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

FROM: Honorable Adrian G. Duplantier, Chair
Advisory Committee on Bankruptcy Rules

DATE: May 7, 1999

RE: Report of the Advisory Committee on Bankruptcy
Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on March 18-19, 1999, at the Airlie Center in Warrenton, Virginia.

* * * * *

The Advisory Committee also approved a preliminary draft of proposed amendments to Bankruptcy Rules 1007, 2002(c) and (g), 3016, 3017, 3020, and 9020, and will present them to the Standing Committee at its June 1999 meeting with a request that they be published for comment.

The Advisory Committee discussed the recommendations of the Standing Committee's Subcommittee on Technology regarding electronic service under Civil Rule 5 and the expansion of the 3-day mail rule under Civil Rule 6(e) to include electronic service. The Advisory Committee also discussed alternative drafts of amendments to Civil Rules 5, 6(e), 77(d), and 4(d) prepared by Professor Edward H. Cooper at the request of the Subcommittee on Technology. The Advisory Committee supports the suggested amendments to Civil Rule 5 that would permit electronic service on consent of the parties, the expansion of the 3-day rule to include any method of service other than personal delivery, and amendments to Civil Rule 77(d) to permit the clerk to use electronic service when giving notice of entry of a judgment. Since Bankruptcy Rule 7005 makes Civil Rule 5 applicable to adversary proceedings, any amendments to Civil Rule 5 to permit electronic service will apply in adversary proceedings without the need to amend the Bankruptcy Rules. But if the Standing Committee approves for publication proposed amendments to Civil Rule 5(b) regarding electronic service, the Advisory Committee will request that proposed amendments to Bankruptcy Rule 9006(f) (expanding the 3-day rule) and 9022(a) (authorizing the clerk to send notice of entry of a judgment or order by electronic means) be published at the same time.*

The proposed amendments that will be presented to the Standing Committee for final approval and transmission to the Judicial Conference, the preliminary draft of proposed amendments that will be presented with a request for publication, and the preliminary draft of proposed amendments ready for publication if the

* At its June 14-15, 1999 meeting, the Standing Committee authorized the publication of proposed amendments to Civil Rules 5(b) and 77.

proposed amendments to Civil Rule 5 on electronic service are approved for publication, are set forth below under “Action Items.”

* * * * *

B. Preliminary Draft of Proposed Amendments to Bankruptcy Rules 1007, 2002(c) and (g), 3016, 3017, 3020, and 9020 Submitted for Approval to Publish for Comment.

1. *Synopsis of Proposed Amendments:*

(a) Rule 1007 is amended so that, if the debtor knows that a creditor is an infant or incompetent person, the debtor will be required to include in the list of creditors and schedules the name, address, and legal relationship of any representative upon whom process would be served in an adversary proceeding against the infant or incompetent person. This information will enable the clerk to mail notices required under Rule 2002 to the appropriate representative.

(b) Rule 2002(c) is amended to assure that parties entitled to notice of a hearing on confirmation of a plan are given adequate notice of any injunction included in the plan that would enjoin conduct not otherwise enjoined by operation of the Bankruptcy Code.

(c) Rule 2002(g) is amended to clarify that where a creditor or indenture trustee files both a proof of claim which includes a mailing address and a separate

request designating a different mailing address, the last paper filed determines the proper address, and that a request designating a mailing address is effective only with respect to a particular case. The amendments also clarify that a filed proof of claim is considered a request designating a mailing address if a notice of no dividend has been given under Rule 2002(e), but has been superseded by a subsequent notice of possible dividend under Rule 3002(c)(5). A new paragraph has been added to assure that notices to an infant or incompetent person are mailed to the person's legal representative identified in the debtor's schedules or list of creditors.

(d) Rule 3016 is amended to assure that entities whose conduct would be enjoined under a plan, rather than by operation of the Bankruptcy Code, are given adequate notice of the proposed injunction. The amendment would require that the plan and disclosure statement describe in specific and conspicuous language all acts to be enjoined and to identify the entities that would be subject to the injunction.

(e) Rule 3017 is amended to assure that entities whose conduct would be enjoined under a plan, but who would not ordinarily receive copies of the plan and disclosure statement or information regarding the confirmation hearing because they are neither creditors nor equity security holders, are provided with adequate notice of the proposed injunction, the confirmation hearing, and the deadline for objecting to confirmation of the plan.

(f) Rule 3020 is amended so that, if a plan contains an injunction against conduct not otherwise enjoined under the Code, the order confirming the plan must describe in detail all acts enjoined and identify the entities subject to the injunction. The amendment also requires that notice of entry of the order of confirmation be mailed to all known entities subject to the injunction.

[G] [Rule 9006(e) is amended to expand the 3-day rule so that it will apply to any method of service, including service by electronic means, authorized under proposed amendments to Civil Rule 5(b), other than service by personal delivery.]

[H] Rule 9020 is amended to delete provisions that delay for 10 days the effectiveness of an order of civil contempt issued by a bankruptcy judge and that render the order subject to *de novo* review by the district court. Other procedural provisions in the rule are replaced with a statement that a motion for an order of contempt made by the United States trustee or a party in interest is governed by Rule 9014 (contested matters).

[I] [Rule 9022(a) is amended to authorize the clerk to serve notice of entry of a judgment or order of a bankruptcy judge by any method of service, including service by electronic means, permitted under the proposed amendments to Civil Rule 5(b).]

2. *Text of Preliminary Draft of Proposed Amendments Submitted for Approval to Publish*

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF BANKRUPTCY PROCEDURE***

Rule 1007. Lists, Schedules and Statements; Time Limits

1

* * * * *

2

(m) *Infants and Incompetent Persons.* If the debtor knows

3

that a person on the list of creditors or schedules is an infant

4

or incompetent person, the debtor also shall include the name,

5

address, and legal relationship of any person upon whom

6

process would be served in an adversary proceeding against

7

the infant or incompetent person in accordance with Rule

8

7004(b)(2).

COMMITTEE NOTE

Subdivision (m) is added to enable the person required to mail notices under Rule 2002 to mail them to the appropriate guardian or other representative when the debtor knows that a creditor or other person listed is an infant or incompetent person.

The proper mailing address of the representative is determined in accordance with Rule 7004(b)(2), which requires mailing to the

*New matter is underlined; matter to be omitted is lined through.

2 FEDERAL RULES OF BANKRUPTCY PROCEDURE

person's dwelling house or usual place of abode or at the place where the person regularly conducts a business or profession.

Rule 2002. Notices to Creditors, Equity Security Holders, United States, and United States Trustee

1 * * * * *

2 (c) *Content of Notice.*

3 * * * * *

4 (3) Notice of Hearing on Confirmation When Plan
5 Provides for an Injunction. If a plan provides for an
6 injunction against conduct not otherwise enjoined under
7 the Code, the notice required under Rule 2002(b)(2) shall:

8 (A) include in conspicuous language (bold,
9 italic, or highlighted text) a statement that the plan
10 proposes an injunction;

11 (B) describe briefly the nature of the
12 injunction; and

13 (C) identify the entities that would be subject
14 to the injunction.

15 * * * * *

16 ~~(g) *Addresses of Notices.* All notices required to be~~
17 ~~mailed under this rule to a creditor, equity security holder, or~~
18 ~~indenture trustee shall be addressed as such entity or an~~
19 ~~authorized agent may direct in a filed request; otherwise, to~~
20 ~~the address shown in the list of creditors or the schedule,~~
21 ~~whichever is filed later. If a different address is stated in a~~
22 ~~proof of claim duly filed, that address shall be used unless a~~
23 ~~notice of no dividend has been given.~~

24 (g) *Addressing Notices.*

25 (1) Notices required to be mailed under Rule 2002 to
26 a creditor, indenture trustee, or equity security holder shall
27 be addressed as such entity or an authorized agent has

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28 directed in its last request filed in the particular case. For
29 the purposes of this subdivision —

30 (A) a proof of claim filed by a creditor or
31 indenture trustee that designates a mailing address
32 constitutes a filed request to mail notices to that
33 address, unless a notice of no dividend has been given
34 under Rule 2002(e) and a later notice of possible
35 dividend under Rule 3002(c)(5) has not been given;
36 and

37 (B) a proof of interest filed by an equity
38 security holder that designates a mailing address
39 constitutes a filed request to mail notices to that
40 address.

41 (2) If a creditor or indenture trustee has not filed a
42 request designating a mailing address under Rule
43 2002(g)(1), the notices shall be mailed to the address

44 shown on the list of creditors or schedule of liabilities,
45 whichever is filed later. If an equity security holder has
46 not filed a request designating a mailing address under
47 Rule 2002(g)(1), the notices shall be mailed to the address
48 shown on the list of equity security holders.

49 (3) If a list or schedule filed under Rule 1007 includes
50 the name and address of a legal representative of an infant
51 or incompetent person, and a person other than that
52 representative files a request or proof of claim designating
53 a name and mailing address that differs from the name
54 and address of the representative included in the list or
55 schedule, unless the court orders otherwise, notices under
56 Rule 2002 shall be mailed to the representative included
57 in the list or schedules and to the name and address
58 designated in the request or proof of claim.

59 * * * * *

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COMMITTEE NOTE

Subdivision (c)(3) is added to assure that parties given notice of a hearing to consider confirmation of a plan under subdivision (b) are given adequate notice of an injunction provided for in the plan if it would enjoin conduct that is not otherwise enjoined by operation of the Code.

This new requirement is not applicable to an injunction contained in a plan if it is substantially the same as an injunction provided under the Code. For example, if a plan contains an injunction against acts to collect a discharged debt from the debtor, Rule 2002(c)(3) would not apply because that conduct would be enjoined under § 524(a)(2) upon the debtor's discharge. But if a plan provides that creditors will be enjoined from asserting claims against persons who are not debtors in the case, the notice of the confirmation hearing must include the information required under Rule 2002(c)(3) because that conduct would not be enjoined by operation of the Code. *See* § 524(e).

The requirement that the notice identify the entities that would be subject to the injunction requires only reasonable identification under the circumstances. If the entities that would be subject to the injunction cannot be identified by name, the notice may describe them by class or category if reasonable under the circumstances. For example, it may be sufficient for the notice to identify the entities as "all creditors of the debtor" and for the notice to be published in a manner that satisfies due process requirements.

This rule is not intended to affect any determination of whether, or to what extent, a plan may provide for injunctive relief. The

validity and effect of any injunction provided for in a plan are substantive law matters that are beyond the scope of these rules.

Subdivision (g) has been revised to clarify that where a creditor or indenture trustee files both a proof of claim which includes a mailing address and a separate request designating a mailing address, the last paper filed determines the proper address. The amendments also clarify that a request designating a mailing address is effective only with respect to a particular case.

Under Rule 2002(g), a duly filed proof of claim is considered a request designating a mailing address if a notice of no dividend has been given under Rule 2002(e), but has been superseded by a subsequent notice of possible dividend under Rule 3002(c)(5). A duly filed proof of interest is considered a request designating a mailing address of an equity security holder.

Rule 2002(g)(3) is added to assure that notices to an infant or incompetent person under this rule are mailed to the appropriate guardian or other legal representative. Under Rule 1007(m), if the debtor knows that a creditor is an infant or incompetent person, the debtor is required to include in the list and schedule of creditors the name and address of the person upon whom process would be served in an adversary proceeding in accordance with Rule 7004(b)(2). If the infant or incompetent person, or another person, files a request or proof of claim designating a different name and mailing address, the notices would have to be mailed to both names and addresses until the court resolved the issue as to the proper mailing address.

The other amendments to Rule 2002(g) are stylistic.

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**Rule 3016. Filing of Plan and Disclosure Statement in
a Chapter 9 Municipality and or Chapter 11
Reorganization Cases Case**

1 * * * * *

2 (c) Injunction Under a Plan. If a plan provides for an
3 injunction against conduct not otherwise enjoined under the
4 Code, the plan and disclosure statement shall describe in
5 specific and conspicuous language (bold, italic, or highlighted
6 text) all acts to be enjoined and identify the entities that would
7 be subject to the injunction.

COMMITTEE NOTE

Subdivision (c) is added to assure that entities whose conduct would be enjoined under a plan, rather than by operation of the Code, are given adequate notice of the proposed injunction.

This requirement is not applicable to an injunction contained in a plan if it is substantially the same as an injunction provided under the Code. For example, if a plan contains an injunction against acts to collect a discharged debt from the debtor, Rule 3016(c) would not apply because that conduct would be enjoined nonetheless under § 524(a)(2). But if a plan provides that creditors will be permanently enjoined from asserting claims against persons who are not debtors

in the case, the plan and disclosure statement must highlight the injunctive language and comply with the requirements of Rule 3016(c). *See* § 524(e).

The requirement that the plan and disclosure statement identify the entities that would be subject to the injunction requires reasonable identification under the circumstances. If the entities that would be subject to the injunction cannot be identified by name, the plan and disclosure statement may describe them by class or category. For example, it may be sufficient for the subjects of the injunction to be identified as “all creditors of the debtor.”

This rule is not intended to affect any determination of whether, or to what extent, a plan may provide for injunctive relief. The validity and effect of any injunction provided for in a plan are substantive law matters that are beyond the scope of these rules.

**Rule 3017. Court Consideration of Disclosure Statement
in a Chapter 9 Municipality and or Chapter 11
Reorganization Cases Case**

1

* * * * *

2

(f) Notice and Transmission of Documents to Entities

3

Subject to an Injunction Under a Plan. If a plan provides for

4

an injunction against conduct not otherwise enjoined under

5

the Code and an entity that would be subject to the injunction

10 FEDERAL RULES OF BANKRUPTCY PROCEDURE

6 is not a creditor or equity security holder, at the hearing held
7 under Rule 3017(a), the court shall consider procedures for
8 providing the entity with:

9 (1) at least 25 days' notice of the time fixed for filing
10 objections and the hearing on confirmation of the plan
11 containing the information described in Rule 2002(c)(3):
12 and

13 (2) to the extent feasible, a copy of the plan and
14 disclosure statement.

COMMITTEE NOTE

Subdivision (f) is added to assure that entities whose conduct would be enjoined under a plan, rather than by operation of the Code, and who will not receive the documents listed in subdivision (d) because they are neither creditors nor equity security holders, are provided with adequate notice of the proposed injunction.

This rule recognizes the need for adequate notice to subjects of an injunction, but that reasonable flexibility under the circumstances may be required. If a known and identifiable entity would be subject to the injunction, and the notice, plan, and disclosure statement could be mailed to that entity, the court should require that they be mailed

12 FEDERAL RULES OF BANKRUPTCY PROCEDURE

8 terms regarding the injunction; and (3) identify the entities
9 subject to the injunction.

10 (2) Notice of entry of the order of confirmation notice
11 of entry thereof shall be mailed promptly as provided in
12 Rule 2002(f) to the debtor, the trustee, creditors, equity
13 security holders, and other parties in interest, and, if
14 known, to any identified entity subject to an injunction
15 provided for in the plan against conduct not otherwise
16 enjoined under the Code.

17 (3) Except in a chapter 9 municipality case, notice of
18 entry of the order of confirmation shall be transmitted to
19 the United States trustee as provided in Rule 2002(k).

20 * * * * *

COMMITTEE NOTE

Subdivision (c) is amended to provide notice to an entity subject to an injunction provided for in a plan against conduct not otherwise enjoined by operation of the Code. This requirement is not applicable

to an injunction contained in a plan if it is substantially the same as an injunction provided under the Code.

The requirement that the order of confirmation identify the entities subject to the injunction requires only reasonable identification under the circumstances. If the entities that would be subject to the injunction cannot be identified by name, the order may describe them by class or category if reasonable under the circumstances. For example, it may be sufficient for the order to identify the entities as “all creditors of the debtor.”

This rule is not intended to affect any determination of whether, or to what extent, a plan may provide for injunctive relief. The validity and effect of any injunction provided for in a plan are substantive law matters that are beyond the scope of these rules.

Rule 9006. Time*

1

* * * * *

2

(f) *Additional Time after Service by Mail or Under Rule*

3

5(b)(2)(C) or (D) F. R. Civ. P. When there is a right or

* Compare with the preliminary decision of the Civil Rules Committee not to extend the 3-day rule to electronic service. The Civil Rules Committee, however, does seek comment on an alternative proposal amending Civil Rule 6(b) to extend the 3-day rule to electronic service published for comment on page 48 of this pamphlet.

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4 requirement to do some act or undertake some proceedings
5 within a prescribed period after service of a notice or other
6 paper and the notice or paper other than process is served by
7 mail or under Rule 5(b)(2)(C) or (D) F. R. Civ. P., three days
8 shall be added to the prescribed period.

9 * * * * *

COMMITTEE NOTE

Rule 5(b) F. R. Civ. P., which is made applicable in adversary proceedings by Rule 7005, is being restyled and amended to authorize service by electronic means — or any other means not otherwise authorized under Rule 5(b) — if consent is obtained from the person served. The amendment to Rule 9006(f) is intended to extend the three-day “mail rule” to service under Rule 5(b)(2)(D), including service by electronic means. The three-day rule also will apply to service under Rule 5(b)(2)(C) F. R. Civ. P. when the person served has no known address and the paper is served by leaving a copy with the clerk of the court.

Rule 9020. Contempt Proceedings

1 Rule 9014 governs a motion for an order of contempt
2 made by the United States trustee or a party in interest.

FEDERAL RULES OF BANKRUPTCY PROCEDURE 15

3 ~~(a) Contempt Committed in Presence of Bankruptcy~~

4 ~~Judge. Contempt committed in the presence of a bankruptcy~~

5 ~~judge may be determined summarily by a bankruptcy judge.~~

6 ~~The order of contempt shall recite the facts and shall be~~

7 ~~signed by the bankruptcy judge and entered of record.~~

8 ~~(b) Other Contempt. Contempt committed in a case or~~

9 ~~proceeding pending before a bankruptcy judge, except when~~

10 ~~determined as provided in subdivision (a) of this rule, may be~~

11 ~~determined by the bankruptcy judge only after a hearing on~~

12 ~~notice. The notice shall be in writing, shall state the essential~~

13 ~~facts constituting the contempt charged and describe the~~

14 ~~contempt as criminal or civil and shall state the time and~~

15 ~~place of hearing, allowing a reasonable time for the~~

16 ~~preparation of the defense. The notice may be given on the~~

17 ~~court's own initiative or on application of the United States~~

18 ~~attorney or by an attorney appointed by the court for that~~

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19 ~~purpose. If the contempt charged involves disrespect to or~~
20 ~~criticism of a bankruptcy judge, that judge is disqualified~~
21 ~~from presiding at the hearing except with the consent of the~~
22 ~~person charged.~~

23 ~~(c) *Service and Effective Date of Order; Review.* The~~
24 ~~clerk shall serve forthwith a copy of the order of contempt on~~
25 ~~the entity named therein. The order shall be effective 10 days~~
26 ~~after service of the order and shall have the same force and~~
27 ~~effect as an order of contempt entered by the district court~~
28 ~~unless, within the 10 day period, the entity named therein~~
29 ~~serves and files objections prepared in the manner provided~~
30 ~~in Rule 9033(b). If timely objections are filed, the order shall~~
31 ~~be reviewed as provided in Rule 9033.~~

32 ~~(D) *Right to Jury Trial.* Nothing in this rule shall be~~
33 ~~construed to impair the right to jury trial whenever it~~
34 ~~otherwise exists.~~

COMMITTEE NOTE

The amendments to this rule cover a motion for an order of contempt filed by the United States trustee or a party in interest. This rule, as amended, does not address a contempt proceeding initiated by the court sua sponte. Neither the Bankruptcy Rules nor the Federal Rules of Civil Procedure provide procedures for sua sponte contempt orders.

Whether the court is acting on motion under this rule or is acting sua sponte, these amendments are not intended to extend, limit, or otherwise affect either the contempt power of a bankruptcy judge or the role of the district judge regarding contempt orders. Issues relating to the contempt power of bankruptcy judges are substantive and are left to statutory and judicial development, rather than procedural rules.

This rule, as amended in 1987, delayed for ten days from service the effectiveness of a bankruptcy judge's order of contempt and rendered the order subject to de novo review by the district court. These limitations on contempt orders were added to the rule in response to the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, which provides that bankruptcy judges are judicial officers of the district court, but does not specifically mention contempt power. *See* 28 U.S.C. § 151. As explained in the committee note to the 1987 amendments to this rule, no decisions of the courts of appeals existed concerning the authority of a bankruptcy judge to punish for either civil or criminal contempt under the 1984 Act and, therefore, the rule as amended in 1987 "recognizes that bankruptcy judges may not have the power to punish for contempt." Committee Note to 1987 Amendments to Rule 9020.

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Since 1987, several courts of appeals have held that bankruptcy judges have the power to issue civil contempt orders. *See, e.g., Matter of Terrebonne Fuel and Lube, Inc.*, 108 F.3d 609 (5th Cir. 1997); *In re Rainbow Magazine, Inc.*, 77 F.3d 278 (9th Cir. 1996). Several courts have distinguished between a bankruptcy judge’s civil contempt power and criminal contempt power. *See, e.g., Matter of Terrebonne Fuel and Lube, Inc.*, 108 F.3d at 613, n. 3 (“[a]lthough we find that bankruptcy judge’s [sic] can find a party in civil contempt, we must point out that bankruptcy courts lack the power to hold persons in criminal contempt.”). For other decisions regarding criminal contempt power, *see, e.g., In re Ragar*, 3 F.3d 1174 (8th Cir. 1993); *Matter of Hipp, Inc.*, 895 F.2d 1503 (5th Cir. 1990). To the extent that Rule 9020, as amended in 1987, delayed the effectiveness of civil contempt orders and required de novo review by the district court, the rule may have been unnecessarily restrictive in view of judicial decisions recognizing that bankruptcy judges have the power to hold parties in civil contempt.

Subdivision (d), which provides that the rule shall not be construed to impair the right to trial by jury, is deleted as unnecessary and is not intended to deprive any party of the right to a jury trial when it otherwise exists.

Rule 9022. Notice of Judgment or Order

- 1 (a) *Judgment or Order of Bankruptcy Judge.* Immediately
- 2 on the entry of a judgment or order the clerk shall serve a
- 3 notice of entry ~~by mail~~ in the manner provided ~~by Rule 7005~~
- 4 in Rule 5(b) F. R. Civ. P. on the contesting parties and on

5 other entities as the court directs. Unless the case is a chapter
6 9 municipality case, the clerk shall forthwith transmit to the
7 United States trustee a copy of the judgment or order. Service
8 of the notice shall be noted in the docket. Lack of notice of
9 the entry does not affect the time to appeal or relieve or
10 authorize the court to relieve a party for failure to appeal
11 within the time allowed, except as permitted in Rule 8002.

12 * * * * *

COMMITTEE NOTE

Rule 5(b) F. R. Civ. P., which is made applicable in adversary proceedings by Rule 7005, is being restyled and amended to authorize service by electronic means — or any other means not otherwise authorized under Rule 5(b) — if consent is obtained from the person served. The amendment to Rule 9022(a) authorizes the clerk to serve notice of entry of a judgment or order by electronic means if the person served consents, or to use any other means of service authorized under Rule 5(b), including service by mail. This amendment conforms to the amendments made to Rule 77(d) F. R. Civ. P.

**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 , 1998

Re: Report of the Civil Rules Advisory Committee

I Introduction

The Civil Rules Advisory Committee met on November 12 and 13, 1998, in Charleston, South Carolina. The three following parts of this Report present: (II) a recommendation to publish for comment changes in the rules governing impoundment of things claimed to infringe a copyright; (III) a report of the Advisory Committee's deliberations on the proposal to establish a uniform effective date for local district-court rules; and (IV) brief summaries of other matters that remain on the Advisory Committee's agenda.

* * * * *

II Action Item

Copyright Rules Proposals Recommended for Publication

The Advisory Committee recommends publication for comment of three related rules changes: (1) Abrogation of the

Copyright Rules of Practice; (2) Amendment of Civil Rule 65 by adding a new subdivision (f) that explicitly brings copyright impoundment procedures within Rule 65 injunction procedures; and (3) Amendment of Civil Rule 81(a)(1), primarily for the purpose of reflecting abrogation of the Copyright Rules of Practice. These proposals seek to establish a firm legal foundation for the practices that have been adopted by several district courts. Confirming these practices will ensure that effective pretrial remedies are in fact available to protect copyrights as a central form of intellectual property. The changes will provide reassurance to other countries that the United States can honor its international obligations in these matters.

Most lawyers, including many copyright lawyers, do not know that an independent set of Copyright Rules of Practice, adopted under the 1909 Copyright Act, seems to persist to this day. The Advisory Committee first proposed abrogation of the Copyright Rules in 1964, but the question was put aside in deference to the copyright reform efforts that eventually led to the 1976 Copyright Act. Nothing has been done since then, despite grave doubts about the constitutionality of the *ex parte* seizure provisions and about the actual life or accidental death of the rules. Several federal courts have recognized the problems that arise from these anachronistic rules, and have invented apparently successful means to overcome the problems. At least a few anecdotes suggest that some practitioners have continued to invoke the *ex parte* seizure remedies provided by the Copyright Rules, however, and in any event it is desirable to get our house in order. This proposal renews the 1964 proposals to abrogate the 1909 Copyright Rules and to amend Civil Rule 65 to provide a secure foundation for all appropriate pretrial remedies.

These proposals are designed to ensure that federal courts can continue to do what they are doing now — providing effective remedies and procedures in copyright cases. As matters now stand,

there is a plausible technical argument that there are no rules of procedure for copyright actions. Almost universally, federal courts ignore this potential problem and apply the Federal Rules of Civil Procedure. Beyond this general difficulty lies a more pointed problem. The prejudgment seizure provisions in the Copyright Rules of Practice, even if they apply to actions under the 1976 Copyright Act, probably are inconsistent with the Act and quite probably are unconstitutional. Here too the federal courts seem to have adapted by applying the safeguards of Civil Rule 65 procedure in ways that both satisfy constitutional requirements and provide effective protection against copyright infringements. Appropriate rule changes are more than thirty years overdue. It is time to make the rules conform to practice.

Congressional staff members have expressed some concern that the proposed action, although taken for the purpose of establishing a secure foundation for effective copyright remedies, might be misunderstood in other countries. The United States is actively encouraging all countries to provide effective intellectual property schemes. If the Committee decides that these problems have lingered more than long enough, care must be taken to reassure the world that the purpose and effect are to bolster present effective practice, not to diminish it.

The Problems

No Procedure. Civil Rule 81(a)(1) presents the question whether there are any procedural rules to apply in copyright actions. It states that the Civil Rules “do not apply to * * * proceedings in copyright under Title 17, U.S.C., except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States.” Rule 1 of the Copyright Rules of Practice reads:

Proceedings in actions under section 25 of the Act of March 4, 1909, entitled “An Act to amend and

consolidate the acts respecting copyright”, including proceedings relating to the perfecting of appeals, shall be governed by the Rules of Civil Procedure, in so far as they are not inconsistent with these rules.

The problem is that all of the 1909 Copyright Act was superseded in 1976. On the face of Civil Rule 81 and Copyright Rule 1, there is no Supreme Court rule that makes the Civil Rules applicable to proceedings in copyright under present Title 17.

Courts have mostly reacted by ignoring this seeming problem. In *Kulik Photography v. Cochran*, E.D.Va.1997, 975 F.Supp. 812, 813, the court noted an unpublished opinion by a magistrate judge that apparently holds the Civil Rules inapplicable in a copyright action. The court observed that many courts continue to apply the Civil Rules, and then concluded that it need not decide whether to follow the Civil Rules because in any event it could grant the defendants’ motion to dismiss for lack of personal jurisdiction. Otherwise, federal courts seem to follow the sensible course of applying the Civil Rules without further anguish. The Civil Rules nonetheless should be amended to securely establish this result.

The failure to amend Copyright Rule 1 in 1976 may reflect the obscurity of the Copyright Rules. Although it is embarrassing to have waited so long, it would be easy to adopt a technical amendment that substitutes an appropriate reference to the 1976 Act in Copyright Rule 1.

The reason for inquiring beyond this simple technical correction is revealed on examining the balance of the Copyright Rules. Rule 2, which imposed special pleading requirements, was abrogated in 1966. The remaining Rules 3 through 13 deal with one subject only — the procedure for seizing and holding, before judgment, “alleged infringing copies, records, plates, molds, matrices, etc., or other means of making the copies alleged to infringe the

copyright.” These rules require a bond approved by the court or commissioner, but do not appear to require any particular showing of probable success. The marshal is to retain the seized items and keep them in a secure place. The defendant has three days to object to the sufficiency of the bond. The defendant also may apply for the return of the articles seized with a supporting “affidavit stating all material facts and circumstances tending to show that the articles seized are not infringing * * *.” Rule 10 provides that “the court in its discretion, after such hearing as it may direct, may order such return” if the defendant files a bond in the sum directed by the court.

Since the Copyright Rules deal only with prejudgment seizure, and have not been reviewed for many years, it seems appropriate to ask whether they continue to reflect evolving concepts and practices that have transformed the due process constraints on prejudgment remedies.

Due Process. In 1964, the Civil Rules Advisory Committee considered the Copyright Rules and published for comment a proposal to abrogate the Copyright Rules. The proposal was driven in part by a belief that all civil actions should be governed by the Civil Rules, and in part by grave doubts about the wisdom of the prejudgment seizure provisions in Rules 3 through 13. The seizure procedure:

is rigid and virtually eliminates discretion in the court; it does not require the plaintiff to make any showing of irreparable injury as a condition of securing the interlocutory relief; nor does it require the plaintiff to give notice to the defendant of an application for impounding even when an opportunity could feasibly be provided.

Opposition was expressed by the American Bar Association and by the Ninth Circuit Judicial Conference, who apparently relied on the

same advisers. The opponents expressed satisfaction with the working of the Copyright Rules. The Reporters were not swayed; they suggested that alleged infringers were not likely to be heard in the rulemaking process. In the end, the Advisory Committee concluded that its proposals were sound, but that the final decision whether to recommend adoption should be made by the Standing Committee in light of the needs of sound relations with Congress while the process of revising the Copyright Act was going on. The Standing Committee recommended that only the special pleading requirements embodied in Rule 2 be abrogated.

For more than thirty years, the Copyright Rules of Practice have been published in U.S.C.A. with the following Advisory Committee Notes appended to each remaining rule:

* * * The Advisory Committee has serious doubts as to the desirability of retaining Copyright Rules 3-13 for they appear to be out of keeping with the general attitude of the Federal Rules of Civil Procedure * * * toward remedies anticipating decision on the merits, and objectionable for their failure to require notice or a showing of irreparable injury to the same extent as is customarily required for threshold injunctive relief. However, in view of the fact that Congress is considering proposals to revise the Copyright Act, the Advisory Committee has refrained from making any recommendation regarding Copyright Rules 3-13, but will keep the problem under study.

The line of contemporary decisions revising due process requirements for prejudgment remedies began soon after this paragraph was written. See *Sniadach v. Family Fin. Corp.*, 1969, 395 U.S. 337, 89 S.Ct. 1820; *Fuentes v. Shevin*, 1972, 407 U.S. 67, 92 S.Ct. 1983; *Mitchell v. W.T. Grant Co.*, 1974, 416 U.S. 600, 94 S.Ct.

1895; *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 1975, 419 U.S. 601, 95 S.Ct. 719; *Connecticut v. Doebr*, 1991, 501 U.S. 1, 111 S.Ct. 2105. These decisions do not establish a crystal-clear formula for evaluating the process required to support no-notice prejudgment remedies. But they do make it clear that the procedures established by the Copyright Rules have at best a very low chance of passing constitutional muster. It seems to be accepted that no-notice preliminary relief continues to be available on showing a strong prospect that notice will enable the opposing party to defeat the opportunity for effective relief. But it is almost certainly required that this showing be made in ex parte proceedings before a judge or magistrate judge. A mere affidavit filed with a court clerk will not do. The Copyright Rules do not approach this standard.

Statutory Provision: In addition to the due process problem, the Copyright Rules also seem inconsistent with the interim impoundment remedy established by the 1976 Copyright Act. 17 U.S.C. § 503(a) provides:

At any time while an action under this title is pending, the court may order the impounding, on such terms as it may deem reasonable, of all copies or phonorecords claimed to have been made or used in violation of the copyright owner's exclusive rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced.

This provision gives the court discretion whether to order impoundment, and discretion to establish reasonable terms. Apart from the terms of the bond posted by the plaintiff, discretion seems to enter the Copyright Rules only at the Rule 10 stage of an order to return the seized items.

An early reaction to these difficulties was provided by Judge Harold Greene in *WPOW, Inc. v. MRLJ Enterprises*, D.D.C.1984, 584 F.Supp. 132, 134-135. Judge Greene concluded that § 503(a) makes prejudgment impoundment discretionary, and that an exercise of discretion requires “procedures which are other than summary in character.” Decisions under the pre-1976 Act Copyright Rules no longer control. Instead, the normal injunction requirements of Civil Rule 65 apply. A later decision by Judge Sifton provides a strong statement that the Copyright Rules are inconsistent with § 503(a), and an equally strong suggestion that they probably are unconstitutional. *Paramount Pictures Corp. v. Doe*, E.D.N.Y.1993, 821 F.Supp. 82. The reasoning of these decisions was found persuasive in *Religious Technology Center v. Netcom On-Line Communications Servs., Inc.*, N.D.Cal.1995, 923 F.Supp. 1231, 1260-1265, where the court adopted Civil Rule 65 procedures. The doubts expressed by the *WPOW* and *Paramount Pictures* courts are reflected, without need for resolution, in *First Technology Safety Systems, Inc. v. Depinet*, 6th Cir.1993, 11 F.3d 641, 648 n. 8. *Columbia Pictures Indus. v. Jasso*, N.D.Ill.1996, 927 F.Supp. 1075, 1077, may seem to look the other way by stating that the Copyright Rules govern impoundment, but the court then proceeds through all of the appropriate steps for a court-determined temporary restraining order under Civil Rule 65. *Century Home Entertainment, Inc. v. Laser Beat, Inc.*, E.D.N.Y.1994, 859 F.Supp. 636, is similar to the *Columbia Pictures* decision.

If there is room for significant doubt, it is whether even the Civil Rule 65(b) temporary restraining order procedures may support no-notice seizures. The Supreme Court decisions are not as clear as could be wished. There is room to argue that even after an ex parte hearing, free use of a defendant’s property can be restrained without notice only if the plaintiff’s claim falls into a category that is easily proved and that gives the plaintiff some form of pre-existing interest in the property. A secured creditor can qualify, as with the vendor’s lien in *Mitchell v. W.T. Grant*. A tort claimant does not qualify, as in

Connecticut v. Doehr. A copyright owner is asserting a property interest that might, for this purpose, be found to attach to an infringing item. But the claim of infringement often will be difficult to establish. The Court emphasized the risk of error in *Connecticut v. Doehr*, and there is a genuine risk of error in making many claims of copyright infringement.

These doubts cannot be completely dispelled, but they can be satisfactorily met. There is strong appellate authority justifying no-notice seizure of counterfeit trademarked goods. The consensus classic decision is *Matter of Vuitton et Fils S.A.*, 2d Cir.1979, 606 F.2d 1. Vuitton showed that it had initiated 84 counterfeit goods actions, and filed affidavits detailing experience with notices of requested restraints. The defendants regularly arranged to transfer the infringing items. The court found this showing sufficient to establish

why notice should not be required in a case such as this one. If notice is required, that notice all too often appears to serve only to render fruitless further prosecution of the action. This is precisely contrary to the normal and intended role of “notice,” and is surely not what the authors of the rule [65(b)] either anticipated or intended.

Congress reacted to continuing trademark infringement problems with the Trademark Counterfeiting Act of 1984, which establishes an elaborate temporary-restraining-order-like procedure for no-notice seizure. 15 U.S.C. § 1116(d). This procedure was explored and approved in *Vuitton v. White*, C.A.3d, 1991, 945 F.2d 569.

The analogy to trademark problems is bolstered by the relative frequency of proceedings that combine copyright and trademark claims. The *Time Warner Entertainment* case, for example, involved both copyright and trademark rights in Looney Tunes and Mighty Morphin Power Rangers figures.

The most significant question raised by the trademark analogy is whether it would be better to shape the Enabling Act response to the prospect that Congress may wish to enact a copyright analogue to the trademark statute. A letter from the American Intellectual Property Law Association, which otherwise supports the changes proposed below, reports a division of opinion on the desirability of supplemental legislation. Supplemental legislation indeed should be welcomed if Congress concludes that a new statute would usefully give more pointed guidance than a combination of the copyright impoundment statute, § 503(a), and Civil Rule 65(b). But there is little indication that courts have encountered any special difficulties in adapting Rule 65(b) to copyright impoundment. It seems better to supplement repeal of the Copyright Rules and amendment of Rule 81(a)(1) by a revision that expressly applies Civil Rule 65 to copyright impoundment. This revision was first proposed in 1964, and continues to make sense. Additional measures can safely be left to Congress.

International Obligations

The TRIPS provisions of the Uruguay Round of GATT require that effective remedies be provided “against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements.” Article 41(1). “Defendants shall have the right to written notice which is timely and contains sufficient detail, including the basis of the claims.” Article 42. “The judicial authorities shall have the authority to order a party to desist from an infringement * * *.” Article 44(1). Provisional measures are covered in Article 50:

1. The judicial authorities shall have the authority to order prompt and effective provisional measures: (a) to prevent an infringement of any intellectual property

right from occurring * * *; (b) to preserve relevant evidence in regard to the alleged infringement.

2. The judicial authorities shall have the authority to adopt provisional measures *inaudita altera parte* where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed.

3. The judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed or that such infringement is imminent, and to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse.

4. Where provisional measures have been adopted *inaudita altera parte*, the parties affected shall be given notice, without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period after the notification of the measures, whether these measures shall be modified, revoked or confirmed. * * *

These procedures can be implemented fully under Civil Rule 65, and as suggested above the *ex parte* — *inaudita altera parte* — provisions seem compatible with due process requirements. Abrogating the Copyright Rules and amending Civil Rule 65 to expressly govern impoundment proceedings will help ensure that we

are in compliance with TRIPS by removing the doubts surrounding current practice and provisions. Such room for doubt as might remain goes to the Article 50(1) authority “to preserve relevant evidence in regard to the alleged infringement,” and the Article 50(2) authority to act “where there is a demonstrable risk of evidence being destroyed.” A combination of Rule 65 with the discovery rules, however, should be relied upon to establish this authority. Only if these tools prove inadequate should consideration be given to a procedural rule governing no-notice, prejudgment seizure of evidence.

MEMORANDUM

To: Honorable Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure

From: Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules

Date: May 11, 1999

Re: Report of the Advisory Committee on Civil Rules

I. INTRODUCTION

At its meeting on April 19 and 20, 1999, in Gleneden Beach, Oregon, the Civil Rules Advisory Committee approved recommendations for the adoption of the three rules packages that were published for comment in August 1998.

* * * * *

At the meeting, the Committee also approved proposals for electronic service with the recommendation that they be published for comment if the Standing Committee determines that the time has come to move toward electronic service.*

* * * * *

* At its June 14-15, 1999 meeting, the Standing Committee authorized the publication of proposed amendments to Civil Rules 5(b) and 77.

III Action Item: Electronic Service for Possible Publication

The Standing Committee Technology Subcommittee has recommended that the time has come to publish for comment proposed rules to authorize electronic service of papers other than the initial summons or other process, subpoenas, or the Civil Rule 71A(c)(3) notice in condemnation proceedings. At a February meeting of the Subcommittee, it was agreed that the Civil Rules Advisory Committee should take the lead by drafting Civil Rules amendments providing for electronic service. It also was agreed that the amendments would permit electronic service only with the consent of the person served. Proposed amendments of Civil Rules 5(b), 6(e), and 77(d) were prepared and circulated to the other advisory committees for comment. Many of the suggestions from the other advisory committees have been incorporated in the drafts set out below. Some of the suggestions were discussed and not adopted by the Civil Rules Committee.

The Civil Rules Committee believes that if the Standing Committee determines that electronic service rules should be published for comment this summer, the proposed Civil Rule provisions have matured to a point that makes them suitable for publication.

Although the occasion for drafting Rule 5(b) provisions has been the desire to facilitate electronic service, the draft also authorizes service by “other means” consented to by the person served. The Appellate Rules Advisory Committee asked why consent should be required for service by commercial carrier, noting that Appellate Rule 25(c) authorizes service “by mail, or by third-party commercial carrier for delivery within 3 calendar days” without requiring consent by the person served. The Civil Rules Committee concluded that consent should be required. A party who desires to make a commercial carrier its agent to effect personal service by

delivery, bearing the risk that delivery will not be made, can do so under the personal service provisions of Rule 5(b). Consent should be required if service is to be complete on delivery to the carrier for at least three reasons. The universe of commercial carriers includes those that may not be as reliable as the most familiar carriers. Even some of the most reliable commercial carriers make it awkward to accomplish delivery at a residential address. And Civil Rule 5(b) covers a far wider range of papers, with more multifarious consequences, than are covered by Appellate Rule 25(c).

Discussion at the Technology Subcommittee meeting agreed on the concept that electronic service should be complete upon dispatch by the person making service. On the advice of the technology support staff in the Administrative Office, the word chosen to express this concept was “transmission.” All of the advisory committees continue to adhere to this concept. The person being served, by giving consent, assumes the responsibility to monitor the agreed-upon mode of delivery. The Civil Rules Committee, responding to a specific suggestion by the Appellate Rules Committee, concluded that it is sufficient to use the Committee Note to state that the transmitter’s actual knowledge that delivery has not been made defeats the presumption that service is complete on transmission. Although the Civil Rules Committee voted in favor of the “transmission” proposal by a margin of 9 to 2, it also agreed unanimously that public comment should be sought on the alternative that would make electronic service complete on receipt.

Electronic filing opens up the possibility that electronic service can be made through the court’s system. The Civil Rules Committee concluded that this possibility should be made available. To protect courts that are not prepared for this step, authorization by local rule is required. In addition, this final sentence of proposed Rule 5(b)(2)(D) makes it explicit that service is made by the party through the court’s facilities; it is not the court that is making service.

Many suggestions were made for expanding the Committee Note to illustrate the variety of electronic-service questions that might be addressed by local rules. The Appellate Rules Advisory Committee suggested that the text of Rule 5(b) should itself address “the ability of courts to use local rules to regulate electronic service.” The Civil Rules Committee concluded that it is better to avoid any elaborate discussion of the issues that may arise. Present experience is very limited, and the ratio between foreseeable and unforeseeable issues is unfavorable. The draft Committee Note was shortened by deleting some of the suggestions for addressing the mode of consent.

Electronic service raises the question whether to allow additional time to respond in the way that Civil Rule 6(e) now provides an additional 3 days after service by mail. A draft Rule 6(e) and three alternatives were presented for discussion. All of these alternatives are preserved in the materials set out below. Those who favored allowing additional time following service by any means that requires consent of the person served urged that consent is more likely to be given if it brings the reward of added time. The Appellate Rules Advisory Committee urged the opposite view — that consent is less likely to be sought if the person making service must pay the price of granting additional time. Additional time also was supported on the ground that the time from personal service runs only from the moment of actual notice. Electronic mail is not always instantaneous, even when it does eventually arrive, and Appellate Rule 25(c) itself recognizes the practices of commercial carriers by authorizing “delivery within 3 calendar days.” Those who opposed allowing additional time noted that practicing attorneys often consent to electronic or other modes of service now. Consent is given only for reliable and expeditious means of delivery, and it is given to take advantage of those means. Additional time is not required. The Civil Rules Committee resolved these arguments by casting 6 votes for “Alternative 1,” which — by making no change in Rule 6(e) — would not allow any additional time for responding. Four votes,

however, were cast for “Alternative 3,” a draft that amends Rule 6(e) to allow an additional 3 days following service by mail “or by a means permitted only with the consent of the party served.” This means of expression facilitates incorporation in the Bankruptcy Rules, and should be published for comment as an alternative approach.

Finally Rule 77(d) would be amended to permit the clerk of court to give notice of the entry of an order or judgment by any means authorized by Rule 5(b). By invoking Rule 5(b), this draft allows use of electronic or other non-mail means only with the consent of the person receiving notice. This proposal was accepted without independent discussion.

One last word on style. The only comments from the Style Subcommittee were based on the outstanding draft that restyles all of the Civil Rules. The Civil Rules Committee concluded that the schedule of this project, urged by the Technology Subcommittee, should not be delayed while all of these style changes are considered. One illustration of the questions that arise from the style draft is provided by the suggestion that service on a person “residing” in a home be changed to service on a person “living” in a home. There may be subtle differences in the meaning of these two words; which concept is more suitable requires some thought. The style aim has been to put the elements of current Rule 5(b) into a clear organization without undertaking the additional work that would be required to consider each of the more dramatic changes that might be made.

Following discussion at the Standing Committee meeting, it was concluded that Rules 5(b) and 77(d) should be published for comment in tandem with parallel provisions for the Bankruptcy Rules. Comment is specifically invited on these questions: (1) Whether electronic service should be made complete on “transmission,” or whether instead it should be made complete only

on “receipt” or some other event. (2) Whether additional time should be provided in Civil Rule 6(e) to respond to papers served by electronic means or by other means permitted with the consent of the person served. A proposed amendment of Rule 6(e) is published for this purpose, in a form adapted for easy incorporation into the Bankruptcy Rules. (3) Whether there are distinctive considerations that suggest that different electronic service rules should be adopted for the Appellate Rules or Criminal Rules.

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE***

Rule 5. Service and Filing of Pleadings and Other Papers

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* * * * *

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~~(b) Same: How Made.~~ Whenever under these rules

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service is required or permitted to be made upon a party

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represented by an attorney the service shall be made upon the

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attorney unless service upon the party is ordered by the court.

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Service upon the attorney or upon a party shall be made by

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delivering a copy to the attorney or party or by mailing it to

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the attorney or party at the attorney's or party's last known

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address or, if no address is known, by leaving it with the clerk

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of the court. Delivery of a copy within this rule means:

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handing it to the attorney or to the party; or leaving it at the

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attorney's or party's office with a clerk or other person in

13

charge thereof; or, if there is no one in charge, leaving it in a

*New matter is underlined; matter to be omitted is lined through.

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14 ~~conspicuous place therein; or, if the office is closed or the~~
15 ~~person to be served has no office, leaving it at the person's~~
16 ~~dwelling house or usual place of abode with some person of~~
17 ~~suitable age and discretion then residing therein. Service by~~
18 ~~mail is complete upon mailing.~~

19 **(b) Making Service.***

20 (1) Service under Rules 5(a) and 77(d) on a party
21 represented by an attorney is made on the attorney unless
22 the court orders service on the party.

23 (2) Service under Rule 5(a) is made by:

24 (A) Delivering a copy to the person served by:

25 (i) handing it to the person;

26 (ii) leaving it at the person's office with a

27 clerk or other person in charge, or if no one is in

* Criminal Rule 49 applies the rules governing service in a civil action to service in a criminal proceeding.

28 charge leaving it in a conspicuous place in the
29 office; or

30 (iii) if the person has no office or the office is
31 closed, leaving it at the person's dwelling house or
32 usual place of abode with someone of suitable age
33 and discretion residing there.

34 (B) Mailing a copy to the last known address
35 of the person served. Service by mail is complete on
36 mailing.

37 (C) If the person served has no known address,
38 leaving a copy with the clerk of the court.

39 (D) Delivering a copy by any other means,
40 including electronic means, consented to by the
41 person served. Service by electronic means is
42 complete on transmission; service by other consented
43 means is complete when the person making service

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44 delivers the copy to the agency designated to make
45 delivery. If authorized by local rule, a party may
46 make service under this subparagraph (D) through the
47 court's transmission facilities.

48 * * * * *

Committee Note

Rule 5(b) is restyled.

Rule 5(b)(1) makes it clear that the provision for service on a party's attorney applies only to service made under Rules 5(a) and 77(d). Service under Rules 4, 4.1, 45(b), and 71A(d)(3) — as well as rules that invoke those rules — must be made as provided in those rules.

Subparagraphs (A), (B), and (C) of Rule 5(b)(2) carry forward the method-of-service provisions of former Rule 5(b).

Subparagraph (D) of Rule 5(b)(2) is new. It authorizes service by electronic means or any other means, but only if consent is obtained from the person served. Early experience with electronic filing as authorized by Rule 5(d) is positive, supporting service by electronic means as well. Consent is required, however, because it is not yet possible to assume universal entry into the world of electronic communication. Subparagraph (D) also authorizes service by nonelectronic means. The Rule 5(b)(2)(B) provision making mail

service complete on mailing is extended in subparagraph (D) to make service by electronic means complete on transmission; transmission is effected when the sender does the last act that must be performed by the sender. As with other modes of service, however, actual notice that the transmission was not received defeats the presumption of receipt that arises from the provision that service is complete on transmission. The sender must take additional steps to effect service. Service by other agencies is complete on delivery to the designated agency.

Finally, subparagraph (D) authorizes adoption of local rules providing for service through the court. Electronic case filing systems will come to include the capacity to make service by using the court's facilities to transmit all documents filed in the case. It may prove most efficient to establish an environment in which a party can file with the court, making use of the court's transmission facilities to serve the filed paper on all other parties. Because service is under subparagraph (D), consent must be obtained from the persons served.

Service under subparagraph (D) does not allow the additional time provided by Rule 6(e) when service is made by mail under subparagraph (B). Electronic service commonly is effected with great speed. A party should consent to receive service by electronic or other means only as to modes that are trusted to provide prompt actual notice. By giving consent, a party also accepts the responsibility to monitor the appropriate facility for receiving service.

ALTERNATIVE PROPOSAL

The Advisory Committee recommends that no change be made in Civil Rule 6(e) to reflect the provisions of Civil Rule 5(b)(2)(D) that, with the consent of the person to be served, would allow service by electronic or other means. Absent change, service by these means would not affect the time for acting in response to the paper served. Comment is requested, however, on the alternative that would allow an additional 3 days to respond. The alternative Rule 6(e) amendments are cast in a form that permits ready incorporation in the Bankruptcy Rules.*

Rule 6. Time

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* * * * *

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(e) Additional Time After Service ~~by Mail~~ under Rule

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5(b)(2)(B), (C), or (D). Whenever a party has the right or is

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required to do some act or take some proceedings within a

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prescribed period after the service of a notice or other paper

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upon the party and the notice or paper is served upon the party

* Compare proposed amendments to Bankruptcy Rule 9006(f) contained on page 18 of this pamphlet, which extends the 3-day rule to service by electronic means.

7 by ~~mail~~ under Rule 5(b)(2)(B), (C), or (D), 3 days shall be
8 added to the prescribed period.

Committee Note

The additional three days provided by Rule 6(e) is extended to the means of service authorized by the new paragraph (D) added to Rule 5(b), including — with the consent of the person served — service by electronic or other means. The three-day addition is provided as well for service on a person with no known address by leaving a copy with the clerk of the court.

Rule 65. Injunctions

1 * * * * *
2 **(f) Copyright Impoundment.** This rule applies to
3 copyright impoundment proceedings.

Committee Note

New subdivision (f) is added in conjunction with abrogation of the antiquated Copyright Rules of Practice adopted for proceedings under the 1909 Copyright Act. Courts have naturally turned to Rule 65 in response to the apparent inconsistency of the former Copyright Rules with the discretionary impoundment procedure adopted in 1976, 17 U.S.C. § 503(a). Rule 65 procedures also have assuaged well-founded doubts whether the Copyright Rules satisfy more contemporary requirements of due process. *See, e.g., Religious*

Technology Center v. Netcom On-Line Communications Servs., Inc., 923 F.Supp. 1231, 1260-1265 (N.D.Cal.1995); *Paramount Pictures Corp. v. Doe*, 821 F.Supp. 82 (E.D.N.Y.1993); *WPOW, Inc. v. MRLJ Enterprises*, 584 F.Supp. 132 (D.D.C.1984).

A common question has arisen from the experience that notice of a proposed impoundment may enable an infringer to defeat the court's capacity to grant effective relief. Impoundment may be ordered on an ex parte basis under subdivision (b) if the applicant makes a strong showing of the reasons why notice is likely to defeat effective relief. Such no-notice procedures are authorized in trademark infringement proceedings, *see* 15 U.S.C. § 1116(d), and courts have provided clear illustrations of the kinds of showings that support ex parte relief. *See Matter of Vuitton et Fils S.A.*, 606 F.2d 1 (2d Cir.1979); *Vuitton v. White*, 945 F.2d 569 (3d Cir.1991). In applying the tests for no-notice relief, the court should ask whether impoundment is necessary, or whether adequate protection can be had by a less intrusive form of no-notice relief shaped as a temporary restraining order.

This new subdivision (f) does not limit use of trademark procedures in cases that combine trademark and copyright claims. Some observers believe that trademark procedures should be adopted for all copyright cases, a proposal better considered by Congressional processes than by rulemaking processes.

Rule 77. District Courts and Clerks

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* * * * *

2

(d) Notice of Orders or Judgments. Immediately upon

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the entry of an order or judgment the clerk shall serve a notice

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of the entry ~~by mail~~ in the manner provided for in Rule 5**(b)**

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upon each party who is not in default for failure to appear,

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and shall make a note in the docket of the mailing. Any party

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may in addition serve a notice of such entry in the manner

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provided in Rule 5**(b)** for the service of papers. Lack of

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notice of the entry by the clerk does not affect the time to

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appeal or relieve or authorize the court to relieve a party for

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failure to appeal within the time allowed, except as permitted

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in Rule 4(a) of the Federal Rules of Appellate Procedure.

Committee Note

Rule 77(d) is amended to reflect changes in Rule 5(b). A few courts have experimented with serving Rule 77(d) notices by electronic means on parties who consent to this procedure. The

success of these experiments warrants express authorization. Because service is made in the manner provided in Rule 5(b), party consent is required for service by electronic or other means described in Rule 5(b)(2)(D). The same provision is made for a party who wishes to ensure actual communication of the Rule 77(d) notice by also serving notice. As with Rule 5(b), local rules may establish detailed procedures for giving consent.

Rule 81. Applicability in General

1 (a) ~~To~~ **What Proceedings to Which the Rules**
2 **Applicable.**

3 (1) These rules do not apply to prize proceedings in
4 admiralty governed by Title 10, U.S.C., §§ 7651-7681.
5 They do not apply to proceedings in bankruptcy as
6 provided by the Federal Rules of Bankruptcy Procedure ~~or~~
7 ~~to proceedings in copyright under Title 17, U.S.C., except~~
8 ~~in so far as they may be made applicable thereto by rules~~
9 ~~promulgated by the Supreme Court of the United States.~~
10 ~~They do not apply to mental health proceedings in the~~

11 United States District Court for the District of Columbia.

12 * * * * *

Committee Note

Former Copyright Rule 1 made the Civil Rules applicable to copyright proceedings except to the extent the Civil Rules were inconsistent with Copyright Rules. Abrogation of the Copyright Rules leaves the Civil Rules fully applicable to copyright proceedings. Rule 81(a)(1) is amended to reflect this change.

The District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub.L. 91-358, 84 Stat. 473, transferred mental health proceedings formerly held in the United States District Court for the District of Columbia to local District of Columbia courts. The provision applying the Civil Rules to these proceedings is deleted as superfluous.

The reference to incorporation of the Civil Rules in the Federal Rules of Bankruptcy Procedure has been restyled.

“COPYRIGHT RULES”

Rules of Practice as Amended

Rule 1

1 Proceedings in actions brought under section 25 of the Act
2 of March 4, 1909, entitled “An Act to amend and consolidate

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3 ~~the acts respecting copyright”, including proceedings relating~~
4 ~~to the perfecting of appeals, shall be governed by the Rules of~~
5 ~~Civil Procedure, in so far as they are not inconsistent with~~
6 ~~these rules.~~

[Rule 2 — Abrogated in 1966]

~~Rule 3~~

1 ~~Upon the institution of any action, suit or proceeding, or~~
2 ~~at any time thereafter, and before the entry of final judgment~~
3 ~~or decree therein, the plaintiff or complainant, or his~~
4 ~~authorized agent or attorney, may file with the clerk of any~~
5 ~~court given jurisdiction under section 34 of the Act of March~~
6 ~~4, 1909, an affidavit stating upon the best of his knowledge,~~
7 ~~information and belief, the number and location, as near as~~
8 ~~may be, of the alleged infringing copies, records, plates,~~
9 ~~molds, matrices, etc., or other means for making the copies~~
10 ~~alleged to infringe the copyright, and the value of the same,~~

11 ~~and with such affidavit shall file with the clerk a bond~~
12 ~~executed by at least two sureties and approved by the court or~~
13 ~~a commissioner thereof.~~

Rule 4

1 Such bond shall bind the sureties in a specified sum, to be
2 ~~fixed by the court, but not less than twice the reasonable value~~
3 ~~of such infringing copies, plates, records, molds, matrices, or~~
4 ~~other means for making such infringing copies, and be~~
5 ~~conditioned for the prompt prosecution of the action, suit or~~
6 ~~proceeding, for the return of said articles to the defendant, if~~
7 ~~they or any of them are adjudged not to be infringements, or~~
8 ~~if the action abates, or is discontinued before they are returned~~
9 ~~to the defendant, and for the payment to the defendant of any~~
10 ~~damages which the court may award to him against the~~
11 ~~plaintiff or complainant. Upon the filing of said affidavit and~~
12 ~~bond, and the approval of said bond, the clerk shall issue a~~

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13 ~~writ directed to the marshal of the district where the said~~
14 ~~infringing copies, plates, records, molds, matrices, etc., or~~
15 ~~other means of making such infringing copies shall be stated~~
16 ~~in said affidavit to be located, and generally to any marshal of~~
17 ~~the United States, directing the said marshal to forthwith seize~~
18 ~~and hold the same subject to the order of the court issuing~~
19 ~~said writ, or of the court of the district in which the seizure~~
20 ~~shall be made.~~

Rule 5

1 ~~The marshal shall thereupon seize said articles or any~~
2 ~~smaller or larger part thereof he may then or thereafter find,~~
3 ~~using such force as may be reasonably necessary in the~~
4 ~~premises, and serve on the defendant a copy of the affidavit,~~
5 ~~writ, and bond by delivering the same to him personally, if he~~
6 ~~can be found within the district, or if he can not be found, to~~
7 ~~his agent, if any, or to the person from whose possession the~~

8 ~~articles are taken, or if the owner, agent, or such person can~~
9 ~~not be found within the district, by leaving said copy at the~~
10 ~~usual place of abode of such owner or agent, with a person of~~
11 ~~suitable age and discretion, or at the place where said articles~~
12 ~~are found, and shall make immediate return of such seizure,~~
13 ~~or attempted seizure, to the court. He shall also attach to said~~
14 ~~articles a tag or label stating the fact of such seizure and~~
15 ~~warning all persons from in any manner interfering therewith.~~

Rule 6

1 ~~A marshal who has seized alleged infringing articles, shall~~
2 ~~retain them in his possession, keeping them in a secure place,~~
3 ~~subject to the order of the court.~~

Rule 7

1 ~~Within three days after the articles are seized, and a copy~~
2 ~~of the affidavit, writ and bond are served as hereinbefore~~
3 ~~provided, the defendant shall serve upon the clerk a notice~~

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4 that he excepts to the amount of the penalty of the bond, or to
5 the sureties of the plaintiff or complainant, or both, otherwise
6 he shall be deemed to have waived all objection to the amount
7 of the penalty of the bond and the sufficiency of the sureties
8 thereon. If the court sustain the exceptions it may order a new
9 bond to be executed by the plaintiff or complainant, or in
10 default thereof within a time to be named by the court, the
11 property to be returned to the defendant.

Rule 8

1 Within ten days after service of such notice, the attorney
2 of the plaintiff or complainant shall serve upon the defendant
3 or his attorney a notice of the justification of the sureties, and
4 said sureties shall justify before the court or a judge thereof at
5 the time therein stated.

Rule 9

1 ~~The defendant, if he does not except to the amount of the~~
2 ~~penalty of the bond or the sufficiency of the sureties of the~~
3 ~~plaintiff or complainant, may make application to the court~~
4 ~~for the return to him of the articles seized, upon filing an~~
5 ~~affidavit stating all material facts and circumstances tending~~
6 ~~to show that the articles seized are not infringing copies,~~
7 ~~records, plates, molds, matrices, or means for making the~~
8 ~~copies alleged to infringe the copyright.~~

Rule 10

1 ~~Thereupon the court in its discretion, and after such~~
2 ~~hearing as it may direct, may order such return upon the filing~~
3 ~~by the defendant of a bond executed by at least two sureties,~~
4 ~~binding them in a specified sum to be fixed in the discretion~~
5 ~~of the court, and conditioned for the delivery of said specified~~
6 ~~articles to abide the order of the court. The plaintiff or~~

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7 ~~complainant may require such sureties to justify within ten~~
8 ~~days of the filing of such bond.~~

Rule 11

1 ~~Upon the granting of such application and the justification~~
2 ~~of the sureties on the bond, the marshal shall immediately~~
3 ~~deliver the articles seized to the defendant.~~

Rule 12

1 ~~Any service required to be performed by any marshal may~~
2 ~~be performed by any deputy of such marshal.~~

Rule 13

1 ~~For services in cases arising under this section the marshal~~
2 ~~shall be entitled to the same fees as are allowed for similar~~
3 ~~services in other cases.~~

**PROCEDURES FOR THE CONDUCT OF BUSINESS BY
THE JUDICIAL CONFERENCE COMMITTEES ON
RULES OF PRACTICE AND PROCEDURE**

Scope

These procedures govern the operations of the Judicial Conference Committee on Rules of Practice, Procedure, and Evidence (Standing Committee) and the various Judicial Conference Advisory Committees on Rules of Practice and Procedure in drafting and recommending new rules of practice, procedure, and evidence and amendments to existing rules.

Part I - Advisory Committees

1. Functions

Each Advisory Committee shall carry on "a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use" in its particular field, taking into consideration suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and legal commentary.

2. Suggestions and Recommendations

Suggestions and recommendations with respect to the rules should be sent to the Secretary, Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington, D.C. 20544, who shall, to the extent feasible, acknowledge in writing every written suggestion or recommendation so received and shall refer all suggestions and

recommendations to the appropriate Advisory Committee. To the extent feasible, the Secretary, in consultation with the Chairman of the Advisory Committee, shall advise the person making a recommendation or suggestion of the action taken thereon by the Advisory Committee.

3. Drafting Rules Changes

- a. An Advisory Committee shall meet at such times and places as the Chairman may authorize. All Advisory Committee meetings shall be open to the public, except when the committee so meeting, in open session and with a majority present, determines that it is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public and states the reason for closing the meeting. Each meeting shall be preceded by notice of the time and place of the meeting, including publication in the Federal Register, sufficient to permit interested persons to attend.
- b. The reporter assigned to each Advisory Committee shall, under the direction of the Committee or its Chairman, prepare initial draft rules changes, "Committee Notes" explaining their purpose and intent, copies or summaries of all written recommendations and suggestions received by the Advisory Committee, and shall forward them to the Advisory Committee.
- c. The Advisory Committee shall then meet to consider the draft proposed new rules and rules amendments, together with Committee Notes, make revisions therein, and submit them for approval of publication to the Standing

Committee, or its Chairman, with a written report explaining the Committee's action, including any minority or other separate views.

4. Publication and Public Hearings

- a. When publication is approved by the Standing Committee, the Secretary shall arrange for the printing and circulation of the proposed rules changes to the bench and bar, and to the public generally. Publication shall be as wide as practicable. Notice of the proposed rule shall be published in the Federal Register and copies provided to appropriate legal publishing firms with a request that they be timely included in their publications. The Secretary shall also provide copies to the chief justice of the highest court of each state and, insofar as is practicable, to all individuals and organizations that request them.
- b. In order to provide full notice and opportunity for comment on proposed rule changes, a period of at least six months from the time of publication of notice in the Federal Register shall be permitted, unless a shorter period is approved under the provisions of subparagraph d of this paragraph.
- c. An Advisory Committee shall conduct public hearings on all proposed rules changes unless elimination of such hearings is approved under the provisions of subparagraph d of this paragraph. The hearings shall be held at such times and places as determined by the chairman of the Advisory Committee and shall be preceded by adequate notice, including publication in the

Federal Register. Proceedings shall be recorded and a transcript prepared. Subject to the provisions of paragraph six, such transcript shall be available for public inspection.

- d. Exceptions to the time period for public comment and the public hearing requirement may be granted by the Standing Committee or its chairman when the Standing Committee or its chairman determines that the administration of justice requires that a proposed rule change should be expedited and that appropriate public notice and comment may be achieved by a shortened comment period, without public hearings, or both. The Standing Committee may eliminate the public notice and comment requirement if, in the case of a technical or conforming amendment, it determines that notice and comment are not appropriate or necessary. Whenever such an exception is made, the Standing Committee shall advise the Judicial Conference of the exception and the reasons for the exception.

5. Subsequent Procedures

- a. At the conclusion of the comment period the reporter shall prepare a summary of the written comments received and the testimony presented at public hearings. The Advisory Committee shall review the proposed rules changes in the light of the comments and testimony. If the Advisory Committee makes any substantial change, an additional period for public notice and comment may be provided.

- b. The Advisory Committee shall submit proposed rules changes and Committee Notes, as finally agreed upon, to the Standing Committee. Each submission shall be accompanied by a separate report of the comments received and shall explain any changes made subsequent to the original publication. The submission shall also include minority views of Advisory Committee members who wish to have separate views recorded.

6. Records

- a. The Chairman of the Advisory Committee shall arrange for the preparation of minutes of all Advisory Committee meetings.
- b. The records of an Advisory Committee shall consist of the written suggestions received from the public; the written comments received on drafts of proposed rules, responses thereto, transcripts of public hearings, and summaries prepared by the reporter; all correspondence relating to proposed rules changes; minutes of Advisory Committee meetings; approved drafts of rules changes; and reports to the Standing Committee. The records shall be maintained at the Administrative Office of the United States Courts for a minimum of two years and shall be available for public inspection during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.
- c. Any portion of minutes, relating to a closed meeting and made available to the public, may contain such deletions

as may be necessary to avoid frustrating the purposes of closing the meeting as provided in subparagraph 3a.

- d. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.

Part II - Standing Committee

7. Functions

The Standing Committee shall coordinate the work of the several Advisory Committees, make suggestions of proposals to be studied by them, consider proposals recommended by the Advisory Committees, and transmit such proposals with its recommendation to the Judicial Conference, or recommit them to the appropriate Advisory Committee for further study and consideration.

8. Procedures

- a. The Standing Committee shall meet at such times and places as the Chairman may authorize. All Committee meetings shall be open to the public, except when the committee so meeting, in open session and with a majority present, determines that it is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public and states the reason for closing the meeting. Each meeting shall be preceded by notice of the time and place of the meeting, including publication in the Federal Register, sufficient to permit interested persons to attend.

- b. When an Advisory Committee's final recommendations for rules changes have been submitted, the Chairman and Reporter of the Advisory Committee shall attend the Standing Committee meeting to present the proposed rules changes and Committee Notes.
- c. The Standing Committee may accept, reject, or modify a proposal. If a modification effects a substantial change, the proposal will be returned to the Advisory Committee with appropriate instructions.
- d. The Standing Committee shall transmit to the Judicial Conference the proposed rules changes and Committee Notes approved by it, together with the Advisory Committee report. The Standing Committee's report to the Judicial Conference shall include its recommendations and explain any changes it has made.

9. Records

- a. The Secretary shall prepare minutes of all Standing Committee meetings.
- b. The records of the Standing Committee shall consist of the minutes of Standing and Advisory Committee meetings, reports to the Judicial Conference, and correspondence concerning rules changes including correspondence with Advisory Committee Chairmen. The records shall be maintained at the Administrative Office of the United States Courts for a minimum of two years and shall be available for public inspection during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in

accordance with applicable Government retention and disposition schedules.

- c. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.

**STANDING COMMITTEE ON RULES OF PRACTICE
AND PROCEDURE**

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Judge James A. Parker	Patrick F. McCartan, Esquire
Chief Judge Frank W. Bullock, Jr.	Charles J. Cooper, Esquire
Judge Morey L. Sear	Honorable Eric H. Holder, Jr. Deputy Attorney General United States Department of Justice
Chief Justice E. Norman Veasey Supreme Court of Delaware	

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Peter G. McCabe, Secretary

Rules Committee Support Office
John K. Rabiej, Chief

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Professor Daniel J. Capra, Reporter

**STATE BAR ASSOCIATIONS'
POINTS OF CONTACT
TO THE RULES COMMITTEES**

Alabama State Bar <i>Frank M. Bainbridge, Esquire</i>	Illinois State Bar Association <i>Dennis A. Rendleman, General Counsel</i>
Alaska Bar Association <i>Monica Jenicek, Esquire</i>	Indiana State Bar Association <i>Thomas A. Pyrz, Esquire</i>
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Georgia State Bar Association <i>Glenn Darbyshire</i>	The Mississippi Bar <i>Larry Houchins, Executive Director</i>
Hawaii State Bar Association <i>Margery S. Bronster, Esquire</i>	The Missouri Bar <i>Robert T. Adams, Esquire</i>
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Oklahoma Bar Association
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Oregon State Bar
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Pennsylvania Bar Association
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Rhode Island Bar Association
Benjamin V. White, III, Esquire

South Carolina Bar
Justin S. Kahn, Esquire

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Virginia State Bar
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Washington State Bar Association
Jan Michels, Executive Director

The West Virginia State Bar
Thomas R. Tinder, Esquire

State Bar of Wisconsin
Gary E. Sherman, Esquire

Wyoming State Bar
Richard E. Day, Esquire

SUBMIT COMMENTS ON PROPOSED RULE AMENDMENTS ELECTRONICALLY

The Judicial Conference Committee on Practice and Procedure, on the advice of the Advisory Committees on Appellate, Bankruptcy, Civil, Criminal, and Evidence Rules, has agreed to consider — as part of a two-year pilot project and on an optional basis — comments on proposed rule amendments received electronically via the Internet in addition to written comments.

In deciding whether to approve the pilot project, the rules committees considered the reservations voiced by some members that comments submitted electronically may not be as carefully prepared or worded as comments submitted in writing. On the other hand, the convenience and widespread availability of Internet will broaden the audience and likely increase the number of comments submitted on the rule amendments. On balance, the rules committees concluded to proceed with the project and review it after two years.

Every comment sent electronically will be circulated to each member of the pertinent advisory rules committee for review. The receipt of every electronic comment received will be automatically acknowledged. Depending on the volume of comments, summaries of comments sent electronically may be grouped. It is also likely that a general and generic follow-up describing the committee's action on comments submitted electronically will be posted on the Internet website instead of individual notification of the committee's response to the comment.

**[CLICK HERE FOR INSTRUCTIONS ON
SUBMITTING COMMENTS](#)**