeal; identification of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, or other legal entities that are financially interested in the outcome of the litigation; for corporations, identification of all parent corporations and identification of any publicly held company that owns 10% or more of the corporation's stock; an individual listing is not necessary if a large group of persons or firms can be specified by a generic description; identification of attorneys not entering an appearance in the court who have appeared for any party in the bankruptcy court case or proceeding sought to be reviewed, or in related proceedings that preceded the original action being pursued in this court
Time of Filing	with each entry of appearance; first entry of appearance should be filed within 10 days after service of notice that the appeal has been docketed with the court (BAP Rule 8001-2(a))
Negative Report	required
Disclosure Form	Form 3. Entry of Appearance, Certificate of Interested Parties, and Oral Argument Statement, located in BAP L.R. Appendix A.
Number of Copies	
Scope of Applicability	bankruptcy appeals before a bankruptcy appellate panel
Obligation to Update	stated
Note	

ECM 12

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

Memorandum

TO: Honorable Anthony J. Sirica, Chair, and
Members of the Committee on Rules of Practice and Procedure

FROM: Mary P. Squiers

RE: Progress Report on the Local Rules Project

DATE: December 5, 1999

This document is intended to update you on my progress to date with the Local Rules Project. As you may be aware, I began working on the Project July 1, 1999. I spent some time during the summer organizing my activities, generally, including my office space and computer, and also organizing my thoughts on how to proceed most effectively. What follows is a general background of the Local Rules Project, some of which may be familiar to you. There is then a discussion of what I am currently doing. Lastly, I have provided a brief discussion of what I plan to do in the future.

I am very interested in any thoughts or comments you may have on how to proceed, particularly with respect to the actual content and format of the written report. I will be at the Standing Committee meeting in January. I can also be reached at my office by telephone (781.444.2876) or by email (marysquiers@mediaone.net).

General Background of the Local Rules Project

In 1986, the United States Judicial Conference authorized the Committee on Rules of Practice and Procedure to undertake a study of federal district court local rules regulating civil practice. The Local Rules Project became operational at Boston College Law School in the fall of 1986.

The study was intended to attempt: 1) a complete review of the local civil rules for legal errors or internal inconsistencies; 2) a study of the rules and rulemaking procedures to see how they work in practice; and 3) an examination of the relationship of

local rules to the overall scheme of uniform federal rules. The results of this study were sent to the chief judges of the district courts in April 1989 from the Chairman of the Standing Committee, Joseph F. Weis, Jr., and entitled: "The Report of the Local Rules Project: Local Rules on Civil Practice." That Report consisted of several documents:

1. History and methodology.
2. Uniform numbering system.
3. Three different documents discussing the content of the local rules.
4. List of local rules for each court.

The Committee on Rules of Practice and Procedure then authorized a study of the local rules on appellate practice. The "Report on the Local Rules of Appellate Practice" was distributed to the chief judges of the circuit courts by the Chairman of the Advisory Committee on Appellate Rules, Kenneth F. Ripple, in April of 1991. The Committee on Rules of Practice and Procedure authorized a review of the local rules on criminal practice at its June 1994 meeting in Washington, D.C., which was completed and distributed to the district courts June 6, 1995. Both of these reports contained documents similar to those in the Report on Civil Practice.

The methodology for each of these Reports was similar. The first step was to collect each court's local rules and any other directives having the same function. After collection of the material, the next step was to enter each rule into a computerized database. The rules of each court were individually placed on an outline based on the respective Federal Rules. This resulted in a retrieval system organized by topic. It was then possible to sort and count the local rules according to each of the topics on the outline.

The rules were then analyzed. The analysis focused on an examination of the rules covering each particular topic on the outline. The rules were studied singly and in the aggregate to determine if they were appropriate subjects for local district court rulemaking. Specifically, the rules were analyzed using five broad questions:

1. Do the local rules repeat existing law?
2. Do the local rules conflict with existing law?
3. Should the local rules form the basis of a Model Local Rule for all jurisdictions to consider adopting?
4. Should the local rules remain subject to local variation?
5. Should the subject addressed by the local rules be considered by the Advisory Committee to become part of the Federal Rules?

This analysis formed the content of the treatises discussing the rules.

Each court was provided a list indicating where, in these treatises, each of the court's rules was discussed.

Methodology for the New Local Rules Project

The Local Rules Project will, again, evaluate the existing local rules of civil, criminal, and appellate practice with the goal of determining whether these rules comply with the Rules Enabling Act (28 U.S.C. §§2071 *et seq.*), whether the local rules highlight areas which may more appropriately be covered through the Federal Rules, and whether the local rules have successfully operated in particular fields which other courts may want to emulate. In addition, there will be an examination of whether and how the circuit councils review existing and proposed local district court rules. Lastly, there will be an examination of how the Civil Justice Reform Act has impacted local rule proliferation.

At present, I am working on the evaluation of the local rules of civil practice, the largest number of rules. I expect, generally, to follow the same method and format as I used originally. I am, of course, able to take full advantage of better computer capabilities and Internet access of local rules and relevant case law.

The first step has been to develop an outline of all of the local rules. To that end, I am reading each local rule, by topic, and coding it for entry onto a database. The topics are based on the Federal Rules of Civil Procedure. My goal is then to be able, for each topic, to retrieve the rule numbers and a good understanding of the various rules' content from the coding so that I can easily write about them. This is not the method I used previously since, when I read the rules originally, I did not have a sufficient grasp of what was there until after going through them once. So, I ended up reading the rules carefully more than once. It is, obviously, helpful that I have a good understanding of what is there at the outset. I believe reading them this way will be a significant time-saver in the end. The objective of this rather painstaking and detailed reading of the rules is to allow the analysis to proceed without the necessity of retrieving all of the rules multiple times. I have hired a technical assistant on a very part-time basis to help me develop the computer database.

Perhaps illustrating what I am doing is helpful to you. I have read, as an example, the local rules relating to Rule 5 of the Federal Rules of Civil Procedure on service and filing of pleadings. To do this, I have read rules on facsimile transmissions, filing of discovery, certificates of service, and form of the documents. The local rules on certificate of service vary in content: some rules require that a certification be provided, some allow either a certificate or acknowledgement, some require immediate filing of the certificate, some require filing of the certificate only before the court takes action on the particular document purported to have been served, and some rules indicate that filing the document itself with the court is sufficient and no further proof, such as a certificate of service, need be filed. Each of these content areas is coded. After the codes are all entered into the database, I am able to compile a picture of all of the rules relating to certificates of service. This information will be the basis for the actual write-up. There are multiple topics for each of the other areas relating to Rule 5.

Some topics appear at the outset to be quite straightforward but, in fact, end up being much more complicated. For example, the local rules concerning Federal Rule 6, on time, cover in detail issues such as: when and how a party can seek a trial continuance, when and how a party can receive an extension for submission of a pleading or other paper, and whether and how the Rule 6 calculations apply to time limits set forth in the local rules.

At present, I am working from a set of local rules entitled: *Federal Local Court Rules*, published by Lawyers Cooperative Publishing and previously known as "Callahan's". Callahan's provides me with periodic local rule updates. I am using paper so that I can easily monitor what rules have already been read and what are still outstanding. Many district courts have their local rules on websites. When I am finished reading these rules on paper, I plan to quickly verify from these websites that the rules have not been recently amended.

Future Activities

At this point, I intend to write the report following the outline of the Federal Rules of Civil Procedure. During the first study of local rules, this Committee noted that there was no uniform numbering system for federal district court local rules relating to civil practice. Writing the discussion in this order will help to refine the numbering system for all of the districts. Each court can see where the particular rule was discussed and why it was placed there.

As before, repetitious rules will be highlighted since such repetition is superfluous and may be counterproductive. Similarly, rules that are inconsistent with existing law will be noted since the relevant Federal Rules and provisions in Title 28 mandate that there be no inconsistency in the local rules with existing law.

Any local rules that may more appropriately be incorporated into the Federal Rules rather than remain as local rules will also be highlighted. Incorporation into the Federal Rules may be advisable for one of several reasons: 1) the particular topic covered by the local rule is critical to the procedural scheme of the Federal Rules; 2) the local rule affects the substantive outcome of a class of cases; 3) the local rule affects litigation costs; 4) the local rule affects the operation of the federal courts generally; or 5) the local rule relates in a significant way to the integrity of the Federal Rules as a unified, integrated set of rules.

There are many local rules that are useful in delineating certain procedures and practices in particular courts. These will be discussed so that other courts can consider whether they would be helpful in their respective jurisdictions. Lastly, model local rules that may be useful for all courts to consider adopting will be developed.

I expect that each local rule relating to a particular topic will be set forth in footnotes or endnotes corresponding to the place in the text where the rule is discussed.

This is different from what was done previously; increased computer capability allows this to be possible. Incorporating the actual rule citations has the advantage of not only helping a district court find where its own rules are discussed in the text but also helping all district courts in reviewing the actual text of rules in other jurisdictions for possible incorporation into their own rules.

Item 13-15

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

December 6, 1999

MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Long-Range Planning and Strategic Issues*

I am attaching a Summary Report of the September 14, 1999 Long-Range Planning meeting prepared by the Administrative Office's long-range planning staff. At that meeting each committee of the Judicial Conference was asked to prepare a brief planning document outlining the committee's strategic issues and goals. A uniform format for the planning document, which is set out as an appendix to the summary report, was suggested by the long-range planning staff to facilitate coordination among committees.

In accordance with the decision made at the long-range planning meeting, and consistent with the uniform reporting format, the attached planning document is submitted for the committee's consideration. The planning document will be discussed at the March 2000 Long-Range Planning meeting of Judicial Conference chairs.

John K. Rabiej

Attachments

JUDICIAL CONFERENCE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

STRATEGIC PLANNING OUTLINE

Making Effective Use of Technology and Information

Description: The courts are moving rapidly to expand the use of technology by the bench and bar.

Strategic Objectives: Ensure that the rules of practice and procedure do not unintentionally impede the increased use of technology by the courts.

Initiatives/Course of Action:

- Formed a technology subcommittee with representatives from each advisory committee
- Published for public comment proposed amendments that would allow electronic service with consent of the parties
- Participated in the Committee on Court Administration and Case Management' s ad hoc committee discussions and meetings on privacy
- Closely monitored the CM/ECF project

Monitoring, Analyzing, and Addressing the Proliferation of Local Rules

Description: A comprehensive review of the local rules of court was last made in 1986 in accordance with a Congressional mandate. The local rules were reviewed for legal error, internal inconsistency, and consistency with federal law and national rules. The report identified particular local rules that made sense for national adoption. The project resulted in many changes to the national rules and the implementation of a uniform numbering system for local rules.

The Standing Committee believes it is time for another comprehensive review of local rules to assess their consistency with national rules and statutes and to suggest changes to the courts, when appropriate. Many amendments have been made to local rules since the last review. Moreover, caselaw on local rules has substantially increased. In addition, local rules have been revised to account for changes prompted by the Civil Justice Reform Act. As courts struggle to develop alternative dispute resolution programs and incorporate increased reliance on electronic filing, more and more local rules and internal operating procedures are being promulgated. Finally, the uniform numbering system authorized by the Judicial Conference has been in place for approximately two years. A review of local rules would show the extent of its adoption in the courts. It would also provide hard data on the overall increase in the number of local rules since 1990.

The bar routinely complains about the growing number of local rules. Local rule proliferation has now become a primary concern of the Litigation Section of the ABA. In the past, Congress has listened to the bar's complaints and called for reform — including the 1986 local rules project initiated by Congress. The rules committees are statutorily responsible for monitoring the operation and effect of the rules. The proposed project is consistent with the committees' statutory obligations. It will provide the courts with a useful service and may dissuade any direct Congressional interference.

Strategic Objectives: The rules committee will review all local rules and identify possible new national rules.

Initiatives/Course of Action

- A law professor has been selected to gather and study all local rules.
- The project is expected to be completed in 2 or 3 years.

Uphold the Integrity of the Rules Process

Description: The current rulemaking process carefully balances the authority and responsibility of courts to enact procedures to govern cases it must decide with the authority and responsibility of Congress to enact substantive law. In recent years Congress has become increasingly involved in the rulemaking process.

Strategic Objectives: Ensure the rulemaking process remains within the Third Branch.

Initiatives/Course of Action:

- Work closely with the Office of Legislative Affairs to educate members and staff of Congress about the rulemaking process
- Diligently monitor legislation to quickly identify any attempts to directly or indirectly amend the Federal Rules of Practice and Procedure
- Respond to specific bills that would amend the rules

Judiciary Long-Range Planning Meeting

September 14, 1999

Report

Administrative Office of the United States Courts
Office of Management Coordination and Planning

SUMMARY REPORT
SEPTEMBER 1999 LONG-RANGE PLANNING MEETING

Judicial Conference committees with planning responsibility continue to make progress in strengthening and integrating long-range planning and budgeting activities. Chairs representing 13 committees met for the second time on September 14, 1999, in Washington, D.C. under the cross-committee planning process that was launched earlier this year. The meeting was led by Judge Lloyd D. George, a member of the Judicial Conference's Executive Committee who has coordinated the long-range planning process for the Executive Committee. Also in attendance were Administrative Office Associate Director Clarence A. Lee, and Deputy Associate Director, Cathy A. McCarthy, who provides principal staff support for the integrated long-range planning process. Other senior Administrative Office committee staff also attended. A list of participants is included as an appendix.

The meeting resulted in these major accomplishments:

- Endorsement of the importance of continued consideration and discussion of significant planning issues at these meetings of committee chairs
- A commitment to identifying and addressing strategic issues within the context of the judiciary's core values and mission in addition to considering economy and efficiency
- Proposed development of an abbreviated plan for each committee that outlines its strategic issues and goals.

Judiciary Trends

Cathy McCarthy presented statistical information on the judiciary's work, personnel and costs, including their comparative growth over five years.

Because personnel costs represent 54 percent of the judiciary's expenditures, the results of an in-depth analysis of the growth in staff and personnel costs were reviewed. While it is common to assess growth in costs relative to the effects of inflation, the group learned that this is not the best approach for assessing increases in personnel costs because the effects of mandatory pay adjustments have outpaced inflation.

The analysis of the average cost per employee showed that the courts have been economical in managing payroll costs. Therefore, the best opportunity for controlling the judiciary's expenses for personnel is to limit the growth in the number of positions.

The group reviewed graphs depicting the hours spent by judges and staff per case, and the cost per case, then discussed the question of whether it is possible to increase productivity without sacrificing quality.

Judge John G. Heyburn II, Chair of the Budget Committee, reported on the long-range budget forecast for the judiciary. He reviewed the growth assumptions, noting that spending is estimated to increase 6 to 7 percent annually, reaching $5.8 billion in 2005. Judge Heyburn presented several discussion issues, suggesting that for the judiciary to perform its mission and balance its institutional rate of growth with available resources, we need to continue our efforts in productivity improvements. This will require conducting further analysis on where efficiencies might be achieved.

Strategic Planning Issues

Judge Lloyd D. George reviewed the list of cross-cutting strategic issues developed to date (included at Appendix A). In-depth discussions of several related issues followed.

National Standards versus Local Flexibility and Judicial Values versus Budget Economy

Associate Director Clarence A. Lee, Jr. suggested several strategic issues for consideration, including the implications for policy-making, governance, program management, and accountability when the primary focus is on budget versus basic legal values. He questioned the budget/economy emphasis. In noting the grand success of program management devolution, Mr. Lee also discussed the issue of national policy versus local operational governance and the difficulties created by the bifurcated structure. He noted that Congress and others have been critical of the judiciary when there are local deviations from national policy that result in greater costs and he questioned whether the judiciary can afford to continue its practice in instances of absolute administrative autonomy. Two committees, in particular, have been wrestling with this issue in their programs: the Committee on Automation and Technology and the Committee on Security and Facilities.

Organizing for the Future

Judge William G. Young, Economy Subcommittee Chair, echoed the sentiments expressed by Associate Director Lee in his plea to the chairs to consider issues as matters of policy rather than matters of budget. He stressed that important matters, such as how courts are organized in the future, should not be decided by the spending plans or the budget. However, it is vital to think of ways to increase efficiency, such as through the combination of some administrative functions now performed in several units within each court. It is particularly important to find ways to increase productivity that do not impact the heart of the judicial process. The policy makers should have some idea on these issues before it is time for budgetary decisions.

Update on ECF Issues

Judge Edward W. Nottingham, Chair of the Committee on Automation and Technology, informed the group as to its progress on addressing the various issues related to electronic filing and the involvement of other committees.

- ECF Privacy Issue. Judge D. Brock Hornby, Chair of the Court Administration and Case Management Committee, reported on the formation of a privacy and access to electronic case files subcommittee to address whether the ability to provide unlimited access to electronic case files requires a change in the judiciary's policies. The subcommittee comprises four members of the Court Administration and Case Management Committee and liaisons from the Committee on Automation and Technology, the Committee on the Administration of the Bankruptcy System, the Rules Committee, and the Criminal Law Committee. At present, the subcommittee is gathering information.

- ECF Electronic Service Issue. Judge Anthony J. Scirica, Chair of the Rules Committee, reported on his committee's work with respect to various rules amendments that are out for public comment addressing electronic service. He also noted the committee is looking into issues with respect to discovery. The Rules Committee is cooperating with the Committees on Automation and Technology and Court Administration and Case Management on these matters.

Update on Planning Issues by Committee Chairs

The chairs reported on key strategic issues that are being explored by their committees.

Judge Roth - Security & Facilities Committee

- Ernst & Young is conducting a comprehensive study of the space and facilities program.

Judge Heyburn - Budget Committee

- Strengthening the budget request and its presentation to Congress as reflecting and advancing core values is the committee's main objective.

Judge Cauthron – Defender Services Committee

- High on the committee's main agenda are getting funding, keeping the quality of defense services, and increasing panel attorney fees.

- In order to support the long-range planning subcommittee's primary goal to define better measures and evaluate results, there is a need for more comprehensive data.

Judge Nottingham – Committee on Automation and Technology

- The committee is ensuring equal access to justice in the electronic courtroom by considering how to provide defenders with more systems and applications training so that these attorneys are on par with U.S. Attorneys.
- Another issue under consideration is balancing national needs for computer network security versus local needs to permit access that might be less than fully secure.

Judge Jacobs - Judicial Resources Committee

- The most ambitious undertaking of the Judicial Resources Committee is the update of all staffing formulas for the judiciary. These formulas should be completed in time for the summer 2000 meetings of the Judicial Conference committees. The new formulas could then be used to allocate staffing resources for 2001 and budget preparation for 2002.
- The initial focus of our long-range planning efforts should be to identify human resource requirements that will impact staffing needs in the future, and to develop a way to consider future resource requests in terms of cost/ benefit.
- Currently, funds for courts are now allocated at 80% of staffing requirements. The committee thinks that 80% remains the right number for several reasons:
  - It seems unwise to expect Congress to fund us above 80%;
  - There is no reason to believe the courts are having difficulty managing at the 80% level; and
  - With new responsibilities being heaped on us by the other branches and by a litigious culture, it is imprudent to assume that the courts could function at some lower arbitrary level.
- The committee would like to use the long-range planning process to raise issues with other committees about future resource needs and the impact of those decisions on resource allocation. It will be helpful to have more coordination and communication among committees and the respective

staffs of those committees to identify ongoing initiatives that will have an impact on resource needs.

Judge Hansen - Judicial Branch Committee

- Seeking cost-of-living adjustments for judges has been an important issue.
- A long-term care program is ready to be implemented.
- A flexible benefit program will be offered.

Judge Melloy - Bankruptcy Committee

- The Bankruptcy Committee is focusing its attention on pending bankruptcy reform legislation that could profoundly affect the future workload and administration of the federal courts in general and the bankruptcy court system in particular. The Bankruptcy Committee has been working with other Conference committees to recommend action by the Judicial Conference to oppose many of the provisions in the pending legislation that, if enacted, would have serious consequences for the judiciary.
- The committee is working with the Committee on Court Administration and Case Management and other committees on the electronic case files privacy issue.

Judge Scirica - Rules Committee

- The committee continues its efforts to uphold the integrity of the Rules Enabling Act.
- The committee is working on issues with national versus local rules.

Judge Harris – Intercircuit Assignments Committee

- Because this committee serves as a surrogate of the Chief Justice on intercircuit assignments, it is not actively engaged in long-range planning.

Judge Stapleton – Federal-State Jurisdiction Committee

- How to be effective in dissuading Congress from inappropriately expanding federal jurisdiction is a continuing issue.
- Maintaining and enhancing relations with state courts in the new area of electronic case files has produced two new initiatives: (a) ensuring that state courts will be able to transmit habeas corpus and other cases electronically to federal courts and vice versa and (b) promoting uniformity

on electronic case file standards (e.g., standards for an interface), thereby ensuring that lawyers are not faced with disparate or incompatible systems for state and federal practices.

- The committee is considering a World Wide Web page to disseminate information on federal-state matters.

Judge Hornby - Court Administration and Case Management Committee

- While the committee does not have any specific budgetary responsibilities, it does make recommendations concerning many national programs. At its June meeting the committee discussed and made recommendations regarding the following long-range planning issues:
  - The committee proposed a policy regarding the judiciary's budget in the event that there is a significant budget shortfall for FY 2000: "The principles of budget decentralization should be preserved and courts should be given the flexibility to manage cutbacks locally according to their own needs and circumstances; all components of the courts should participate in this exercise."
  - The committee has begun to integrate long-range planning into its normal course of business by prioritizing each new program it recommends to the Judicial Conference or other committees.
  - The committee emphasized the importance of training for judges on both case management and court administration issues, believing that quality training could greatly impact the implementation of new initiatives.
  - The committee discussed the draft report from the Judicial Officers Resources Working Group, which has been submitted to the Executive Committee. The committee plans on being involved with implementing some of the report's recommendations.

Judge Schlesinger – Magistrate Judges Committee

- The long-range planning subcommittee addresses many strategic issues. Among the most pressing currently are managing resources effectively and the relationship of Article III judges to magistrate judges.

Long-Range Planning Process

Cathy McCarthy discussed why cost-benefit analysis may not always be the best approach to assessing new programs and policies. She reviewed how committees can use the long-range planning process adopted in April to assess new initiatives. In particular, Step 3 of the process calls for committees to determine the feasibility of possible actions, identify the results expected to be achieved, estimate the resource implications, and assess the impact on processes, quality of justice or services, institutions and individuals.

Because important program issues often affect more than one committee, better planning across committee lines is seen as vital. Judge Jacobs, incoming Chair of the Committee on Judicial Resources, urged improved cross-committee information sharing, particularly with his committee. He stressed that his committee needs early information, perhaps in the form of a resource impact statement, when staffing resources will be affected by important initiatives. Only with such early and detailed information can his committee effectively plan for court staff resources.

Judge George requested that each committee prepare, by February 1, 2000, a short planning document outlining its issues and program goals. The documents would be consolidated into a comprehensive overview. A template is included at Appendix B.

In light of Judge George's pending departure from the Executive Committee, the participants expressed their appreciation for his leadership in enhancing the planning process and establishing the current program of committee chair meetings. The next planning meeting will occur in March 2000 prior to the Judicial Conference session.

Appendix A: Key Strategic Issues

- **Preserving the quality of justice and the excellence of judicial services**
  - Determining how to measure the quality of justice and assess the effects of changes or initiatives on the quality of justice
  - Assessing the implications of the growth in magistrate judges, staff attorneys, and other groups in relation to Article III judgeships
  - Providing effective defender services
  - Providing effective supervision of offenders

- **Coping with changing work and increasing workload**
  - Managing increasing criminal filings
  - Addressing disparate growth in work and the congested dockets in some courts
  - Handling complex cases

- **Managing resources effectively**
  - Making effective use of available judicial resources across the judiciary
  - Considering the growing reliance on senior judges
  - Allocating, organizing, and using staff resources efficiently
  - Achieving economies while preserving quality

- **Maintaining effective judicial governance and management mechanisms**
  - Improving mission-based program planning and budgeting
  - Achieving consensus on priorities and directions
  - Determining the right balance between national policies and programs vs. local flexibility
  - Maintaining effective oversight mechanisms to ensure accountability

- **Making effective use of technology and information**
  - Preparing for electronic case files
  - Protecting the security of sensitive information
  - Identifying changes in responsibilities, work methods, staffing, and facilities that will result from the use of new technologies

- **Preserving judicial independence, obtaining adequate resources, and maintaining effective external communications and relationships**
  - Obtaining adequate funding for the judiciary
  - Obtaining needed judgeships
  - Ensuring the judiciary has adequate and secure facilities

- **Attracting and retaining a highly competent workforce**
  - Seeking adequate compensation for judges
  - Improving benefits programs for judges and judiciary employees

Appendix B: Outline for Committee Planning Reports

In order to produce a comprehensive overview of strategic issues and objectives, each committee is asked to produce a 1-3 page outline of its major strategic issues and objectives. This document will change over time.

In formulating your committee's outline of strategic issues and objectives, consider trends, events, initiatives and policies that will or may affect your programs over the next five to ten years. What problems do you see? What changes may occur? What changes may be necessary? What changes are desired? Can improvements be made?

Strategic Issues

- List the most important strategic issues for the committee. These may relate to key crosscutting issues or they may be program-specific. They may be problems to solve or goals to achieve.

Under each issue, provide the following information in a brief form:

Description

- For each issue, provide a description (a couple of sentences or a few bullets) on its scope and/or its driving forces--considering what has happened and what may happen. For example, you may wish to cite relevant growth projections, statistics or forecasts; identify quality issues; or speculate on the implications of possible legislative or policy changes.

Strategic Objectives

- Identify for each issue what would be desirable outcomes or what you wish to happen.

Initiatives or Courses of Action

- To the extent you can, identify possible initiatives or courses of action that might be pursued to achieve the desired outcomes. This list will change over time as the committee undertakes new initiatives.

Appendix C: Participants in the September 1999 Long-Range Planning Meeting

Committee Representatives	Administrative Office Staff
Planning Coordinator Hon. Lloyd D. George	Clarence A. Lee, Jr. Cathy A. McCarthy William M. Lucianovic Kerry Mueller Cecilee Goldberg
Executive Committee Hon. Lloyd D. George	Wendy Jennis
Committee on Automation and Technology Hon. Edward W. Nottingham, Chair	Pamela B. White Mel Bryson Terry Cain
Committee on the Administration of the Bankruptcy System Hon. Michael J. Melloy, Chair	Francis F. Szczebak Kevin Gallagher
Committee on the Budget Hon. John G. Heyburn II, Chair Hon. William G. Young	George H. Schafer Gregory D. Cummings Diane V. James Bruce Johnson
Committee on Court Administration and Case Management Hon. D. Brock Hornby, Chair	Noel J. Augustyn Abel J. Mattos Mark S. Miskovsky
Committee on Criminal Law	John M. Hughes
Committee on Defender Services Hon. Robin J. Cauthron, Chair	Theodore J. Lidz Steven G. Asin
Committee on Federal-State Jurisdiction Hon. Walter K. Stapleton, Chair	Mark W. Braswell

Committee on Intercircuit Assignments
Hon. Stanley S. Harris, Chair

David L. Cook

Committee on the Judicial Branch
Hon. David R. Hansen, Chair

Steven M. Tevlowitz

Committee on Judicial Resources
Hon. Dennis G. Jacobs, Chair

Alton C. Ressler
Charlotte G. Peddicord
H. Allen Brown

Committee on the Administration of the Magistrate Judges System
Hon. Harvey E. Schlesinger, Chair

Charles E. Six

Committee on Rules of Practice and Procedure
Hon. Anthony J. Scirica, Chair

Peter G. McCabe
John K. Rabiej

Committee on Security and Facilities
Hon. Jane R. Roth, Chair

Ross Eisenman
William J. Lehman

Other Administrative Office Staff:
Robert Lowney
Steven R. Schlesinger
Jeffrey A. Hennemuth
Nancy G. Miller
Linda Holz