COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

Washington, D.C.
June 19-21, 1996

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
WASHINGTON, D.C.
JUNE 19-21, 1996

1. Opening Remarks of the Chair — Report on actions taken by the Judicial Conference at its March 1996 session

   A. Approval of uniform local rules' numbering system

   B. Approval of local option to permit cameras in appellate proceedings, but maintaining prohibition against cameras in district court proceedings

   C. Automation initiatives sponsored by the Committee on Automation and Technology

2. Approval of the Minutes

3. Report of the Administrative Office

   A. Legislative activity

   B. Administrative actions

4. Report of the Federal Judicial Center

5. Report of the Advisory Committee on Criminal Rules

   A. **ACTION** — Proposed amendments to Rule 16 for approval and transmission to the Judicial Conference

   B. **ACTION** — Proposed amendments to Rules 5.1, 26.2, 31, 33, 35, and 43 for public comment

   C. Minutes and other informational items

6. Report of the Style Subcommittee (oral)

7. Report of the Advisory Committee on Appellate Rules

   A. **ACTION** — Proposed amendments to Rules 26.1, 29, 35, and 41 for approval, but delayed transmission, to the Judicial Conference

B. **ACTION** — Proposed amendments that combine Rules 5 and 5.1 into a new Rule 5 and proposed revision of Appellate Form 4 for public comment

C. Stylized revision of the Federal Rules of Appellate Procedure, minutes, and other informational items

8. Report of the Advisory Committee on Bankruptcy Rules

A. **ACTION** — Proposed amendments to Rules 1010, 1019, 2002, 2007.1, 3014, 3017, 3018, 3021, 8001, 8002, 9011, 9035, and new Rules 1020, 3017.1, 8020, and 9015 for approval and transmission to the Judicial Conference

B. **ACTION** — Proposed revisions to Official Forms 1, 3, 6F, 8, 9A-9I, 10, 14, 17, 18, and new Forms 20A and 20B for publication

C. Minutes and other items

9. Report of the Advisory Committee on Evidence

A. **ACTION** — Proposed amendments to Rules 407, 801, 804, 806 and a new 807 that contains the contents of the residual exceptions transferred from Rules 803(24) and 804(b)(5) for approval and transmission to the Judicial Conference

B. Minutes of the May 4-5, 1995 meeting and the April 22, 1996 meeting, and other informational items

10. Report of the Advisory Committee on Civil Rules

A. Report on committee's actions regarding proposed amendments to Rules 26(c) and 47 that had been published for comment

B. **ACTION** — Proposed amendments to Rules 9(h) and 48 for approval and transmission to the Judicial Conference

C. **ACTION** — Proposed amendments to Rule 23 for public comment

D. Informational items, including a planned study of the general scope of discovery and a summary of comments to proposed amendments to Rules 26(c) and 47

E. Minutes of the November 9-10, 1995 meeting and the April 18-19, 1996 meeting

11. Report of the Standing Committee's Reporter

A. Status report on self-study plan

B. Special study conference on attorney conduct in the federal courts (oral)

12. Next meetings (oral)

A. Winter meeting scheduled for January 8-10, 1997, in Tucson Arizona

B. Summer meeting suggested for June 18-20, 1997 in Washington, D.C.

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ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

May 21, 1996

MEMORANDUM TO HONORABLE ALICEMARIE H. STOTLER

SUBJECT: *Circuit Liaisons*

The circuit liaisons for the Judicial Conference Committees on the Rules of Practice and Procedure are as follows:

1) Standing Committee

First Circuit	Honorable Alicemarie H. Stotler, United States District Court for the Central District of California
Second Circuit	Honorable Frank H. Easterbrook, United States Court of Appeals for the Seventh Circuit
Third Circuit	Honorable Thomas S. Ellis, III, United States District Court for the Northern District of Virginia
Fourth Circuit	Honorable Thomas S. Ellis, III, United States District Court for the Northern District of Virginia
Fifth Circuit	Honorable Phyllis A. Kravitch, United States Court of Appeals for the Eleventh Circuit
Sixth Circuit	Honorable William R. Wilson, Jr., United States District Court for the Eastern District of Arkansas
Seventh Circuit	Honorable Frank H. Easterbrook, United States Court of Appeals for the Seventh Circuit
Eight Circuit	Honorable William R. Wilson, Jr., United States District Court for the Eastern District of Arkansas
Ninth Circuit	Honorable Alicemarie H. Stotler, United States District Court for the Central District of California

Circuit Liaisons

Tenth Circuit	Honorable James A. Parker, United States District Court for the District of New Mexico
Eleventh Circuit	Honorable Phyllis A. Kravitch, United States Court of Appeals for the Eleventh Circuit
Federal Circuit	Honorable Thomas S. Ellis, III, United States District Court for the Northern District of Virginia
District of Columbia	Honorable Thomas S. Ellis, III, United States District Court for the Northern District of Virginia

2) Advisory Committee on Appellate Rules

First Circuit	Honorable James K. Logan, United States Court of Appeals for the Tenth Circuit
Second Circuit	Honorable James K. Logan, United States Court of Appeals for the Tenth Circuit
Third Circuit	Honorable Will L. Garwood, United States Court of Appeals for the Fifth Circuit
Fourth Circuit	Honorable Stephen F. Williams, United States Court of Appeals for the District of Columbia
Fifth Circuit	Honorable Will L. Garwood, United States Court of Appeals for the Fifth Circuit
Sixth Circuit	Honorable Will L. Garwood, United States Court of Appeals for the Fifth Circuit
Seventh Circuit	Honorable Alex Kozinski, United States Circuit Court for the Ninth Circuit
Eight Circuit	Honorable Alex Kozinski, United States Circuit Court for the Ninth Circuit
Ninth Circuit	Honorable Alex Kozinski, United States Circuit Court for the Ninth Circuit

Circuit Liaisons

Tenth Circuit	Honorable James K. Logan, United States Court of Appeals for the Tenth Circuit
Eleventh Circuit	Honorable James K. Logan, United States Court of Appeals for the Tenth Circuit
Federal Circuit	Honorable Stephen F. Williams, United States Court of Appeals for the District of Columbia
District of Columbia	Honorable Stephen F. Williams, United States Court of Appeals for the District of Columbia

3) Advisory Committee on Bankruptcy Rules

First Circuit	Honorable Jane A. Restani, United States Court of International Trade
Second Circuit	Leonard M. Rosen, Esquire, Wachtell, Lipton, Rosen, & Katz (212) 403-1250
Third Circuit	Honorable Eduardo C. Robreno, United States District Court for the Eastern District of Pennsylvania
Fourth Circuit	R. Neal Batson, Esquire, Alston & Bird (404) 881-7267
Fifth Circuit	Honorable Adrian G. Duplantier, United States District Court for the Eastern District of Louisiana
Sixth Circuit	Honorable Alice M. Batchelder, United States Court of Appeals for the Sixth Circuit
Seventh Circuit	Professor Charles J. Tabb, University of Illinois (217) 333-2877
Eight Circuit	Honorable Robert J. Kressel, United States Bankruptcy Court for the District of Minnesota
Ninth Circuit	Kenneth N. Klee, Esquire, Stutman, Treister & Glatt (213) 251-5100 & Gerald K. Smith, Esquire, Lewis & Roca (602) 262-5747

Circuit Liaisons

Tenth Circuit	Honorable Donald E. Cordova, United States Bankruptcy Judge for the District of Colorado
Eleventh Circuit	Honorable A. Jay Cristol, Chief, United States Bankruptcy Judge for the Southern District of Florida
Federal Circuit	Henry J. Sommer, Esquire, Community Legal Services (215) 427-4898
District of Columbia	Henry J. Sommer, Esquire, Community Legal Services (215) 427-4898

4) Advisory Committee on Civil Rules

First Circuit	Francis H. Fox, Esquire, Bingham, Dana, & Gould (617) 951-8000
Second Circuit	Honorable Anthony J. Scirica, United States Court of Appeals for the Third Circuit
Third Circuit	Honorable Anthony J. Scirica, United States Court of Appeals for the Third Circuit
Fourth Circuit	Honorable Paul V. Niemeyer, United States Court of Appeals for the Fourth Circuit
Fifth Circuit	Honorable Patrick E. Higginbotham, United States Court of Appeals for the Fifth Circuit
Sixth Circuit	Honorable Patrick E. Higginbotham, United States Court of Appeals for the Fifth Circuit
Seventh Circuit	Carol Hansen Posegate, Esquire, Giffin, Winning , Cohen, & Bodewes (217) 525-1571
Eight Circuit	Honorable David S. Doty, United States District Court for the District of Minnesota
Ninth Circuit	Honorable David F. Levi, United States District Court for the Eastern District of California

Circuit Liaisons

Tenth Circuit	Honorable Christine M. Durham, Justice of the Utah Supreme Court
Eleventh Circuit	Honorable C. Roger Vinson, United States District Court for the Northern District of Florida
Federal Circuit	Honorable Frank W. Hunger, Assistant Attorney General for the Civil Division
District of Columbia	Honorable Frank W. Hunger, Assistant Attorney General for the Civil Division

5) Advisory Committee on Criminal Rules

First Circuit	Honorable D. Brooks Smith, United States District Court for the Western District of Pennsylvania
Second Circuit	Honorable D. Brooks Smith, United States District Court for the Western District of Pennsylvania
Third Circuit	Honorable D. Brooks Smith, United States District Court for the Western District of Pennsylvania
Fourth Circuit	Honorable B. Waugh Crigler, United States Magistrate Judge for the Western District of Virginia
Fifth Circuit	Honorable W. Eugene Davis, United States Circuit Court for the Fifth Circuit
Sixth Circuit	Honorable David D. Jr., United States District Court for the Northern District of Ohio
Seventh Circuit	Honorable George M. Marovich, United States District Court for the Northern District of Illinois
Eight Circuit	Honorable George M. Marovich, United States District Court for the Northern District of Illinois
Ninth Circuit	Honorable D. Lowell Jensen, United States District Court for the Northern District of California
Tenth Circuit	Honorable Sam A. Crow, United States District Judge for the District of Kansas

Circuit Liaisons

Eleventh Circuit	Honorable W. Eugene Davis, United States Circuit Court for the Fifth Circuit
Federal Circuit	Honorable B. Waugh Crigler, United States Magistrate Judge for the Western District of Virginia
District of Columbia	Honorable B. Waugh Crigler, United States Magistrate Judge for the Western District of Virginia

6) Advisory Committee on Evidence Rules

First Circuit	Honorable Ralph K. Winter, Jr. United States Court of Appeals for the Second Circuit
Second Circuit	Gregory P. Joseph, Esquire, Fried, Frank, Harris, Shriver & Jacobson (212) 859-8052
Third Circuit	Honorable Ralph K. Winter, Jr. United States Court of Appeals for the Second Circuit
Fourth Circuit	Professor Kenneth S. Braun, University of North carolina, 919 962-4112
Fifth Circuit	Honorable Jerry E. Smith, United States District Court for the Southern District of Texas
Sixth Circuit	Dean James K. Robinson, Wayne State University, (313) 577-5478
Seventh Circuit	Honorable Milton I. Shadur, United States District Court for the Northern District of Illinois
Eight Circuit	Honorable Ralph K. Winter, Jr. United States Court of Appeals for the Second Circuit
Ninth Circuit	Honorable Fern M. Smith, United States District Court for the Northern District of California
Tenth Circuit	John M. Kobayashi, Esquire, (303) 861-2100
Eleventh Circuit	Honorable Ralph K. Winter, Jr. United States Court of Appeals for the Second Circuit

Circuit Liaisons

Federal Circuit	Honorable James T. Turner, United States Court of Federal Claims
District of Columbia	Honorable James T. Turner, United States Court of Federal Claims

John K. Rabiej

cc: Honorable Alicemarie H. Stotler

Item 1A-C

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

April 29, 1996

MEMORANDUM TO ALL: CHIEF JUDGES, UNITED STATES DISTRICT COURTS
CHIEF JUDGES, UNITED STATES BANKRUPTCY COURTS
CLERKS, UNITED STATES DISTRICT COURTS
CLERKS, UNITED STATES BANKRUPTCY COURTS

SUBJECT: Uniform Numbering System for Local Rules of Court **(ACTION REQUESTED)**

RESPONSE DUE DATE: **April 15, 1997**

On March 12, 1996, the Judicial Conference approved the recommendation of the Committee on Rules of Practice and Procedure to "adopt a numbering system for local rules of court that corresponds with the relevant Federal Rules of Practice and Procedure." The action of the Judicial Conference implements the December 1, 1995 amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, which provide that all local rules of court "must conform to any uniform numbering system prescribed by the Judicial Conference." (See Appellate Rule 47, Bankruptcy Rules 8018 and 9029, Civil Rule 83, and Criminal Rule 57.) The Conference also set April 15, 1997, as the date for compliance with the uniform numbering system.

Uniform numbering systems will assist the bar in locating local rules applicable to a particular subject, reduce the chance of a trap for unwary counsel, and ease incorporation of local rules into indexing and computer services. Model uniform numbering systems that track the Federal Rules of Practice and Procedure are attached with an accompanying introduction from Judge Alicemarie H. Stotler, Chair, Committee on Rules of Practice and Procedure, to assist the courts in renumbering their local rules. A report prepared by the Local Rules Project on the Local Rules of Criminal Practice also is being distributed, which evaluates and identifies particular local rules that may be models for other courts or inconsistent or duplicative of the Federal Rules of Criminal Procedure.

Please contact either Professor Mary P. Squiers, Director of the Local Rules Project, at (617) 552-8851, or Professor Daniel R. Coquillette, the Reporter to the Standing Rules Committee, at (617) 552-8650, if you have a question regarding the numbering of Appellate,

Civil, or Criminal local rules of court. You may contact Patricia S. Channon, a senior attorney with the Bankruptcy Judges Division at (202) 273-1908, if you have a question regarding the numbering of bankruptcy local rules of court.

Leonidas Ralph Mecham

Attachments

cc: Circuit Executives

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JAMES K. LOGAN
APPELLATE RULES

PAUL MANNES
BANKRUPTCY RULES

PATRICK E. HIGGINBOTHAM
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

April 19, 1996

MEMORANDUM TO ALL: CHIEF JUDGES, UNITED STATES DISTRICT COURTS
CHIEF JUDGES, UNITED STATES BANKRUPTCY COURTS
CLERKS, UNITED STATES DISTRICT COURTS
CLERKS, UNITED STATES BANKRUPTCY COURTS

SUBJECT: *Uniform Numbering System for Local Rules of Courts and a Report on the Local Rules of Criminal Practice*

UNIFORM NUMBERING SYSTEM

The Judicial Conference authorized the Committee on Rules of Practice and Procedure to undertake a study of local rules of the district courts at its September 1986 meeting. The committee recognized early on that there was no uniform numbering system for federal district court local rules. Such a system would have many advantages and would be especially helpful to a national practitioner.

At the committee's request, the Judicial Conference in 1988 urged district courts to adopt a uniform numbering system for their local rules addressing civil practice, patterned on the Federal Rules of Civil Procedure. In 1991, a suggested uniform numbering system governing local rules of courts of appeal based on the Federal Rules of Appellate Procedure was circulated to the circuit chief judges. Many of the district courts and all but one of the courts of appeals have revised the numbering of their local rules using suggested uniform numbering systems. In 1995, a preliminary draft of a uniform numbering system for local rules of courts based on the Federal Rules of Bankruptcy Procedure was circulated for comment.

The Federal Rules of Practice and Procedure were amended in December 1995 to require courts to adopt a numbering system for their local rules that conforms to any uniform numbering system prescribed by the Judicial Conference. The Conference has now implemented those amendments mandating only that the number of a particular local rule correspond with the relevant number of the Federal Rules of Practice and Procedure. For example, matters regarding

a summary judgment would be located in number 56 of a district court's local rules governing civil practice.

To assist courts, model uniform numbering systems for local rules are included as Attachment A (Civil Rules), Attachment B (Bankruptcy Rules), and Attachment C (Criminal Rules). The suggested numbering system for local rules governing bankruptcy practice was submitted by the Advisory Committee on Bankruptcy Rules and is more detailed than the other two models. These model uniform numbering systems for local rules are similar to those that were previously circulated. As a result, courts that have already renumbered their local rules based on these models need take no further action.

REPORT ON THE LOCAL RULES OF CRIMINAL PRACTICE

In response to Congressional concerns regarding the proliferation of local rules of court, the Committee on Rules of Practice and Procedure formed the Local Rules Project in 1984 to study local rules. The Project completed its study of local civil rules in 1989, local appellate rules in 1991, and local criminal rules in 1995. Comprehensive reports on local rules of appellate and civil practice were distributed to courts identifying particular local rules as models for other courts or as duplicative or inconsistent with the national rules. For your consideration, I am attaching the Project's report on Local Rules of Criminal Practice (Attachment D), which follows the format of the earlier reports.

The Project's report ought to be considered as the empirical research of scholars. Neither the Committee on Rules of Practice and Procedure nor the Advisory Committee on Criminal Rules has evaluated or approved the Report. The committees hope that the report will be helpful to you as you examine and renumber your local criminal rules.

REQUESTS FOR ASSISTANCE

The Committee on Rules of Practice and Procedure recognizes the burden imposed on judges, staff, and the bar in complying with the amended Federal Rules of Practice and Procedure. We have asked our reporter, Professor Daniel R. Coquillette, and our consultant, Professor Mary P. Squiers, Director of the Local Rules Project, to stand ready to respond to your questions regarding renumbering of local rules of court and the Report on the Local Rules of Criminal Practice. We have also asked Patricia S. Channon, a senior attorney in the Bankruptcy Judges Division, to be available to respond to questions regarding the numbering of bankruptcy local rules of court. I would also welcome a letter or call from you on any aspect of this project.

Alicemarie H. Stotler
Chair

Attachments

cc: Circuit Executives

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

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

L. RALPH MECHAM
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
March 12, 1996

****

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

****

At its March 12, 1996 session, the Judicial Conference:

Elected to the Board of the Federal Judicial Center the Honorable Pasco M. Bowman II, U. S. Court of Appeals for the Eighth Circuit, to replace the Honorable J. Harvie Wilkinson III; and the Honorable Thomas F. Hogan, U. S. District Court for the District of Columbia, to replace the Honorable Michael Telesca.

Executive Committee

With regard to gender/race bias studies in the federal judicicary, agreed to send letters to the chairmen of the judiciary's congressional Appropriations Subcommittees to advise them that, absent their objection, the judiciary would fund ongoing gender/race studies to their completion, and that no new studies would be initiated. Copies of the letters would be sent to Senators who participated in colloquies on bias funding.

Pending review of the judiciary's relocation allowance policies by the Judicial Resources Committee, approved reimbursement to overseas law clerks for the expenses of shipping automobiles, so long as the total reimbursement for relocation expenses for each law clerk does not exceed $5000 each way.

d. Clarify that a bankruptcy judge recalled under these regulations shall also take the constitutional oath under 5 U.S.C. § 3331.

Committee on Codes of Conduct

Approved a technical amendment to the Ethics Reform Act outside earned income regulations.

Approved two corrections to Section C of the Compliance Section of the Code of Conduct for United States Judges.

Committee on Court Administration and Case Management

Agreed to take no policy position on legislative amendments pertaining to closed circuit television of certain criminal proceedings, but to inform the House and Senate Judiciary Committee leadership that such legislation, if enacted, should be modified to:

a. Remove any prohibition relating to the expenditure of appropriated funds; and

b. Make discretionary any requirement that courts order closed circuit televising of certain criminal proceedings.

With respect to cameras in the courts:

a. Authorized each court of appeals to decide for itself whether to permit the taking of photographs and radio and television coverage of appellate arguments, subject to any restrictions in statutes, national and local rules, and such guidelines as the Judicial Conference may adopt.

b. Strongly urged each circuit judicial council to adopt an order reflecting the Judicial Conference's decision to authorize the taking of photographs and radio and television coverage of court proceedings in the United States courts of appeals.

c. Strongly urged each circuit judicial council to adopt an order pursuant to 28 U.S.C. § 332(d)(1) reflecting the September 1994 decision of the Judicial Conference not to permit the taking of photographs and radio and television coverage of court proceedings in the United States district courts. In addition, the Judicial Conference strongly urged the judicial councils to

abrogate any local rules of court that conflict with this decision, pursuant to 28 U.S.C. § 2071(c)(1).

Approved guidelines for providing services to hearing-impaired and other persons with communications disabilities to be published in Volume I, Chapter III of the *Guide to Judiciary Policies and Procedures*.

With respect to videoconferencing:

a. Endorsed videoconferencing as a viable optional case management tool in prisoner civil rights pretrial proceedings (civil only);

b. Authorized continued funding, pending availability, for the on-going videoconferencing programs in the district court for the Eastern District of Texas and the bankruptcy court for the Western District of Texas; and

c. Authorized the expenditure of funds to expand the videoconferencing program of prisoner civil rights pretrial proceedings in district courts to additional district courts that meet the criteria developed by the Court Administration and Case Management Committee, pending available funding.

Agreed to seek legislation amending 28 U.S.C. § 134(b) to allow district judges appointed to the Eastern or Southern Districts of New York to reside within 20 miles of the district to which they are appointed.

With regard to court interpreters:

a. Directed that the resources available for the certification of interpreters be used first to support Spanish language certification;

b. Directed the Administrative Office to evaluate cost savings proposals for Spanish certification and to implement savings proposals that would not impair the overall quality of the program; and

c. Suspended the certification of interpreters in all languages other than Spanish (including Navajo and Haitian Creole) pending further evaluation by the Administrative Office of alternatives to certification.

Committee on Rules of Practice and Procedure

Resolved that on April 1, 1998, and at each three-year interval ending on April 1 thereafter, the Official Bankruptcy Forms will be amended, automatically and without further action by the Judicial Conference, to conform to any adjustment of dollar amounts made under § 104(b) of the Bankruptcy Code.

With respect to local rules:

a. Adopted a numbering system for local rules that corresponds with the relevant Federal Rules of Practice and Procedure; and

b. Set April 15, 1997 as the effective date of compliance with the uniform numbering system so that courts will have sufficient time to make necessary changes to their local rules.

Committee on Security, Space and Facilities

Approved a plan entitled "Space Management Initiatives in the Federal Courts."

Took no position on S. 1005, the Public Buildings Reform Act of 1995. However, in the event of further action by the Senate or House of Representatives, the Conference delegated to the Committee on Security, Space and Facilities, in consultation with the Director of the Administrative Office of the United States Courts and the Executive Committee, the authority to express views on certain provisions of the bill that will have an impact on the space and facilities program of the federal courts.

Approved security-related amendments to the *United States Courts Design Guide* in probation and pretrial services and bankruptcy clerks' offices located in commercially-leased space.

With respect to courthouse construction projects:

a. Approved criteria and a methodology for placing courthouse construction projects in numerical order (including the factors and scores for calculating and weighting the criteria) and a revised five-year plan of courthouse construction projects placed in order of priority, including the composite and detailed scores of each project; and authorized the Committee to

DRAFT

MAY 10 1996

Tab
Automation and Technology
June 1996

IMPACT OF TECHNOLOGY ON FUTURE SPACE NEEDS

At its March 1996 session, the Judicial Conference approved a plan to contain space growth entitled "Space Management Initiatives in the Federal Courts." Among the several actions contained in the report is the following:

> Impact of Technology: The Committee on Automation and Technology should take the lead, working in conjunction with the Rules Committee, the Security, Space, and Facilities Committee, and other appropriate Conference Committees, to initiate study of and incorporate into long-range space planning the potential effect of technology on future space needs (e.g., telecommuting; document filing from distant locations, etc.).

The Committee on Automation and Technology is sponsoring three initiatives being undertaken by the Administrative Office that will identify different ways of doing business that may impact future space needs:

- Desktop Videoconferencing
- Electronic Case Files (including Electronic Filing)
- Electronic Courtroom

As the scheduled completion date of these initiatives is such that the long-term impact on space will not to be known until after 1997, it is not yet possible to determine when cost savings, if any, would be realized and final recommendations made. A status report will be provided to the Committee on Security, Space, and Facilities in January 1997, and the results will be provided to that committee as they become known for incorporation into long-range space planning and to the Committee on Rules for consideration of their effect on practice and procedure.

Proposed Schedule

June 1996:	Presentation to the Committee on Automation and Technology of the Administrative Office's suggested approach.
January 1997:	A status report will be presented to the Committee on Automation and Technology and then forwarded to the Committee on Security, Space, and Facilities.
June 1997:	An update on the status report will be presented to the Committee on Automation and Technology and then forwarded to the Committee on Security, Space, and Facilities.

John R.

Cecilee A. Goldberg
OJP-AD

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

KATHRYN C. HOGAN
Chief
Automation Planning
and Policy Formulation Office

May 13, 1996

MEMORANDUM TO: UMBRELLA GROUP CHAIRS AND ASSOCIATE CHAIRS

SUBJECT: *Long Range Plan for Automation in the Federal Judiciary*, Fiscal Year 1997 Update

As discussed at the Director's Automation Planning Council (DAPC) meeting held on April 22, the Office of Information Technology (OIT) is now beginning the next planning cycle for the development of the *Long Range Plan for Automation in the Federal Judiciary* (Long Range Plan for Automation). A draft schedule outlining the Long Range Plan for Automation milestones, and the format for the FY 1997 version of the plan are attached.

As you will recall, Judge Ware expressed his concern that the DAPC should formally support electronic filing as a high priority for the next three to five years. The DAPC concurred with Judge Ware's statement and resolved to recommend to the Director that, by the year 2000, the United States courts terminate their primary reliance on paper as a means to access information and adopt electronic information systems that would permit simultaneous access by the various constituencies of the judiciary, litigants, and the public, as well as the production of reports that would allow for the just, speedy, and inexpensive resolution of disputes.

The next day at the Subcommittee on Planning and Priorities meeting, Judge Forrester spoke of his vision for the next three to five years. He identified four initiatives that are key to shaping the future of the judiciary in the next three to five years. These initiatives are:

- electronic filing that would include docketing and case management systems;
- video teleconferencing that would address the establishment of multi-purpose video teleconferencing sites in courthouses to facilitate both administration and judicial proceedings;
- electronic courtroom that would apply high technology to facilitate courtroom

processes; and

- Intranet/Internet that would augment the Data Communications Network and facilitate the transmittal of electronic documents and data.

In addition to Judge Forrester's vision, there are two other areas of the automation program that are critical.

The infrastructure area, which is well underway, focuses on establishing an infrastructure for the automation program, including adopting an Information Systems Architecture (ISA) which determines what kind of platforms, databases and tools the judiciary uses to build its application systems. Adopting the ISA means that the project managers who are acquiring new software products to modernize operations in the courts can be confident that modern, standardized, state-of-the-market equipment and a communications network that meets their needs will be available when they are ready to deploy their products.

The stewardship area, which is also well underway, focuses on demonstrating to the Congress and the taxpayers the judiciary's commitment to good stewardship in implementing key projects designed to modernize and improve administrative and financial processes in the courts. By the end of FY 1998, the judiciary will have completed the delivery of the following five major systems that will meet these objectives: Personnel Systems Modernization, Integrated Library System, Jury Systems Modernization, Financial Accounting System for Tomorrow, and Criminal Justice Act Payment Replacement System.

Please review and update your Functional Strategy Statement (FSS) within the context of the resolution adopted by the DAPC, Judge Forrester's vision statement and the other two key areas of infrastructure and stewardship. It is extremely important for umbrella groups to consider the DAPC's resolution, the three main areas of the Judiciary's Automation Program and the four strategic initiatives identified by Judge Forrester and reflect how their individual plans support these key components of the Judiciary's Automation Program. Additionally, umbrella groups should indicate adherence to the ISA. Major Problems and Courses of Action should be clearly identified in your FSS. Courses of Action should reference the appropriate Major Problems and IRM Goal(s). Additionally, Products and Services, Prioritized Projects, and Projected Projects should be linked with one or more Courses of Action.

We will be providing an electronic version of the appropriate FSS and pertinent information needed to update the FSS to AO-Based Leaders. A revised electronic version should be submitted via e-mail to Gayle Lowe, IRM Strategic Planning Officer, by June 28.

Your OIT liaison will be assisting you during all phases of this important activity. Please contact me, your liaison or Gayle Lowe at (202) 273-2332 should you have any questions. Thank you for your cooperation.

Kathryn C. Hogan

Attachments

cc: Honorable J. Owen Forrester
Honorable John D. Tinder
Honorable Lee M. Jackwig
Ms. Pamela B. White
OIT Liaisons

Item 2

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Draft Minutes of the Meeting of January 12-13, 1996
Los Angeles, California

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Los Angeles, California on Thursday and Friday, January 12-13, 1996. All committee members were present:

Judge Alicemarie H. Stotler, Chair
Judge Leroy J. Contie, Jr.
Judge Frank H. Easterbrook
Judge Thomas S. Ellis, III
Professor Geoffrey C. Hazard, Jr.
Judge Phyllis A. Kravitch
Gene W. Lafitte, Esquire
Judge James A. Parker
Alan W. Perry, Esquire
Sol Schreiber, Esquire
Alan C. Sundberg, Esquire
Chief Justice E. Norman Veasey
Judge William R. Wilson

Deputy Attorney General Jamie Gorelick was unable to be present because of weather and transportation conditions. Ian H. Gershengorn, Special Assistant to the Deputy Attorney General participated in the meeting as the representative of the Department of Justice.

Supporting 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, and Mark D. Shapiro, senior attorney in the rules office.

Representing the advisory committees at the meeting were:

Advisory Committee on Appellate Rules -
Judge James K. Logan, Chair
Professor Carol Ann Mooney, Reporter
Advisory Committee on Bankruptcy Rules -
Judge Paul Mannes, Chair
Professor Alan N. Resnick, Reporter
Advisory Committee on Civil Rules -
Judge Patrick E. Higginbotham, Chair
Professor Edward H. Cooper, Reporter

Advisory Committee on Criminal Rules -
Judge D. Lowell Jensen, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules -
Professor Margaret A. Berger, Reporter

Also participating in the meeting were: Joseph F. Spaniol, Jr. and Bryan A. Garner, consultants to the committee, Mary P. Squiers, project director of the local rules project, Patricia S. Channon, senior attorney in the Bankruptcy Judges Division of the Administrative Office, and Joe S. Cecil of the Research Division of the Federal Judicial Center.

INTRODUCTORY REMARKS

Judge Jensen reported that he had represented the committee at the September 1995 meeting of the Judicial Conference. He stated that the committee had proposed to the Conference two changes to Rule 16 of the Federal Rules of Criminal Procedure. The first would have amended Rule 16(a)(1)(F) to require the government to disclose the names of its witnesses to the defendant seven days before trial, unless the United States attorney were to file with the court an *ex parte,* unreviewable statement that the government believed that disclosure would threaten a person's safety or lead to an obstruction of justice. The second change would have amended Rule 16(b)(1)(C) to require the defense to disclose to the government a written summary of the testimony of its witnesses when it intended to rely on expert testimony to show the defendant's mental condition.

Judge Jensen stated that the Judicial Conference, on a close vote, had failed to approve a motion to adopt the proposed changes to Rule 16. He added that the Advisory Committee on Criminal Rules had concluded that the Conference's action must be read as a rejection of the committee's entire Rule 16 proposal, including the provision that would have amended rule 16(b)(1)(C) to require disclosure of expert testimony by the defense. He added that the Advisory Committee on Criminal Rules would be pleased to consider this latter proposal again.

Judge Jensen also reported that the Judicial Conference had rejected a motion to prevent publication of the proposed amendments to the civil and criminal rules that would require attorney participation in voir dire. Accordingly, the voir dire proposals, which had been sponsored jointly by the Advisory Committee on Criminal Rules and the Advisory Committee on Civil Rules, were published immediately following the Conference's meeting.

Some members and participants suggested that the committee's recommendations and supporting material may not have been given adequate consideration by the members of the Judicial Conference. One participant suggested that the motion to prevent publication of the voir

dire proposals was purely procedural in nature and had been made at the last minute. He stated that in the future the committees should be provided with greater advance notice of proposed objections to their reports. Some members recommended that consideration be given to changing the presentation and format of the committee's reports to the Conference to ensure that Conference members are fully informed about the materials and that the committees be given an adequate opportunity to present and defend their proposals on the merits.

Judge Stotler reported that she and Professor Coquillette had attended part of the December 1995 meeting of the Committee on Court Administration and Case Management. At the meeting, they discussed the Judicial Conference's obligations under the Civil Justice Reform Act to file a report and recommendations with the Congress by December 31, 1996 . She stated that she and the reporter had emphasized that the Rules Enabling Act process is very participatory and lengthy. The RAND report, providing empirical data on the results of the CJRA pilot program, would not be ready even on a preliminary basis until the end of June 1996, and in final form by the end of September 1996. Under this schedule, there would not be enough time for the Conference and its committees to review the RAND report, make appropriate recommendations regarding the adoption of litigation principles and guidelines, and initiate proposed rules changes to implement the recommendations. The Committee on Court Administration and Case Management was urged to take the rulemaking process into account in coming to its recommendations.

Judge Higginbotham reported that the RAND Corporation and the American Bar Association were eager to obtain reactions by bench and bar to the findings and recommendations in the report. He noted that the ABA was planning to hold a national conference to consider the report, possibly in March 1997. He added that Judge Ann C. Williams, chair of the Court Administration and Case Management Committee, had been very receptive to receiving input from bench and bar and had asked to be included in the ABA conference.

Judge Stotler reported that she, Professor Coquillette, and Judge Robert E. Keeton, former chairman of the committee had met with the Chief Justice on December 13, 1995 to discuss: (1) the style revision project, (2) the appropriate length of terms for rules committee members and chairs, and (3) inviting the chairs of other Judicial Conference committees to attend the committee's January 1996 special study conference on attorney conduct. She stated that the Chief Justice was very interested in, and very knowledgeable about, the rules process. She added that he approved of the committee's proceeding with its plans for revising the Federal Rules of Appellate Procedure for style and for using the appellate rules as the bellwether for the style revision project. She added that style revision of the other federal rules of procedure should be delayed until revision of the appellate rules has concluded. Judge Stotler emphasized that attorney conduct issues cut across the jurisdictional lines of several Judicial Conference committees and had to be coordinated closely with the other committees. For that reason, she had wanted to apprise the Chief Justice directly of the committee cross-over in inviting other

Judicial Conference chairs to the special study conference and ascertain that the proposal met with the Chief Justice's approval.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee approved unanimously the minutes of the July 6-7, 1995 meeting.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported that the Administrative Office had just installed the hardware and software for its new electronic document management system that will support the rules committees. Customization of the software and training of the staff were underway, and dual operation of the manual and automated systems would follow. Judge Stotler recommended that the office invite the committee to an on-site demonstration of the system in conjunction with the June 1996 meeting.

Mr. Rabiej stated that Senator Thurmond had introduced S. 1426, a bill that would amend the Federal Rules of Civil and Criminal Procedure to eliminate the requirement of unanimous consent for a verdict and require that a verdict in a civil or criminal case be made only by a 5/6 vote of the jury.

Several of the participants expressed objection to the legislation on the merits and recommended that the Judicial Conference be heard on the matter. Concern was also expressed that the bill would violate the Rules Enabling Act process by amending federal procedural rules directly by statute. One member recommended that work begin immediately to consider the implications of the legislation and obtain empirical data.

REPORT OF THE STYLE SUBCOMMITTEE

Judge Parker reported that the chair had recently selected him to serve as chair of the style subcommittee. He stated that the role of the subcommittee would necessarily be limited because further work on revision of the civil, criminal, and bankruptcy rules would likely be held in abeyance until after completion of the revision process for the appellate rules.

Mr. Garner reported that his codification of the style conventions used by the style subcommittee was about to be published by the Administrative Office under the title *Guidelines for Drafting and Editing Court Rules*. He stated that the conventions are easy to apply and that they would be of substantial assistance in teaching and drafting. He agreed to eliminate references to the Federal Rules of Evidence in the work before it is published.

Judge Stotler asked whether any member had an objection to having the *Guidelines* published in the Federal Rules Decisions. No objection was voiced.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Logan presented the report of the advisory committee, as set forth in his memorandum of December 12, 1995. (Agenda Item 7)

Amendments for Publication

Judge Logan reported that the advisory committee was proposing substantive amendments to three appellate rules, Rules 27, 28, and 32. He added that the advisory committee recommended that these three rules be amended regardless of the outcome of the rules restyling project.

FED. R. APP. P. 27

Judge Logan stated that Rule 27, dealing with motions, had been entirely rewritten by the advisory committee. As amended, the rule would require that any legal argument in support of a motion be contained in the motion. No separate brief would be permitted. He explained that this provision had been derived from the rules of the Supreme Court.

The time for responding to a motion would be expanded from 7 days to 10 days. This change had been made in response to comments received during the publication period. The rule would be amended to make it clear that a reply to a response may be filed. A motion could not exceed 20 pages, and a response could not exceed 10 pages. A motion would be decided without oral argument unless the court ordered otherwise. In addition, the format requirements for a motion would be moved from Rule 32(b) to Rule 27(d).

FED. R. APP. P. 28

Judge Logan stated that the proposed amendments to Rule 28 were necessary to conform the rule to the proposed amendments to Rule 32. Subdivision (g), governing page limits of briefs would be deleted and moved to Rule 32. Rule 28 would also be amended to require a brief to contain a certificate of compliance with the length limitations established in Rule 32.

FED. R. APP. P. 32

Judge Logan stated that the advisory committee had adopted a draft revision of Rule 32 prepared by Judge Easterbrook. He asked Judge Easterbrook to summarize the changes.

Judge Easterbrook stated that most of the features in the rule had been discussed by the Standing Committee at prior meetings. He had attempted to redraft the rule in light of various concerns expressed by committee members at the July 1995 meeting. He stated that the advisory committee's goal was to write a rule that would facilitate good practices by attorneys. The revised rule strived for both simplicity and equality. It used simpler terms than earlier drafts, although printers' terms could not be eliminated completely. The revision also achieved equality between those who use computers and those who use typewriters.

Judge Easterbrook stated that uniformity was also an important objective of the rule. As revised, it would abrogate local rules that impose requirements not set forth in the national rule. Therefore, a brief that complied with the national rule would be acceptable in every court. On the other hand, the rule would allow the circuit courts to *reduce* requirements and accept documents not in full compliance with certain aspects of the national rule. For example, a brief in 14-point typeface would be acceptable everywhere, but a particular circuit court could authorize a brief printed in 12-point type.

Judge Easterbrook stated that the advisory committee had deferred consideration of a proposed amendment to require attorneys to file with the court a copy of the computer disk used to prepare their brief.

As amended, the rule would also require an attorney certificate of compliance with the length limitations. The certificate would serve two practical functions: (1) It would make it clear to the clerk's office that the lawyer is aware of the requirements of the rule and has tried to comply with them. (2) The court could rely on the lawyer's certificate and the word count or character count of the word-processing system used to prepare the brief.

The revised rule also contains a safe harbor provision providing that a certificate of compliance is not required for a principal brief that does not exceed 30 pages in length.

Style Revisions

Judge Logan stated that the advisory committee had completed a draft of the style revisions of all 48 appellate rules. He noted that the proposed amendments had been reviewed seven times, by: (1) the style consultant, (2) the style subcommittee, (3) a subcommittee of the advisory committee, (4) the full advisory committee, (5) the style consultant again, (6) the subcommittee of the advisory committee again, and (7) the full advisory committee again. He stated that the committee now had before it a finished product, except for some final editing.

Judge Logan pointed out that the advisory committee had prepared a standard committee note to follow each rule declaring that the proposed changes were intended to be stylistic only. In a few cases, however, proposed amendments exceeded purely stylistic change to resolve ambiguities in an existing rule or remove poor language from a rule. These particular

amendments were clearly identified as more than stylistic in the advisory committee notes. Judge Logan elaborated on each amendment that would make more than stylistic changes.

FED. R. APP. P. 3

Under the current Rule 3(b), it is not clear whether appeals may be consolidated without court order if the parties stipulate to the consolidation. The revised rule would resolve the ambiguity by requiring a court order for consolidation. The rule would also make it clear that the court may order consolidation on its own motion.

Rule 3(d) would be amended to conform to a proposed revision in Rule 4(c). It would provide that when a prison inmate files a notice of appeal by depositing it in the prison's internal mail system, the clerk must note on the notice of appeal the date it is docketed, rather than the date the clerk receives it.

FED. R. APP. P. 4

Current Rule 4(a)(6) permits a district court to reopen the time to file an appeal if it finds that a party did not receive notice of the entry of judgment or order from "the clerk or any party" within 21 days of its entry. The revised rule would broaden the type of notice that can preclude reopening the time for appeal by including a notice from the court. The advisory committee substituted the term "the district court" for "the clerk," believing that the change was within the scope and intent of the rule.

Mr. Perry expressed concern over the proposed change. He stated that a judge may issue instructions in open court that are never reduced to writing. He noted that sometimes a judge states that a judgment will be entered, but it is not in fact entered on the record by the clerk. This practice produces confusion, and lawyers may have to act with peril when a judge makes an oral decision from the bench. He stated that lawyers want to receive written confirmation of a judge's oral decision, either by the judge or the clerk.

Mr. Perry suggested that the problem with the rule was highlighted in the next to last sentence of the fourth paragraph of the committee note, reading: "Under the new language such notice would continue to bar reopening, but the Advisory Committee believes that if a district judge announces the judgment in open court in the presence of the parties that announcement should also be sufficient notice to preclude later reopening of the time for appeal." **He moved to eliminate this sentence from the note, and Judge Logan agreed to strike the sentence.**

Judge Logan noted that Rule 4(b)(4) permits the court to extend the time to file a notice of appeal if there is a "showing of excusable neglect." The advisory committee would permit the court to extend the time for "good cause," as well as for "excusable neglect." He stated that good cause should be sufficient to extend the time in criminal cases as well as civil cases.

The rule, would also be amended to require a "finding," rather than a "showing," of exclusable neglect or good cause.

Rule 4(c) would be amended to require that a prison inmate use the internal mail system designed for legal mail, if there is one, in order to receive the benefit of the subdivision. Companion changes would be made in Rules 3(d) and 25(a). The current rule provides that the time for other parties to appeal begins to run from the date the district court "receives" the inmate's notice of appeal. The advisory committee would amend the rule to provide that the time for other parties to appeal begins to run when the district court "dockets" the inmate's notice of appeal.

FED. R. APP. P. 17

Judge Logan stated that the current Rule 17(b) requires an agency to file with the court the entire record or such parts of it as the parties may designate by stipulation filed with the agency. The advisory committee would revise the language to allow the agency to file the entire record or "parts designated by the parties." A stipulation would no longer be necessary. The agency could file less than the entire record, even without a stipulation, by forwarding only those portions designated by each party.

FED. R. APP. P. 23

Judge Logan stated that the current Rule 23(d) provides that an initial order regarding custody of a prisoner in a habeas corpus proceeding "shall govern review" in the court of appeals and in the Supreme Court. The advisory committee would revise the language to provide that the court's initial order "continues in effect pending review." Judge Logan explained that the advisory committee's proposed change in Rule 23 was made to conform to a revision in the pertinent Supreme Court rule.

FED. R. APP. P. 25

Judge Logan stated that the proposed change in Rule 25(a), dealing with prison mail systems, was a companion to the proposed change in Rule 4(c). The advisory committee recommended amending the rule to require that an inmate use the system in prison designed for legal mail, if there is one, in order to receive the benefits of the rule.

Mr. Perry moved to delete the word "calendar" from proposed Rule 25(a)(2)(B)(ii). The motion was approved by the committee on a voice vote with one objection.

FED. R. APP. P. 26

The proposed amendment to Rule 26(a), governing computation of time, would apply the computation method prescribed within the rule to any time period imposed by a local rule of court.

FED. R. APP. P. 31

Judge Logan stated that the advisory committee would amend Rule 31(b) in two respects. First, the provision of the rule authorizing parties who file "typewritten ribbon and carbon copies" of the brief to file fewer copies of the brief would be modified to make it clear that it applied only to parties who proceed in forma pauperis. Second, parties represented by counsel would not be authorized to file fewer copies of the briefs.

Judge Logan accepted Judge Wilson's suggestion that the word "should" on the last line of the committee note be changed to "must."

FED. R. APP. P. 34

Judge Logan stated that Rule 34 currently requires every circuit to establish a local rule on oral argument that conforms to criteria specified in the national rule. The advisory committee would amend the rule by specifying in the national rule itself the criteria that the current rule requires the local rules to contain, thus eliminating the need for the local rules.

FED. R. APP. P. 15

Judge Parker distributed a draft of proposed style changes in the advisory committee's proposed Rule 15(b) that would: (1) substitute "a party opposing review" for "the respondent," (2) substitute "after the date when the application for enforcement is filed" for "thereafter," and (3) reverse the order of paragraphs (2) and (3).

Justice Veasey moved to adopt the changes proposed by Judge Parker. The committee approved the changes unanimously.

Title and Format of the Revisions

The committee spent considerable time deciding upon the appropriate title for the publication that would contain the body of revised appellate rules. Much of the discussion addressed whether to designate the style conventions as "guidelines" or "standards."

The committee decided to approve the following title: "Preliminary Draft of Proposed Revision of the Federal Rules of Appellate Procedure Using Guidelines for Drafting and Editing Court Rules."

Judge Logan stated that the document would be published in the same side-by-side format set forth in Agenda Item 7. Each appellate rule in effect at the time of publication would appear on the left side of the page. Opposite it on the right side of the page would appear the corresponding restyled rule. Any proposed substantive changes that are still in the midst of the rules revision process—including amendments pending before the Supreme Court or Congress and amendments published for public comment—would appear in italics immediately following each pertinent rule.

The committee discussed the appropriate length of time that should be given for public comment on the proposed style amendments. Judge Logan said that the advisory committee could complete its final editing of the rules by April 1996. The rules could then be published immediately, and the public could be given until the end of 1996 to comment on them. This schedule would permit consideration of the rules by the Standing Committee at its June 1997 meeting.

Judge Stotler called for the vote to authorize publication of the proposed style revisions of the appellate rules using the proposed side-by-side format and including the proposed substantive changes to Rules 27, 38, and 32. The committee approved publication by voice vote without objection.

Local Appellate Rules

Judge Logan stated that local rules project had been very successful in improving appellate rules at both the national and local levels. He pointed out that the project had reviewed the local rules of each of the courts of appeals and had identified several court rules that conflicted with, or repeated, the national rules. The project also recommended the renumbering of local rules to follow the numbering of the national rules. The courts of appeals had taken the recommendations seriously and made appropriate changes in their rules. Significantly, the project also identified a number of good local rules that were appropriate for promulgation as uniform national rules. As a result, many of the changes proposed by the advisory committee in the Federal Rules of Appellate Procedure over the past few years had been derived from its review of local rules of court.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Professor Resnick presented the report of the advisory committee, as set forth in Judge Mannes' memorandum of December 5, 1995. (Agenda Item 8)

Uniform Numbering System for Local Court Rules

Professor Resnick stated that four or five years ago the advisory committee had been asked to devise a uniform numbering system for local court bankruptcy rules. The proposal now

before the Standing Committee had been prepared by a subcommittee assisted by Ms. Channon of the Bankruptcy Judges Division of the Administrative Office and had been through several drafts, several committee meetings, and public comment. The proposed local rule-numbering system was tied to the numbering of the Federal Rules of Bankruptcy Procedure. Each local rule topic was linked to its equivalent subject in the national rules. When the subject of a local rule had no national equivalent, the committee assigned a new number based on the general framework of the national rules.

Professor Resnick pointed out that the advisory committee had made a decision against designating one single, "catch-all" number for assigning all local court rules that do not have a national counterpart. Instead, the committee designated a specific number to cover every subject presently addressed by the bankruptcy courts in their local rules. To assist the courts further, the advisory committee had prepared a set of cross-references and indexes to the rules. Also, the committee had encouraged the bankruptcy courts to contact Ms. Channon for assistance in revising their local rules.

Professor Squiers pointed out that the proposed numbering system for the bankruptcy rules was different from those proposed for the civil, criminal, and appellate rules. The latter three systems would give the courts more discretion in numbering their rules, and all local topics not covered by a specific national rule would be aggregated in the generic national rule number dealing with local rulemaking, i.e., FED. R. CIV. P. 83 and FED. R. CRIM.. P. 57. Professor Resnick said that the Advisory Committee on Bankruptcy Rules was confident that it had linked every current local rule to either a national rule number or another appropriate number based on the general framework of the national rules. He added that courts should be discouraged from using a single rule number as a "dumping ground" for all local rules not linked closely to a national rule.

Some participants questioned the precise form of citation proposed in the numbering system for local bankruptcy rules. Judge Easterbrook pointed out that judges do not cite the national rules uniformly, and the specific form of citation recommended by the advisory committee would not achieve the committe's expected results. He suggested, moreover, that there was nothing in the national rules giving the Judicial Conference authority to prescribe a uniform citation system, rather than a numbering system.

Judge Easterbrook moved that the committee recommend to the Judicial Conference that it adopt a uniform numbering system for all local court rules that simply required each court to renumber its local rules according to the numbers of the national rules. A court, thus, could use any system it wanted for numbering its local rules as long as it was sensible and corresponded with the numbers in the equivalent federal procedural rules. The members agreed that the various materials and refinements prepared by the Advisory Committee on Bankruptcy Rules and by Professor Squiers were very helpful and should be included in the instructional package distributed to the courts.

The committee approved the motion by voice vote without objection.

Judge Easterbrook further moved to give the courts until April 15, 1997, to bring their local rules into compliance with the uniform national numbering systems. The committee approved the motion by voice vote without objection.

Automatic Adjustments to the Bankruptcy Forms

Professor Resnick stated that the Congress had amended section 104(b) of the Bankruptcy Code in 1994 to provide that beginning on April 1, 1998, and every three years thereafter, the various dollar amounts in the Code would be adjusted automatically based on the Consumer Price Index. Some of the dollar amounts appear in the Official Bankruptcy Forms. The statute, as explained in the advisory committee's agenda item, requires the Judicial Conference by March 1 of the pertinent years to publish in the *Federal Register* the amounts of the automatic adjustments, to be calculated using figures supplied by the Executive Branch.

Professor Resnick explained that the advisory committee viewed the dollar adjustment process as a ministerial, administrative matter. Accordingly, it recommended simply that the Official Bankruptcy Forms be amended automatically to conform to whatever adjustments are made every three years in the dollar amounts. Thus, neither the Standing Committee nor the Judicial Conference would have to take further, explicit action to amend the Official Forms to account for the administrative procedure prescribed by section 104(b) of the Code. The Administrative Office could make the adjustments in the forms ministerially and notify the courts and publishers.

To this end, the advisory committee recommended that the Standing Committee approve the following resolution:

> **That the Judicial Conference resolve that on April 1, 1998, and at each 3-year interval ending on April 1 thereafter, the Official Bankruptcy Forms be amended, automatically and without further action by the Judicial Conference, to conform to any adjustment of dollar amounts made under § 104(b) of the Bankruptcy Code.**

The committee approved the resolution by voice vote without objection.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Higginbotham presented the report of the advisory committee, as set forth in his memorandum of December 13, 1995. (Agenda Item 10)

He pointed out that the advisory committee had published for public comment proposed amendments to the civil rules dealing with: (1) attorney participation in voir dire, (2) the use of

12-person juries in civil cases, (3) protective orders under FED. R. CIV. P. 26(c), and (4) interlocutory appeals in admiralty, FED. R. CIV. P. 9(h). He stated that the civil and criminal advisory committees had received a large number of comments on the voir dire proposals, with attorneys generally favoring the amendments and judges opposing them. He added that the committee had received very useful information on the issue of jury size, but that few comments had yet been submitted regarding protective orders.

Judge Higginbotham briefed the committee on the activities of his advisory committee regarding potential amendments to FED. R. CIV. P. 23, dealing with class actions. He explained that he was raising the matter with the committee as an informational item to obtain their initial reactions. He added that the advisory committee would present specific proposals at the June 1996 meeting of the Standing Committee.

Judge Higginbotham reported that the advisory committee had held several meetings on class actions, including symposia at the University of Pennsylvania, New York University, and Southern Methodist University. Hundreds of suggestions had been received regarding potential improvements to Rule 23. Following its April 1995 meeting, the committee began drafting specific proposals and asked its reporter, Professor Cooper, to group the suggestions into two categories. The first would consist of four major policy issues. The second would contain a variety of proposals to refine Rule 23. The advisory committee then decided to concentrate its efforts on addressing the four major policy issues and defer consideration of the other proposals.

Judge Higginbotham and Professor Cooper proceeded to discuss the four major policy issues.

1. Appeal of a Class Certification Decision

Judge Higginbotham stated that the single issue raised most often at the meetings and symposia was whether to provide a right of appeal, or some kind of appellate review, of class certification decisions.

The advisory committee concluded that class action certification decisions should be reviewable, but an absolute right of appeal should not be created. Rather, the rules should provide a type of appellate review akin to that provided in 28 U.S.C. § 1292, giving the appellate court discretion as to whether to entertain the review. The committee, though, would not require a certificate from the district court. Rather, a party would be allowed to petition the appellate court directly.

Judge Higginbotham stated that in the view of the advisory committee there was no need for appellate review of most class certification decisions, since most are routine in nature. The courts of appeals should have discretion to entertain those appeals that require consideration. He added that the appellate courts have an important role to play in the law of mass torts, and it would be beneficial for them to start producing a body of law in this area.

Professor Cooper added that there was less controversy over this issue than over any other raised before the advisory committee. There was general agreement that the courts of appeals could sort out the issues and prevent unnecessary appeals. The committee's proposal would be a modest expansion on 28 U.S.C. § 1292(b). Judge Higginbotham added that under the advisory committee's draft, an appeal would not stay a case. Professor Mooney pointed out that if the rule were to be approved, it would require a companion change in the Federal Rules of Appellate Procedure.

2. *Requirement that a Class Action be both "Superior and Necessary"*

Judge Higginbotham stated that the decision as to whether to allow a case to proceed as a class action should not be made as a matter of efficiency alone. Other, important values must also be considered. The advisory committee was considering whether the Rule 23(b) requirement that a class action be "superior" to other available methods for the fair and efficient adjudication of the controversy should be strengthened into a requirement that it be both "superior and necessary" to the case.

Judge Higginbotham stated that several lawyers had complained to the advisory committee that some courts act too quickly in certifying a class action. Many cases could continue to proceed as individual actions without class certification, particularly when there is enough money involved in each individual claim.

Some of the members questioned what the standard should be for "necessity" and pointed out that there were different kinds of necessity. Professor Hazard, for example, advised that in some cases where each individual plaintiff's claim could be prosecuted separately, it still may be in the court's own interest and be more efficient to consider the many cases together. He suggested that the idea of looking at the merits makes some sense, but advised caution. It may be artificial to distinguish the notion of necessity or superiority from the issue of the merits of the case.

3. *Considering the Merits of the Case*

Judge Higginbotham stated that the advisory committee was considering whether a trial judge should in some fashion examine the merits of the case in making a class action determination. It had experienced difficulty, however, in attempting to calibrate the nature of the examination without causing other problems. For example, a judge's look at the strength of the case should not be allowed to become the actual determinant of the case. It also should not turn the certification proceeding into a minitrial, with additional discovery and more time for preparation.

The advisory committee had agreed tentatively to use a balancing test. One alternative the committee was studying was to require the court to make a finding that the claim is "not

insubstantial" before certifying a class action. Some class actions produce great burdens, and the judge should have discretion to say that the class action simply comes at too high a price.

Professor Cooper added that the balancing approach would weigh the prospect of success on the merits against the burdens imposed by certification. He stated that the committee's goal was to provide a low threshold, but it had not yet chosen an alternative. He added that the committee was also examining a proposal that would give a court discretion to refuse certification if the benefits to individual class members from success on the merits would not be sufficient to justify the costs and burdens of administering the class action and distributing individual recoveries.

4. *Settlement Classes*

Judge Higginbotham stated that the advisory committee had not arrived at a conclusion as to whether settlement classes should be provided for explicitly in the rule.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Jensen presented the report of the advisory committee, as set forth in his memorandum of December 4, 1995. (Agenda Item 11)

Judge Jensen reported that the advisory committee had no action items to present to the committee. He pointed out that the Advisory Committee on Criminal Rules and the Advisory Committee on Civil Rules had conducted a joint public hearing in Oakland on proposed amendments to the rules concerning attorney participation in voir dire and 12-person juries in civil cases. He added that a second joint public hearing would be held in New Orleans and that the Advisory Committee on Civil Rules would hold another public hearing in Atlanta.

Judge Jensen stated that the advisory committee would present several proposed rule amendments at the June 1996 meeting of the Standing Committee. He noted that the criminal advisory committee was prepared to review the style consultant's proposed style revisions to the criminal rules, but that the style project would be put on hold until after completion of style revisions to the appellate rules. He also reported that the advisory committee would look further into the work of the local rules project regarding local district court criminal rules.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Professor Berger reported that the advisory committee had no matters to present to the committee.

LONG RANGE PLANNING

Judge Easterbrook presented the report of the Subcommittee on Long Range Planning, including the subcommittee's December 1995 report, *A Self-Study of Federal Judicial Rulemaking*. He noted that the report was before the committee for the third time.

He pointed out that Recommendation 14, encouraging continuation of efforts to restyle the rules, had been revised to suggest that the experience gained in publishing the style revision of the Federal Rules of Appellate Procedure would permit the Standing Committee to decide how to proceed with style revision of the other sets of rules.

Judge Easterbrook noted that a significant change had been made in the study's treatment of the roles of the Supreme Court and the Judicial Conference. Recommendation 16 of the July 1995 draft of the study had recommended that the Court and the Conference consider whether it would be advisable to establish a public notice and written comment period during the Court's evaluation of proposed rules. The subcommittee deleted this recommendation in the revised draft because it concluded that another round of comments and changes would prolong unduly the rule-making process. The subcommittee then modified the text of the study to declare that much time is consumed for little purpose by having both the Court and the Conference pass on rules that have already been fully ventilated by the rules committees. Judge Easterbrook stated that many believe that involvement of the Supreme Court is indispensable to the process because the Court is the highest body in the judiciary and lends considerable prestige to the process. Therefore, if the Supreme Court were to retain its current role in the rules process, it might be appropriate to consider removing the Judicial Conference as a separate step in the process.

Judge Easterbrook emphasized that the subcommittee had not made an explicit recommendation to eliminate the role of either the Supreme Court or the Judicial Conference. It had merely deleted Recommendation 16 and questioned the advisability of continuing the current roles of both the Court and the Conference. He added that the reporter to the Standing Committee would be collecting comments for consideration of the matter at the next committee meeting.

Professor Hazard moved that: (1) the subcommittee report be "accepted" by the committee, (2) that it be published as "received," and (3) that the subcommittee be discharged. He added that the committee should state explicitly that the report had been prepared for the edification of the committee, and that it reflected views received as part of the committee's process of seeking input on the operation of the rules process.

Mr. Spaniol suggested that the report not be "published" until the Chief Justice had reviewed and authorized it. Judge Easterbrook replied that it was appropriate for the subcommittee to make recommendations to the parent committee suggesting that the committee ask the Chief Justice to consider taking certain courses of action.

Mr. Lafitte suggested that the report be "received" by the committee for its own, internal consideration. **Justice Veasey recommended that the committees "receive" the report rather than "accept" it. Professor Hazard accepted this formulation as an amendment to his motion.**

Judge Ellis stated that he wanted assurance that the record reflect that the subcommittee report had been received for consideration and discussion, but that the committee had not yet acted on it. Judge Stotler pointed out that the full committee would look at the document again at the June 1996 meeting and that the members should read the latest draft carefully and submit to the reporter any comments they may have.

Judge Stotler called for the vote on Professor Hazard's amended motion to receive the report and discharge the committee. The committee approved the motion by a vote of 7-3.

SPECIAL STUDY CONFERENCE ON ATTORNEY CONDUCT

The committee sponsored a special study conference to discuss attorney conduct issues on Wednesday, January 11, 1996. Approximately 25 guests were invited to participate, including a cross-section of interested and knowledgeable attorneys, professors, representatives of professional organizations, and representatives of other Judicial Conference committees. Because of the blizzard in the East and major disruption of air travel, several of the invitees were unable to be present.

Professor Coquillette reported that the special study conference had been very frank and useful. He added that he had spoken to the Department of Justice and others about holding another special study conference and made it clear that the committee would make no decisions on attorney conduct until after the second special study conference. He emphasized the sensitive nature of attorney conduct issues and advised that the committee move with caution.

FUTURE COMMITTEE MEETINGS

Judge Stotler reported that the next meeting of the committee would be held on Wednesday through Friday, June 19-21, 1996, in Washington, D.C. The meeting would be preceded on Tuesday, June 18, by another conference on attorney conduct.

The committee fixed January 8-10, 1997 as the date for the following meeting. The location for the meeting would be decided in the discretion of the chair.

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

May 13, 1996

MEMORANDUM TO STANDING RULES COMMITTEE

SUBJECT: *Legislative Activity Report*

The Congress considered and acted on several bills that affect the Federal Rules of Practice and Procedure since the committee last met in January. The following discussion describes the bills and the actions taken by the rules committees regarding them.

Antiterrorism and Effective Death Penalty Act of 1996

The President signed the *Antiterrorism and Effective Death Penalty Act of 1996* on April 24, 1996. (Pub. L. No. 104-132.) One provision of the Act requires closed circuit coverage of certain criminal cases, and another amends Rule 22 of the Federal Rules of Appellate Procedure.

Closed Circuit Coverage

Section 235 of the Act requires closed circuit television coverage of criminal trials for victims of crime, when the venue of the trial is changed out of state and more than 350 miles from the place where the prosecution would have originally taken place. Rough estimates show that less than ten cases meeting these criteria are prosecuted each year. The Act contains several safeguards against public transmission of the closed circuit televising and provides the trial court with substantial authority to set conditions on it.

Earlier drafts of the Act would have limited closed circuit coverage for cases only in which private funds were available to pay for the transmission. CourtTV had volunteered to pay for the closed circuit transmission for victims and families of the Oklahoma bombing. Section 235 now authorizes the Administrative Office of the United

States Courts to accept donations, but otherwise permits the courts to use appropriated funds.

Section 235 sunsets when the Judicial Conference "promulgate(s) and issue(s) rules, or amends existing rules (under the rulemaking process), to effectuate the policy addressed by this section." The Advisory Committee on Criminal Rules has placed the provision on the agenda for its next meeting.

Appellate Rule 22

Section 103 of the Act amends Rule 22 of the Federal Rules of Appellate Procedure and retains the existing provision permitting only a district or a circuit judge to issue a certificate of appealability in a habeas corpus proceeding. But § 102 of the Act amends the underlying statutory provision, 28 U.S.C. § 2253, to permit only a circuit justice or judge to issue the certificate. The discrepancy creates an immediate problem for the courts because an appeal in a habeas corpus proceeding may not proceed unless a certificate of appealability is issued by the appropriate judicial officer.

Last year Judge James K. Logan, chair of the Advisory Committee on Appellate Rules, wrote to Senator Dole, who introduced the bill, and advised him of the apparent inconsistency. Judge Logan notified the Senator — without expressing a preference for either judicial officer issuing the certificate — that unless the inconsistency was reconciled the courts would have a nearly impossible task to determine what role, if any, a district court plays in the certificate process. On April 4, 1996, Judge Logan sent a similar letter expressing concern over the bill to each member of the Senate and House conference committee on the legislation. Judge Logan also advised them that the rule is presently out for public comment as part of a comprehensive style project, and that a new Rule 22 may very well be before Congress for its consideration within a few years.

In 1986, the Judicial Conference voted to oppose legislation that would have permitted only circuit judges to issue a certificate of probable cause in a habeas corpus proceeding. Under the new Act, the certificate of probable cause was changed to one for appealability and the standard for issuing it was raised to require "a substantial showing of the denial of a constitutional right." Whether the altered standard for the issuance of the certificate affects the earlier Judicial Conference position is now an issue for the consideration of the Committee on Federal-State Jurisdiction.

The Act also creates another discrepancy between Appellate Rule 22 and the underlying statutory provision. Under 28 U.S.C. § 2253, as amended by § 102 of the Act, a proceeding under 28 U.S.C. § 2255 (challenging a federal conviction) was added to those requiring a certificate of appealability. Although the caption to Appellate Rule 22,

as amended by the Act, refers to "section 2255 proceedings," the text of the rule omits a reference to it. The discrepancy will likely result in inconsistent rulings made by the court. Judge Logan had advised Senator Dole and the Congressional conferees of the problem in his earlier letters. But since the House and Senate had both passed the same habeas corpus provision earlier, the conferees did not have the authority to change the text during the conference.

The chairs of the House and Senate Judiciary Committees are aware of the inconsistent provisions. Staff of the Administrative Office's Congressional and External Public Affairs Office are working with Congressional staff to resolve the discrepancies, although that will have to be done by separate legislation.

Evidence Rules 413-415

Rules 413-415 of the Federal Rules of Evidence took effect on July 9, 1995, when Congress did not accept changes recommended by the Judicial Conference after Congress had requested the Conference to study the pending new rules and recommend changes, if appropriate. 1995. (Pub. L. No. 103-322.) The Judicial Conference opposed the new rules, but recommended, in the alternative, changes to Evidence Rules 404 and 405.

After many contacts and several meetings between Administrative Office staff and Congressional staff, a meeting between Senator Kyl, the key Senate sponsor of the new rules, and Judge Ralph K. Winter, chair of the Advisory Committee on Evidence Rules, was held on March 12, 1996. Despite repeated requests, a meeting has not taken place between Judge Winter and Congresswoman Molinari, the key House of Representatives sponsor of the new rules. Absent agreement of both the Senator and Congresswoman, a change in the rules is unlikely.

In May 1996, the House of Representatives by an overwhelming majority passed H.R. 2974 to amend the *Violent Crime Control and Law Enforcement Act of 1994.* Two amendments were included that would broaden federal jurisdiction over sex crimes against children and repeat offenders of rape or serious sexual assault. The amendments would also require life sentence without parole on the conviction of a second such crime. The impact of new Rules 413-415 could become much greater with the potential increase in the federal prosecutions of such offenses under the pending legislation.

Prisoner Litigation Reform Act

The President signed the *Prisoner Litigation Reform Act of 1996* on April 26, 1996, as part of the omnibus appropriations measure for fiscal year 1996. (Pub. L. No. 104-134.) The Act has several provisions that are rules-related. First, it encourages

courts to conduct video conferences of pretrial proceedings in prisoner cases. Second, it requires prisoners to pay the full filing fee, on an installment schedule if necessary. In revising the Appellate Form 4 (In Forma Pauperis), the Appellate Rules Committee has accounted for the recent changes. Third, it authorizes a court to appoint a special master to review and monitor prison conditions. The appointment of the special master is subject to an interlocutory appeal. Fourth, the judiciary now must pay the cost of these special masters. The administrative details of how this will be done is under study within the Administrative Office.

Suits in Admiralty Act

On August 8, 1995, Judge Alicemarie H. Stotler sent a letter to the respective Congressional subcommittee chairs dealing with maritime matters conveying the recommendation of the Judicial Conference that the service of process provision contained in the *Suits in Admiralty Act*, 46 U.S.C. § 742, be deleted. The provision requires that a party "forthwith serve" process on the United States in admiralty cases. "Forthwith" has been interpreted by some courts to require service within a period much shorter than the 120-day period provided for effecting service under Rule 4(m) of the Federal Rules of Civil Procedure. Some courts have further ruled that Rule 4(m) does not supersede § 742 because the service requirement is a condition on the United States' waiver of sovereign immunity.

On March 19, 1996, the Supreme Court heard oral argument on this issue in *Henderson v. United States*, No. 95-232. A transcript of the oral argument disclosed that much of the argument concerned whether the provision was substantive or procedural, and whether it was in conflict with the statute for supersession purposes. Rule 4(m) had been amended by direct Congressional action and its effect on the supersession provision was also raised.

John K. Rabiej

Item 3B

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

May 13, 1996

MEMORANDUM TO STANDING COMMITTEE

SUBJECT: *Report of the Administrative Actions Taken by the Rules Committee Support Office*

The following report briefly outlines some major initiatives undertaken by the office to improve its support service to the rules committees.

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 . . . . Thereafter the records may be transferred to a government record center. . . ."

All rules-related documents from 1935 through 1990 have been entered on microfiche and indexed. The documents for 1991 have been catalogued and shipped to a government record center. We will catalogue and box the documents for 1992 shortly. Congressional Information Services (CIS) — the publisher of the microfiche collection — will enter the documents on microfiche and incorporate them into existing indexes. The microfiche collection continues to prove useful to us and the public in researching prior committee positions.

Automation Project

The office is continuing its efforts to develop better methods and procedures in monitoring and retrieving rules-related records and materials. We have purchased hardware (e.g., upgraded PC's, scanners, etc.) and software (off-the-shelf) recommended by the private-sector consultant hired to assess our needs and recommend an automated tracking and

retrieval system. The software has been customized to our specifications by another private-sector consultant. We have been developing and testing the system for approximately three months. The manual system is being be maintained while we are developing and testing the automated system.

When implemented the system offers a high-speed scanner (2-3 seconds per page) and should provide a searchable database with comprehensive indexing and cross referencing capabilities that will allow easy retrieval of information. Full implementation of the project is scheduled for January 1997. Since February we have been scanning all letters commenting on the proposed amendments. The office has hired a summer intern who will help in abstracting legislation, minutes, and other documents from our files and adding them to the system. We are exploring the feasibility of providing access to the document database to committee chairs and reporters, and possibly to other committee members and the public at some point in the future.

Manual Tracking

Meanwhile we have improved our ability to acknowledge and follow-up each public comment or suggested rule change. Our manual system of tracking comments continues to work well. The office received, acknowledged, and forwarded several hundred comments and many suggestions to the appropriate committees. We numbered each comment consecutively, which enabled committee members to determine instantly whether they had received all of them. We are in the process of sending a follow-up letter to each individual and organization that submitted a comment explaining the action taken by the pertinent advisory committee on a proposed rule change.

Distribution of Proposed Rule Changes

We are continuing our efforts to improve the distribution of proposed rule amendments for public comment. The title page of the *Request for Comment*, which contains proposed amendments to the rules, was reformatted to highlight the comment-seeking purpose of the publication and indicate which rules are being amended. The foldout brochure that summarizes the proposed rules amendments has proven useful. We have received many requests for it. We continue to monitor response to the *Request for Comment* and have taken steps as necessary to improve our circulation of rules-related materials. For example, the names of several legal publishers have been added to the list of those who receive rules-related documents, bringing the total to 52 publishers. We have also been coordinating with both the District Clerks Administration Division and the Appellate Clerks Administration Division to distribute rules materials to members of the local district and appellate court rules committees.

State Bar Points-of-Contact

In August 1994, Judge Stotler sent a letter to the president of each state bar requesting that a point-of-contact be designated for the rules committee to solicit and coordinate that state bar's comments on the proposed amendments. She sent a follow-up letter in November 1994 to those who failed to respond to the original request. The Standing Committee outreach to the organized bar has resulted in 43 state bars designating a point-of-contact. (See attached list.) The names and affiliations of the points-of-contact were included in the September 1995 *Request for Comment* publication. We received comments on the proposed rules amendments published in September 1995 from 22 state bar associations, several of whom commented on more than one set of rules.

Mailing List

The Administrative Office has purchased a new automated mailing list system. It is scheduled to be operational by July 1997 and should substantially reduce the time involved in maintaining and expanding the mailing list. During the transition period from the old system to the new system we suspended our efforts to expand the mailing list. Once the new system is in place we will resume adding an additional 200 attorneys and 100 professors to a temporary list every six months until the list contains 2,500 names. If an individual does not comment on rules amendments published for comment for three years, they will be removed from the list, and we will replace the name.

Internet

The Request for Comment is now available on the Internet (http://www.uscourts.gov). Internet access supplements, rather than replaces, our current system of targeted mailing. There were over 1500 "visits" to the *Request for Comment* published in September 1995 on Internet. We are exploring the possibility of making other rules-related documents available on the Internet and other electronic bulletin boards. We are not currently receiving comments on the proposed rules amendments on the Internet.

Tracking Rule Amendments

We have updated the time chart showing the status of all rules changes. It will be distributed at the meeting.

Miscellaneous

In April 1996, the Supreme Court approved and forwarded to Congress the proposed amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure approved by the Judicial Conference at its September 1995 session. In May we advised the courts of the Supreme Court action and distributed the House Documents containing the amendments.

On April 1, 1996, we published for comment the *Preliminary Draft of the Proposed Revision of the Federal Rules of Appellate Procedure Using Guidelines for Drafting and Editing Court Rules and Preliminary Draft of Proposed Amendments to Appellate Rules 27, 28, and 32*. On May 21, 1996, Bryan Garner's *Guidelines for Drafting and Editing Court Rules* will be available for distribution. We are exploring the possibility of publishing the *Guidelines* in Federal Rules Decisions.

John K. Rabiej

Attachment

STATE BAR ASSOCIATIONS'
POINTS OF CONTACT
TO THE RULES COMMITTEES

Alabama State Bar
Frank M. Bainbridge, Esquire

Alaska Bar Association
Monica Jenicek, Esquire

State Bar of Arizona
Anthony R. Lucia, Esquire

Arkansas Bar Association
J. Thomas Ray, Esquire

The State Bar of California
Lee Ann Huntington, Esquire

The Colorado Bar Association
Frances Koncilija, Esquire

Connecticut Bar Association
Francis J. Brady, Esquire

Delaware State Bar Association
Gregory P. Williams, Esquire

Bar Association of District of Columbia
Thomas Earl Patton, Esquire

The Florida Bar
Anthony S. Battaglia, Esquire

Hawaii State Bar Association
Margery Bronster, Esquire

Georgia State Bar Association
Glenn Darbyshire

Idaho State Bar
Diane K. Minnich, Esquire

Illinois State Bar Association
Dennis Rendleman, Esquire

Indiana State Bar Association
Thomas A. Pyrz, Esquire

The Iowa State Bar Association
Donald Thompson, Esquire

Kansas Bar Association
Brian G. Grace, Esquire

Kentucky Bar Association
Norman E. Harned, Esquire

Louisiana State Bar Association
Patrick A. Talley, Esquire

Maine State Bar
Martha C. Gaythwaite, Esquire

Maryland State Bar Association, Inc.
Roger W. Titus, Esquire

State Bar of Michigan
Jon R. Muth

Minnesota State Bar Association
Eric J. Magnuson, Esquire

The Missouri Bar
Robert T. Adams, Esquire

State Bar of Montana
Lawrence F. Daly, Esquire

Nebraska State Bar Association
Terrence D. O'Hare, Esquire

New Jersey State Bar Association
Raymond A. Noble, Esquire

State Bar of New Mexico
Carl J. Butkus, Esquire

New York State Bar Association
Mark H. Alcott, Esquire

The North Carolina State Bar
James M. Talley, Jr., Esquire

State Bar Association of North Dakota
Sandi Tabor, Esquire

Ohio State Bar Association
Eugene P. Whetzel, Esquire

Oregon State Bar
Honorable Robert E. Jones

Pennsylvania Bar Association
H. Robert Fiebach, Esquire

Rhode Island Bar Association
Benjamin V. White III, Esquire

South Carolina Bar
William H. Morrison, Esquire

State Bar of Texas
Ronald F. Ederer, Esquire

Vermont Bar Association
John J. Kennelly, Esquire

Virginia State Bar
Mary Yancey Spencer, Esquire

Washington State Bar Association
Tim Weaver, Esquire

The West Virginia State Bar
Thomas R. Tinder, Esquire

State Bar of Wisconsin
Gary E. Sherman, Esquire

Wyoming State Bar
Richard E. Day, Esquire

Committee on Rules of
Practice and Procedure
June 1996
Information

FEDERAL JUDICIAL CENTER REPORT

This is an update of selected Federal Judicial Center projects and activities related to interests of this Committee.

I. Publications, Manuals, and Videos

1. **Programs on new habeas and prisoner civil rights provisions contained in the Antiterrorism and Effective Capital Punishment Act and the Prison Litigation Reform Act.** We are planning a nationally broadcast videoprogram, probably in July or August, to analyze the new habeas provisions and how the courts have been interpreting them, with some attention also to the Prison Litigation Reform Act. We will also produce a newsletter to summarize relevant appellate and district court decisions under the statutes. It will be patterned after our *Guideline Sentencing Update*. but have a shorter life span. The goal is to provide help during the most intense period of judicial interpretation. The Center will continue to adapt our regular educational programs and reporting services to deal with these changes. In light of these statutes, we are revising the curriculum for our June conference of chief probation and pretrial services officers (the antiterrorism act also affects mandatory restitution), our August Capital Case Management Workshop for appellate clerks, this summer's programs for Magistrate Judges, and next September's seminar on pro se litigation.

2. **Special issue of *Directions* focusing on pro se litigation.** A special issue of *Directions* has been completed on pro se litigation in the federal courts. Articles focus on prisoner and non-prisoner pro se litigation. It is expected to be distributed in early June.

3. **Resource Guide on Managing Prisoner Civil Rights Litigation.** The Center is completing a resource guide to assist district and magistrate judges, as well as pro se law clerks and others, with managing prisoner civil rights litigation. The guide will incorporate a discussion of the relevant provisions of the Prisoner Litigation Reform Act . The guide will be used at an upcoming FJC workshop that will focus on managing prisoner civil rights litigation (see below).

4. ***Bench Book for U.S. District Court Judges.*** The Center is publishing a new edition of its *Bench Book* in 1996, which has been updated and revised pursuant to the recommendations of its *Bench Book* Committee, and incorporates several suggestions received through the Criminal Law Committee. Information from the Center's ongoing study of procedures for handling capital case litigation will be used to update the *Bench Book* section on death penalty cases.

5. **Report of a Survey Concerning Rule 11, Federal Rules of Civil Procedure.** This study, undertaken at the request of the Advisory Committee on Civil Rules, examined judges' and attorneys' experiences under the 1983 and 1993 versions of Rule 11 and their views of the effects each version has had. A majority of both prefer the 1993 amendments, with one exception: Most believe the purpose of Rule 11 sanctions should include compensation of the party injured by violation of the rule and should not be limited to deterrence of future violations. This study was recently published, and a copy was sent to each Committee member.

6. **Guideline sentencing publications.** The Center continues to publish the newsletter *Guideline Sentencing Update* at least monthly and more frequently as case law warrants, and in August will publish a new edition of *Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues*. The Center distributes both publications to judges and probation and pretrial services offices.

7. **Report on Fed. R. Civ. P. 23—Class Action Activity.** The Center's study of class action activity, prepared at the request of the Advisory Committee on Civil Rules, is scheduled for publication in June, 1996. Among other findings, the study found that a substantial number of "routine" class actions, particularly securities cases, have standard modes of litigation and adjudication. Most of these cases resulted in awards for individual class members that appeared to be too small to support individual litigation. Most certified class actions settled, but usually not before the merits were litigated via a motion to dismiss or motion for summary judgment. The study was based on cases filed as class actions in E.D. Pa, S.D. Fla., N.D. Ill., and N.D. Cal.

8. ***Manual on Recurring Problems in Criminal Trials.*** A third edition of this manual, originally prepared by the late Judge Donald S. Voorhees (W.D. Wash.) is in press and will be distributed in June.

9. ***Chambers to Chambers* on death penalty cases.** In June the Center will publish a *Chambers to Chambers* paper on management of the pretrial, trial, and penalty phases of a death penalty case. This will be the third in the Center's series of *Chambers to Chambers* on legal and practical issues unique to federal death penalty cases. The first paper was on appointment of counsel and jury selection; the second addressed compensation of counsel, investigators, and expert witnesses. These articles are based largely on the experiences of several judges who have tried federal death penalty cases and specifically address judges' needs for information about how to manage such cases. The Center distributes *Chambers to Chambers* to all federal judges.

10. **Media programs on capital cases.** The Center videotaped a panel presentation on capital case litigation by Judges Milton Shadur, Avern Cohn, and Henry Morgan at the Center's Workshop for Judges of the Fourth Circuit and audiotaped a program at the Workshop for Judges of the Tenth Circuit by Judge Reena Raggi and counsel who have handled death penalty cases. These media programs are now part of the clearinghouse of capital case materials that the Center is compiling from judges who have tried death penalty cases and is making available to judges seeking assistance on death penalty matters.

11. **District judge orientation videos.** In the last six months, the Center has reedited and updated several programs in its video orientation series for district judges. Reedited titles include *A Word of Welcome to the Federal Judicial Center* and *Court Officers and Support Personnel: Resources for the District Judge*. In January, the Center released a new version of *The Role of the Magistrate Judge*. The Center is producing a new version of *The Final Pretrial Conference and the Civil Trial.* in June.

12. **Juror orientation video.** In February, the Center released *Called To Serve*, a video orientation for petit jurors. The Center distributed the program to all district courts for use, at their option, in juror orientation programs.

13. **ADR and Settlement Procedures in the Federal District Courts. A Sourcebook for Judges and Lawyers.** The Center will soon publish a sourcebook describing the alternative dispute resolution and settlement procedures used in the district courts. The sourcebook provides district-by-district descriptions of current ADR programs. Its purpose is to assist the

Committee and the courts in developing policy and programs regarding ADR and to give guidance to attorneys who practice in federal court.

14.**Sourcebook on Appellate Conference/Mediation Programs in the Federal Courts of Appeals: A Sourcebook for Judges and Attorneys.** Later this year the Center will publish a sourcebook describing pre-argument conference and mediation procedures implemented in the courts of appeals pursuant to Fed. R. App. P. 33. The sourcebook will be a reference guide for courts and others interested in learning more about these programs.

15. **Magistrate judge orientation video on Central Violations Bureau.** In March the Center released *The Central Violations Bureau: How It Helps Magistrate Judges Process Petty Offenses.* The program, which is part of the Center's video orientation series for new magistrate judges, describes the work of the Central Violations Bureau and standardized CVB procedures that assist magistrate judges in processing petty offense cases efficiently.

16. **Security awareness in the federal courts.** In April the Center completed a video on workplace security for federal employees, which it produced at the request of the Committee on Security, Space, and Facilities. The Committee has approved the video for distribution to the courts for use in security awareness programs.

II. Education and Training Seminars and Workshops

These Center seminars and workshops involving matters of interest to the Committee are a small portion of the Center's total educational offerings. In calendar 1995, the Center provided 1,226 educational programs that reached 26,875 federal judges and court staff.

1. **Federal Criminal Law and Procedure Seminar.** First offered in December 1992, this seminar is designed to discuss current criminal procedure and law in a participatory format. Topics include habeas corpus; money laundering; managing the high profile, multi-defendant criminal trial; criminal forfeiture; special problems in conspiracy cases; and issues of uncharged misconduct at trial and sentencing, including 404(b) and relevant conduct. The seminar is offered to 25 judges and will be held in August in Portland, Oregon.

2. **Federal Civil Law and Procedure Seminar.** This new program will deal with legal and procedural challenges that arise in civil litigation, including class actions and citizen suits; summary judgment; injunctions; joinder and counterclaims; venue; discovery; damages (including fee-splitting); use of special masters and court-appointed experts; and attorney's fees. The seminar is offered to 40 judges and will be held in December in Phoenix, Arizona.

3. **Seminar on Juror Utilization and Management.** Teams consisting of judges, clerks, jury administrators and other staff from five district courts attended an April 29-May jury program. A seminar session on notoriety trials, long trials and the use of prescreening questionnaires included discussions on general vs. individual voir dire, anonymous juries, and sequestration.

4. **Court-Appointed Experts.** As an outgrowth of its science and technology project, the Center is assisting in development of two demonstration projects that will provide judges the names of prominent scientists, doctors, and engineers who will serve as court-appointed experts. The National Conference of Lawyers and Scientists (a joint committee of the ABA and the American Association for the Advancement of Science) is preparing a demonstration project to link judges' requests for help in identifying court-appointed experts with specialists

nominated by professional societies. This program is intended to provide assistance in cases with unusually demanding scientific and technical evidence. The Center will serve as evaluator of the demonstration program if it goes forward. The Center has also recently agreed to help the Private Adjudication Center at Duke University School of Law prepare a proposal for funding to establish a standing list of "certified" experts who will agree to serve as court-appointed experts. This program will offer assistance in more routine cases in which problems with expert testimony arise.

5. **Judicial Seminar on Basic Scientific Principles.** In October, 1996, the Center will conduct an experimental seminar on scientific issues for 15 state and 15 federal judges. The seminar, to be held at Cold Spring Harbor Laboratory on Long Island, will focus first on basic principles of science, the scientific method, scientific "proof" and similar issues, and then will turn to practical scientific issues likely to confront judges in the courtroom or in appellate practice. The Center is co-sponsoring this seminar with the Judiciary Leadership Development Council, which annually conducts, with the Center, the Medina Seminar on Science and the Humanities.

6. **Federal Environmental Law Seminar.** Offered first in 1992, this seminar for judges will examine statutory and case law issues in environmental litigation. Experts discuss such topics as the origins of environmental law; the National Environmental Policy Act (NEPA); CERCLA; biodiversity and endangered species; regulatory takings; standing; and criminal enforcement in environmental cases. The Center co-sponsors this seminar, which is planned for 25 judges in Portland, Oregon next October, with Northwestern School of Law of Lewis & Clark College.

7. **Seminar for Federal Judges on Intellectual Property**. Also an outgrowth of the Center's science and technology project, this new program will address the often challenging issues that arise in patent, copyright, and trademark cases. Attention will be given to new issues arising from computer technology, including issues raised by the Internet and by increasingly complex software and hardware products and processes. The primary focus will be on emerging issues and litigation problems, including discovery, damages, special hearings, and use of special masters. The seminar, designed for 25 judges, will be held in June in Phoenix, Arizona.

8. **Management of Silicone Breast Implant Litigation.** At Chief Judge Sam Pointer's request, the Center has produced a videoprogram to help federal and state judges who may receive breast implant cases following breakdown of the settlement in that multi-district litigation. Chief Judge Pointer, Professor Francis McGovern (special master in the litigation), Chief Judge Frederick Motz, and Judge Janice Holder of the Circuit Court of Shelby County, Tennessee, discuss techniques for effective management of these cases. The video will be released in late May or early June. The Center also provided Judge Pointer time at the April Conference of Chief District Judges to speak on this subject.

9. **Seminar on Understanding Statistical Evidence.** In January the Center held a program on statistical concepts in Marina del Rey, California for a group of 30 federal judges. This pro-gram, also a product of the Center's science and technology project, was developed in response to judicial requests for more detailed education in basic statistical concepts. The program covered such topics as interpretation of descriptive statistics (e.g., mean, median, and standard deviation); drawing conclusions from data; and understanding confidence intervals, statistical significance, and multiple regression. The relationship between statistical significance and the legal burden of proof was also discussed. The program was funded in part by a grant to the Center's foundation from the Carnegie Commission on Science, Technology, and Government.

10. **Capital Case Management Workshop.** An August 5-7 workshop for appellate court staff will include sessions on emergency circuit processes, coordination of capital case procedures with state and U.S. district courts, the role of the Supreme Court, and case-management techniques.

11. **Seminar for Circuits Adopting Bankruptcy Appellate Panels.** In March 1996, the Center conducted a seminar for circuits adopting bankruptcy appellate panels. The seminar addressed issues from each stage of establishing a BAP, including sessions on how to design a BAP and how to run and organize a BAP. The First, Second, Sixth, Seventh, Eighth, and Tenth Circuits sent representatives. The participants are continuing their discussion through an online computer conference sponsored by the Center, which began just before the meeting and will run through June.

12. **Bankruptcy Administrator Workshop on Leadership in Addressing Trustee Fraud.** All bankruptcy administrators have been invited to bring two members of their staffs to a May workshop that is jointly funded by the Center and the AO. Participants in the two-day program will review events in a recently concluded fraud case and receive instruction on auditing and handling Chapter 7 cases in which the potential for trustee fraud may exist.

13. **Sentencing Institute.** Following discussions with Judge Barry, Director Hawk of the Bureau of Prisons, as well as Chairman Conaboy and staff of the Sentencing Commission, the FJC has decided to conduct a noncircuit-based sentencing institute in early FY97. Plans are to conduct the institute at Lexington, Kentucky on October 27-30, 1996. The institute will focus on national sentencing policy issues and will afford teams of district court judges, U.S. Attorneys, Federal Defenders, and chief probation officers from about ten districts to talk directly with members and staff of the Sentencing Commission and each other about important areas of concern with the sentencing guidelines. A half day program will be conducted at FMC-Lexington. If this institute proves successful, additional institutes may be planned with the approval and guidance of the Committee.

III. Research Projects

In addition to a number of the items noted above, the following selected research projects may be of interest to the Committee:

1. **Study of Waiver of Chapter 7 Filing Fee in Bankruptcy Courts.** Legislation passed in 1993 requires the judiciary to implement a three-year pilot program to study the costs and benefits of waiving the filing fee for individual Chapter 7 debtors who cannot pay the fee in installments. Implementation and evaluation of the program is under the supervision of the Subcommittee on In Forma Pauperis of the Committee on the Administration of the Bankruptcy System, with assistance from the Center and the AO. The pilot program was implemented in six districts on October 1, 1994 (S.D. Ill., D. Mt., E.D. NY, E.D. Pa., W.D. Tenn., and D. Ut.), and a report is due to Congress in March 1998. The Center will prepare the final report for the Bankruptcy Committee and in the interim submits progress reports on the program's operation to the Committee.

2. **Death Penalty Work Group.** As the number of crimes eligible for the federal death penalty has increased, the few federal judges who have had such cases have expressed concern about the relatively limited information available to inform judges about the substantive and procedural issues relevant to conducting a federal capital trial. The Center has established a work group to address this need and other questions raised by death

penalty cases. From the outset, the Center has consulted with the chairs of relevant Conference committees regarding these projects. Below are listed the individual projects of the work group.

A. ***Chambers to Chambers.*** [See above.]

B. **Clearinghouse for Information on Managing Death Penalty Cases.** The Center's Information Services Office (ISO) serves as a clearinghouse for information on techniques that federal judges are using to manage death penalty cases. The Center has asked all federal judges who have handled such cases to send to ISO materials such as jury questionnaires, orders, jury instructions, and verdict forms; these materials are provided to other federal judges on request.

C. **Study of Procedures for Handling Death Penalty Cases.** Center researchers have collected materials from federal judges who have handled death penalty cases and interviewed federal judges who have presided over death penalty cases. Researchers will also interview attorneys experienced in prosecuting and defending death penalty cases. One product of the study, planned for completion by Spring 1996, will be a *Bench Book* chapter annotated with sample forms and instructions. The study will also produce a longer report (also slated for completion in Summer 1996) describing in more detail the case management procedures used by judges in death penalty cases, and their observations about how these cases differ from more routine criminal actions.

D. **Death Penalty Tracking Study.** This is a long-term Center project to build a comprehensive database on all federal offenders who are or could have been subject to federal capital prosecution. The Center is currently working with the Department of Justice and other groups to develop the data elements for inclusion in the database. Data collection should start in the near future. The project is slated for completion in approximately 2002.

3. **Sentencing Survey.** We have completed a comprehensive survey of judges and chief probation officers regarding their experiences with and views of the federal sentencing guidelines. The Center was asked by the Criminal Law Committee to conduct the survey and it was conducted with the cooperation and assistance of the U.S. Sentencing Commission. The results of the survey are included in the Center's report that will be considered by the Criminal Law Committee at its June meeting.

4. **Criminal Video-Conferencing.** The Center is conducting a study of video conferencing of federal criminal pretrial hearings in connection with a pilot being conducted by the U.S. Marshals Service and the Federal Bureau of Prisons. One of the two pilot districts, Puerto Rico, has dropped out of the study, with only the Eastern District of Pennsylvania now using the video system on a limited but increasing basis. It is anticipated that one or two additional courts may be added as pilot sites. We will continue to monitor developments.

Item 5A

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

TO: **Hon. Alicemarie H. Stotler, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Hon. D. Lowell Jensen, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT **Report on Proposed and Pending Rules of Criminal Procedure**

DATE: **May 7, 1996**

I. INTRODUCTION.

At its meeting April 29, 1996, the Advisory Committee on the Rules of Criminal Procedure acted upon proposed amendments to Rules of Criminal Procedure 5.1, 16, 26.2, 31, 33, 35, and 43. The Committee decided not to take any further action on a proposed amendment to Rule 24(a), which would have provided for attorney-conducted voir dire.. This report addresses those proposals and recommendations to the Standing Committee.

Copies of the proposed rules and the accompanying committee notes are attached. A copy of the minutes of the April meeting is also attached.

II. ACTION ITEMS

A. Rule 5.1. Preliminary Examination & Rule 26.2. Production of Witness Statements.

The proposed amendments to Rule 5.1 and Rule 26.2 would require production of a witness' statement after the witness has testified at a preliminary hearing. The amendments parallel similar changes made in 1993 to Rules 32, 32.1, 46, and Rule 8 of the Rules Governing Proceedings Under § 2255. The proposed amendments are attached.

Recommendation: The Advisory Committee recommends that the amendments to Rules 5.1 and 26.2 be published for public comment.

B. Rule 16. Discovery and Inspection; Disclosure of Expert's Testimony.

At its July 1995 meeting, the Standing Committee approved for transmittal to the Judicial Conference two key amendments to Rule 16. The first amendment would have required the government to provide the names of its witnesses to be called at trial seven days before the trial. The second, would have required the parties to disclose summaries of expert testimony offered on the issue of the defendant's mental condition. The amendment requiring pretrial disclosure of names of government witnesses was the subject of pro and con discussion and was ultimately rejected by the Judicial Conference. Although there was no controversy and no discussion concerning the expert testimony amendment, it was rejected at the same time by the Judicial Conference.

At its January 1996, meeting, in light of this history, the Standing Committee asked whether the Advisory Committee wished to reconsider the amendment governing expert testimony and during its April 1996 meeting, the Advisory Committee did reconsider this proposal and voted to resubmit it to the Standing Committee.

The amendment, as it was forwarded to the Judicial Conference, is attached.

Recommendation: The Advisory Committee recommends that the amendments to Rule 16 regarding expert testimony be resubmitted to the Judicial Conference without further public comment.

C. Rule 31. Polling of Jurors.

The Advisory Committee has proposed an amendment to Rule 31, which would require that the jurors be polled individually whenever any polling occurs after the verdict, either at a party's request or on motion of the court. The Committee agreed with the view that there are distinct advantages to individual polling and that the practice should be required. Individual polling, for example, should reduce the likelihood of a post-trial attack on the verdict on the ground that one of the jurors disagreed with the verdict. The amendment leaves to the courts the exact method of conducting the individual polling in cases involving multiple defendants or multiple counts.

Recommendation: The Advisory Committee recommends that the proposed amendment to Rule 31 be published for public comment.

D. Rule 33. Motion for New Trial.

The proposed amendment to Rule 33 is intended to provide some consistency to the amount of time for filing a motion for new trial based upon newly discovered evidence. As written, the defendant has two years from the "final judgment" to file such a motion. Because the courts interpret final judgment to mean the decision of the appellate court, the disparity in the actual amount of time available to file a motion for new trial can be great. The amendment shifts the triggering event from appellate action to the trial court's verdict or finding of guilty. That is currently the triggering event for motions for new trial based on grounds other than newly discovered evidence Because the amendment does not change the current two year limit, in effect it shortens the actual time for filing the motion. The Committee considered,. but rejected, a proposed change which would have extended the time to three years. The consensus of the Committee was that two years from the verdict or finding of guilty was sufficient time to file the motion.

Recommendation: The Committee recommends that the amendment to Rule 33 be published for public comment.

E. Rule 35(b). Reduction of Sentence for Substantial Assistance.

If a defendant has provided substantial assistance to the government *before* sentencing, the court may reduce the sentence in accordance with the Sentencing Guidelines, § 5K1.1. Rule 35(b) provides a mechanism for the government to seek a reduction in the defendant's sentence if the defendant provides "substantial assistance" *after* sentence is imposed. The proposed amendment to Rule 35(b) is an attempt to fill a gap which may exist where a defendant's pretrial and post-sentencing assistance, when considered separately, does not amount to substantial assistance, but is substantial when combined.

As reflected in the Committee Note, the amendment is not intended to provide "double dipping." The Committee believed that in practice, the likelihood that double dipping might occur would be rare because the government decides whether to file a Rule 35(b) motion.

Recommendation: The Advisory Committee recommends that the amendment to Rule 35 be published for public comment.

F. Rule 43(c)(4). Presence of Defendant.

The amendment to Rule 43(c) is necessary to address specifically the issue of the defendant's presence at a reduction of sentence hearing or a correction of sentence hearing conducted under § 3582(c). Amendments made to Rule 43 in 1995 addressed the question of in absentia sentencing of a defendant and the presence of a defendant at a "correction" of sentence proceeding. In light of those amendments and caselaw interpretation of Rule 35 (which addresses correction and reduction of sentences), it has become clear that a more comprehensive treatment of the issue is required. In addition, Rule 43 makes no mention of resentencing conducted under 18 U.S.C. § 3582(c) which may result from retroactive changes in the sentencing guidelines or from a motion by the Bureau of Prisons to reduce a sentence based on extraordinary and compelling reasons.

The proposed amendment provides that a defendant need not be present a correction or reduction of sentence under Rule 35(b) or (c) or at a resentencing conducted under 18 U.S.C. 3582(c). A defendant's presence would be required at a resentencing following a remand, under Rule 35(a).

Recommendation: The Advisory Committee recommends that the proposed amendment to Rule 43(c)(4) be published for public comment.

III. INFORMATION ITEM

A. Rule 24(a). Attorney Conducted Voir Dire.

The Standing Committee published for comment proposed amendments to Criminal Rule 24(a) in September 1995. The amendment, which addressed attorney-conducted voir dire of the jurors, generated considerable comment. Counting the letters and comments received before publication, the Committee received written comments from over 160 individuals or organizations and heard the testimony of 12 witnesses. The overwhelming number of negative comments on the proposed amendment came from the bench; virtually all other commentators favored the amendment.

After further discussion, the Committee decided not to pursue the amendment at this time. Instead, the Committee believes that the most appropriate step is to increase the awareness of the bench and the bar to the issue through the development and implementation of judicial workshop programs and specific training for newly appointed judges.

B. Minutes of April 1996 Meeting (Draft).

The draft Minutes of the Criminal Rules Committee meeting on April 29, 1996 are also attached to this report. Please note that the minutes have not yet been approved by the Advisory Committee.

Attachments:

Rules and Committee Notes
Draft Minutes

Rule 16. Discovery and Inspection[1]

(a) GOVERNMENTAL DISCLOSURE OF EVIDENCE.

(1) Information Subject to Disclosure.

* * * * *

(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 under Rules 702, 703, and 705 as evidence at trial on the issue of the defendant's mental condition. ~~This~~ The summary provided under this subdivision shall ~~must~~ describe the witnesses' opinions, the bases

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[1]. New matter is underlined and matter to be omitted is lined through.

and the reasons for those opinions ~~therefor~~, and the witnesses' 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 ~~agents in connection with the investigation or prosecution of~~ 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.

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(b) THE DEFENDANT'S DISCLOSURE OF EVIDENCE.

(1) *Information Subject to Disclosure*.

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(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 under Rules 702, 703, and 705 of the Federal Rules of Evidence as evidence at trial: (i) if ~~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. ~~the defendant, at the government's request, must disclose to the government a written summary of testimony the defendant intends to use under Rules 702, 703 and 705 of the Federal Rules of Evidence as evidence at trial.~~ This summary ~~must~~ shall describe the witnesses' opinions ~~of the witnesses~~, the bases and reasons for those opinions ~~therefor~~, and the witnesses' qualifications.

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COMMITTEE NOTE

Subdivision (a)(1)(E). Under Rule 16(a)(1)(E), as amended in 1993, the defense is entitled to disclosure of certain information about expert witnesses which the government intends to call during the trial as well as reciprocal pretrial disclosure by the

government upon defense disclosure. This amendment is a parallel reciprocal disclosure provision which is triggered by a government request for information concerning defense expert witnesses as to the defendant's mental condition, which is provided for in an amendment to (b)(1)(C), *infra*.

Subdivision (b)(1)(C). Amendments in 1993 to Rule 16 included provisions for pretrial disclosure of information, including names and expected testimony of both defense and government expert witnesses. Those disclosures are triggered by defense requests for the information. If the defense makes such requests and the government complies, the government is entitled to similar, reciprocal discovery. The amendment to Rule 16(b)(1)(C) provides that if the defendant has notified the government under Rule 12.2 of an intent to rely on expert testimony to show the defendant's mental condition, the government may request the defense to disclose information about its expert witnesses. Although Rule 12.2 insures that the government will not be surprised by the nature of the defense or that the defense intends to call an expert witness, that rule makes no provision for discovery of the identity, the expected testimony, or the qualifications of the expert witness. The amendment provides the government with the limited right to respond to the notice provided under Rule 12.2 by requesting more specific information about the expert. If the government requests the specified information, and the defense complies, the defense is entitled to reciprocal discovery under an amendment to subdivision (a)(1)(E), *supra*.

Item 5B

Criminal Rules Committee
Proposed Amendent: Rule 5.1
May 1996

Rule 5.1. Preliminary Examination

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(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.

COMMITTEE NOTE

The addition of subdivision (d) mirrors similar amendments made in 1993 which extended the scope of Rule 26.2 to Rules 32, 32.1, 46 and Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255. As indicated in the Committee Notes accompanying those amendments, the primary reason for extending the coverage of Rule 26.2 rested heavily upon the compelling need for accurate information affecting a witness' credibility. That need, the Committee believes, extends to a preliminary examination under this rule where both the prosecution and the defense have high interests at stake.

A witness' statement must be produced only after the witness has personally testified.

Criminal Rules Committee
Proposed Amendent: Rule 26.2
May 1996

Rule 26.2. Production of Witness Statements

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(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(f)~~ 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; ~~and~~

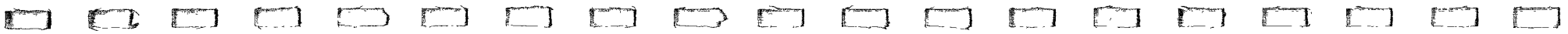
(4) in Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255; and

(5) in Rule 5.1 at a preliminary examination.

COMMITTEE NOTE

The amendment to subdivision (g) mirrors similar amendments made in 1993 to this rule and to other Rules of Criminal Procedure which extended the application of Rule 26.2 to other proceedings, both pretrial and post-trial. This amendment extends the requirement of producing a witness' statement to preliminary examinations conducted under Rule 5.1.

Subdivision (g)(1) has been amended to reflect changes to Rule 32.



Criminal Rules Committee
Proposed Amendment: Rule 31
May 1996

Rule 31. Verdict

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(d) POLL OF JURY. When a verdict is returned and before it is recorded, the court, at the request of any party or upon its own motion, shall poll the jurors individually. ~~jury shall be polled at the request of any party or upon the court's own motion.~~ If ~~upon~~ the poll reveals a lack of unanimity ~~there is not unanimous concurrence~~, the court may direct the jury ~~may be directed~~ to retire for further deliberations or it may ~~be discharged~~ discharge the jury.

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COMMITTEE NOTE

The right of a party to have the jury polled is an "undoubted right." *Humphries v. District of Columbia*, 174 U.S. 190, 194 (1899). Its purpose is to determine with certainty that "each of the jurors approves of the verdict as returned; that no one has been coerced or induced to sign a verdict to which he does not fully assent." *Id.*

Currently, Rule 31(d) is silent on the precise method of polling the jury. Thus, a court in its discretion may conduct the poll collectively or individually. As one court has noted, although the prevailing view is that the method used is a matter within the discretion of the trial court, *United States v. Miller*, 59 F.3d 417, 420 (3d Cir. 1995) (citing cases), the preference, nonetheless of the appellate and trial courts, seems to favor individual polling. *Id.* (citing cases). That is the position taken in the American Bar Association Standards for Criminal Justice § 15-4.5. Those sources favoring individual polling observe that conducting a poll of the jurors collectively saves little time and does not always adequately insure that an individual juror who has been forced to join the majority during deliberations will voice dissent from a collective response. On the other hand, an advantage to individual polling is the "likelihood that it will discourage post-trial efforts to challenge the verdict on allegations of coercion on the part of some of the jurors." *United States v. Miller*, *supra*, at 420, *citing Audette v. Isaksen Fishing Corp.*, 789 F.2d 956, 961, n. 6 (1st Cir. 1986).

The Committee is persuaded by the authorities and practice that there are advantages of conducting an individual poll of the jurors. Thus, the rule requires that the jurors be polled individually when a polling is requested, or when polling is directed sua sponte by the court. The amendment, however, leaves to the court the discretion as to whether to conduct a separate poll for each defendant, each count of the indictment or complaint or on other issues.

Criminal Rules Committee
Proposed Amendment: Rule 33
May 1996

Rule 33. New Trial.

The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for new trial based on the ground of newly discovered evidence may be made only before or within two years after ~~final judgment~~, the verdict or finding of guilty. ~~but if~~ If an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after the verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

COMMITTEE NOTE

As currently written, the time for filing a motion for new trial on the ground of newly discovered evidence runs from the "final judgment." The courts, in interpreting that language, have uniformly concluded that that language refers to the action of the Court of Appeals. *See, e.g., United States v. Reyes*, 49 F.3d 63, 66 (2d Cir. 1995)(citing cases). It is less clear whether that action is the appellate court's judgment or the issuance of its mandate. In *Reyes*, the court concluded that it was the latter event. In either case, it is clear that the present approach of using the appellate court's final judgment as the triggering event can cause great disparity in the amount of time available to a defendant to file timely a motion for new trial. This would be especially true if, as noted by the Court in *Reyes*, *supra* at 67, an appellate court stayed its mandate pending review by the Supreme Court. *See also Herrera v. Collins*, 113 S.Ct. 853, 865-866 (1993)(noting divergent treatment by States of time for filing motions for new trial).

It is the intent of the Committee to remove that element of inconsistency by using the trial court's verdict or finding of guilty as the triggering event. The change also furthers internal consistency within the rule itself; the time for filing a motion for new trial on any other ground currently runs from that same event.

Criminal Rules Committee
Rule 35(b)
May 1996

Rule 35. Correction or Reduction of Sentence

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(b) REDUCTION OF SENTENCE FOR CHANGED CIRCUMSTANCES. The court, on motion of the Government made within one year after the imposition of the sentence, may reduce a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code. The court may consider a government motion to reduce a sentence made one year or more after imposition of the sentence where the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after imposition of sentence. In evaluating whether substantial assistance has been rendered, the court may consider the defendant's pre-sentence assistance. The court's authority to reduce a sentence under this ~~subsection~~ subdivision includes the authority to reduce such sentence to a level below that established by statute as a minimum sentence.

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COMMITTEE NOTE

The amendment to Rule 35(b) is intended to fill a gap in current practice. Under the Sentencing Reform Act and the applicable guidelines, a defendant who has provided "substantial" assistance to the Government before sentencing may receive a reduced sentence under United States Sentencing Guideline § 5K1.1. And a defendant who provides substantial assistance after the sentence has been imposed may receive a reduction of the sentence if the Government files a motion under Rule 35(b). In theory, a

defendant who has provided substantial assistance both before and after sentencing could benefit from both § 5K1.1 and Rule 35(b). But a defendant who has provided, on the whole, substantial assistance may not be able to benefit from either provision because each provision requires "substantial assistance." As one court has noted, those two provisions contain distinct "temporal boundaries." *United States v. Drown*, 942 F.2d 55, 59 (1st Cir. 1991).

Although several decisions suggest that a court may aggregate the defendant's pre-sentencing and post-sentencing assistance in determining whether the "substantial assistance" requirement of Rule 35(b) has been met, *United States v. Speed*, 53 F.3d 643, 647-649 (4th Cir. 1995)(Ellis, J. concurring), there is no formal mechanism for doing so. The amendment to Rule 35(b) is designed to fill that need. Thus, the amendment permits the court to consider, in determining the substantiality of post-sentencing assistance, the defendant's pre-sentencing assistance, irrespective of whether that assistance, standing alone, was substantial.

The amendment, however, is not intended to provide a double benefit to the defendant. Thus, if the defendant has already received a reduction of sentence under U.S.S.G. § 5K1.1 for substantial pre-sentencing assistance, he or she may not have that assistance counted again in any Rule 35(b) motion.

Criminal Rules Committee
Proposed Amendment: Rule 43
May 1996

Rule 43. Presence of the Defendant

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(c). PRESENCE NOT REQUIRED. A defendant need not be present:

(1) when represented by counsel and the defendant is an organization, as defined in 18 U.S.C. § 18;

(2) when the offense is punishable by fine or by imprisonment for not more than one year or both, and the court, with the written consent of the defendant, permits arraignment, plea, trial, and imposition of sentence in the defendant's absence;

(3) when the proceeding involves only a conference or hearing upon a question of law; or

(4) when the proceeding involves a reduction or correction of sentence under Rule ~~35~~ 35(b) or (c) or 18 U.S.C. § 3582(c).

COMMITTEE NOTE

The amendment to Rule 43(c)(4) is intended to address two issues. First, the rule is rewritten to clarify whether a defendant is entitled to be present at resentencing proceedings conducted under Rule 35. As a result of amendments over the last several years to Rule 35, implementation of the Sentencing Reform Act, and caselaw interpretations of Rules 35 and 43, questions had been raised whether the defendant had to be present at those proceedings. Under the present version of the rule, it could be possible to require the defendant's presence at a "reduction" of sentence hearing conducted under Rule 35(b), but not a "correction" of sentence hearing conducted under Rule 35(a). That potential result seemed at odds with sound practice. As amended, Rule 43(c)(4) would permit a court to reduce or correct a sentence under Rule 35(b) or (c), respectively, without the defendant being present. But a sentencing proceeding being conducted on remand by an appellate court under Rule 35(a) would continue to require the defendant's

presence. *See, e.g., United States v. Moree*, 928 F.2d 654, 655-656 (5th Cir. 1991)(noting distinction between presence of defendant at modification of sentencing proceedings and those hearings that impose new sentence after original sentence has been set aside).

The second issue addressed by the amendment is the applicability of Rule 43 to resentencing hearings conducted under 18 U.S.C. § 3582(c). Under that provision, a resentencing may be conducted as a result of retroactive changes to the Sentencing Guidelines by the United States Sentencing Commission or as a result of a motion by the Bureau of Prisons to reduce a sentence based on "extraordinary and compelling reasons." The amendment provides that a defendant's presence is not required at such proceedings. In the Committee's view, those proceedings are analogous to Rule 35(b) as it read before the Sentencing Reform Act of 1984, where the defendant's presence was not required. Further, the court may only reduce the original sentence under these proceedings.

Item 5C

MINUTES [DRAFT]
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

April 29, 1996
Washington, D.C.

The Advisory Committee on the Federal Rules of Criminal Procedure met at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. on April 29, 1996. These minutes reflect the actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Jensen, Chair of the Committee, called the meeting to order at 8:40 a.m. on Monday, April 29, 1996. The following persons were present for all or a part of the Committee's meeting:

Hon. D. Lowell Jensen, Chair
Hon. W. Eugene Davis
Hon. Sam A. Crow
Hon. George M. Marovich
Hon. David D. Dowd, Jr.
Hon. D. Brooks Smith
Hon. B. Waugh Crigler
Hon. Daniel E. Wathen
Prof. Kate Stith
Mr. Robert C. Josefsberg, Esq.
Mr. Henry A. Martin, Esq.
Mr. Roger Pauley, Jr., designate of the Asst. Attorney General for the Criminal Division
Professor David A. Schlueter, Reporter

Also present at the meeting were: Hon. Alicemarie H. Stotler; Chair of the Standing Committee on Rules of Practice and Procedure; Hon. William R. Wilson, Jr., a member of the Standing Committee on Rules of Practice and Procedure and a liaison to the Committee; Professor Daniel R. Coquillette, Reporter to the Standing Committee; Mr. Peter McCabe, Mr. John Rabiej, and Mr. Paul Zing from the Administrative Office of the United States Courts; Mr. Webb Hitt from the Federal Judicial Center, Ms. Mary Harkenrider from the Department of Justice, and Mr. Joseph Spaniol, consultant to the Standing Committee.

The attendees were welcomed by the chair, Judge Jensen, who recognized a new member to the Committee, Professor Kate Stith from Yale Law School. Later in the

meeting, Judge Jensen recognized the contributions of Professor Saltzburg, who made a brief appearance, and whose term on the Committee had expired.

II. APPROVAL OF MINUTES OF OCTOBER 1995 MEETING

Following minor changes to the minutes of the October 1995 meeting, Judge Marovich moved that they be approved. Following a second by Judge Smith, the motion carried by a unanimous vote.

III. CRIMINAL RULES APPROVED BY THE SUPREME COURT AND FORWARDED TO CONGRESS

The Reporter informed the Committee that by operation of the Rules Enabling Act, amendments to four rules had become effective on December 1, 1995: Rule 5(a) (Initial Appearance Before the Magistrate Rule 43 (Presence of Defendant); Rule 49(e) (Repeal of Provision re Filing of Dangerous Offender Notice); and Rule 57 (Rules by District Courts).

IV. RULE 24(a): APPROVED BY STANDING COMMITTEE FOR PUBLICATION AND COMMENT

The Reporter informed the Committee that the period for comment on proposed amendments to Rule 24(a) had been completed and presented a brief overview of the comments supporting and opposing the proposal. He also noted that a number of witnesses had provided testimony at two scheduled hearings.

Judge Jensen informed the Committee that the Civil Rules Advisory Committee had decided not to forward a similar amendment in Civil Rule 47 to the Standing Committee. Instead, it hoped to encourage continued discussion and education about the issue of attorney conducted voir dire.

Judge Marovich expressed regret and doubt about the prospects for the proposed amendment and the process used to obtained comments on the amendment. He believed that those judges who believe that attorney conducted voir dire takes too much time should examine their procedures. And, he added, speed is not everything in conducting a criminal trial.

Judge Jensen responded by noting that the Committee's agenda is public and that anyone interested in commenting on a proposal may do so. He also noted that a short article was being prepared for the publication, Third Branch, which would address the issue of attorney conducted voir dire. Judge Davis questioned whether the proposed amendment had any real chance of succeeding and Mr. Josefsberg stated that he had no

strong desire to push forward with an issue that seemed doomed. But, he added, he was also hesitant to completely abandon the proposal. Judge Jensen noted that he too believed that some attempt should be made to monitor attorney participation in voir dire in death penalty cases.

Judge Wilson stated that he believed the proposed amendment should be carried forward to the Standing Committee for its consideration. Judge Marovich added that he was willing to accept the rejection of the proposal on the merits. In response, Judge Jensen observed that the rules enabling act process had worked. In this instance the bench and bar had been sensitized to the debate regarding attorney conducted voir dire. Professor Stith opposed the proposal on the merits and asked whether the Department of Justice had stated a position on the proposal. In response, Ms. Harkenrider indicated that initially, the Department had voted against the proposal because it believed that the judge should maintain control of the courtroom. The Department, however, had voted in favor of seeking public comment and that it was not opposed to a pilot program. Its current position was to oppose the proposed amendment. In particular, she noted that the Department had concerns about pro se defendants questioning the jurors.

Judge Smith expressed reluctance to forward the amendment to the Standing Committee. While he had been initially opposed to the idea of more attorney participation in voir dire, he now believed that the amendment would marginally improve the process and give the appearance of fairness. He did not believe that judges would lose control of the courtroom by permitting attorney conducted voir dire. He agreed with other members who had expressed the view that the process of obtaining comments had been constructive.

Justice Wathen indicated that Maine follows the present federal practice and that intellectually he could not support a proposed amendment which would increase attorney participation. In his view the proposal would result in a significant interference with the jurors. Judge Crow indicated that he too would oppose forwarding the amendment. He had polled the judges in the Tenth Circuit and only one judge favored the proposed change. He added, that in his view, the current voir dire procedures were not "broken."

Judge Dowd noted that he had supported the version of the amendment forwarded to the Standing Committee because that version had included a timely request provision. Now that that provision had been deleted--as a result of conforming both the civil and criminal rule versions--he could no longer support the amendment.

Mr. Martin moved that the proposed amendment to Rule 24(a) be approved by the Committee and forwarded to the Standing Committee. Judge Marovich seconded the motion, which failed by a vote of 3 to 8.

Judge Stotler informed the Committee that an upcoming issue of the Third Branch would contain a short article on the proposed amendments to both the civil and criminal

rules. She noted that the publication of the proposals had raised the level of consciousness of the bench and bar and that the issue of attorney-conducted voir dire should be subject to continued study and education.

V. CRIMINAL RULES CURRENTLY UNDER CONSIDERATION BY ADVISORY COMMITTEE

A. Proposed Amendments to Rules; Report of Subcommittee on Local Rules Project.

Judge Davis provide an oral and written report of his subcommittee on the local rules project. That subcommittee, consisting of Judge Davis (chair), Judge Crow, Judge Crigler, and Mr. Pauley, had addressed the question of whether certain local rules, identified by the Local Rules Project, might be worthy of including in the national rules. The subcommittee examined local rules which addressed the following four rules:

Rule 4: In some districts, a local rule requires the arresting officer to notify other members of the court family of the arrest. The subcommittee recommended against adoption of that practice in the national rule.

Rule 16: The subcommittee noted that in some districts, the parties are required to confer on discovery matters before filing a motion. The subcommittee also recommended against adoption of that practice in the national rule.

Rule 30: In fifteen districts, the parties are required to submit proposed jury instructions sometime before trial. The subcommittee also recommended that that practice not be included in the national rule.

Rule 47. The subcommittee noted that it had been recommended that Rule 47 be amended to require the parties to confer or attempt to confer before any motion is filed. That recommendation was also rejected by the subcommittee.

The subcommittee noted in its report that the proposed amendments to the foregoing four rules address "details of practice and procedure about which courts have differing customs and traditions and that are properly the subject of local rules." The report also noted that the members of the subcommittee did not believe that any significant problems existed in any of the foregoing areas.

The proposed amendment to Rule 12, generated some discussion: Two districts require the defense to give notice of an intent to raise the entrapment defense. Although a majority of the subcommittee had opposed adoption of that practice in the national rule, they believed that the matter should be raised for evaluation by the Committee.

Mr. Pauley indicated that the Department of Justice did not necessarily believe that the proposed notice requirement had merit but thought that the issue should be raised. He recounted a case where there were multiple defendants and after the jury was selected one defendant wanted to raise the defense, which resulted in a severance.

Judge Crow noted that adoption of such an amendment might lead to additional notifications of defenses that may not actually be raised at trial. Judge Crigler added that he did not perceive that any problem existed in this area.

Judge Dowd commented that it would difficult to distinguish between required notice of an entrapment defense and other defenses. He moved that the subcommittee's report be accepted. Judge Smith seconded the motion, which carried by a unanimous vote.

Professor Coquillette thanked the Committee and the subcommittee for assisting in carrying out the congressional mandate that the local rules be studied. In his view, the local rules governing criminal cases had not presented any serious conflicts with the national rules.

B. Rules 5.1 and 26.2, Production of Witness Statements at Preliminary Examinations

The Reporter indicated that in response to the Committee's action at its Fall 1995 meeting, he had drafted proposed amendments to Rules 5.1 and 26.2, which would require the production of a witness' statement at a preliminary examination. Following brief discussion and several changes to the language of the amendments, Judge Crigler moved that the proposed amendments to those two rules be forwarded to the Standing Committee for publication and comment. Judge Davis seconded the motion, which carried by a unanimous vote.

C. Rule 6(e)(3)(C)(iv). Disclosure of Grand Jury Information to State Officials

Judge Jensen provided a brief background on the implementation of Rule 6(e)(3)(C)(4), which permits disclosure of grand jury information to state officials. Although the rule does not explicitly require such, any requests to disclose the information must first be approved by the Assistant Attorney General, Criminal Division. That practice resulted from an assurance in 1984 by the Department of Justice to the Committee when amendments to Rule 6 were being considered. He noted that the Department had informed the Committee that it favored placing the decision to disclose in the hands of the local United States attorneys.

Mr. Pauley stated that the Department has dutifully followed the stated practice and that it believed it appropriate to inform the Committee of an intent to consider changing the practice. Professor Stith asked for information on how many requests are actually processed through this method. Mr. Pauley responded that approximately 20 or thirty requests were forwarded to the Department and could not think of a single case where it really made a difference that the request was handled at the Department level.

Judge Crigler raised the issue of judicial review of such requests, as currently required by the rule; several members noted that the requirement of review at the national level may be restrictive and that they generally count on the presentations of the attorney for the government.

Ms. Harkenrider indicated that the issue had arisen in the process of reviewing the United States Attorney's Manual and that currently, the Department was interested in de-centralizing various decisions, which be made just as effectively at the local level.

Mr. Josefsberg observed that in most cases there should be no problem with the local United States attorney seeking permission to disclose the information. But, he added, there may be politically sensitive cases where it would better to place the authority at the national level. After brief discussion about the options available to the Committee in addressing the issue, the consensus developed that the Department should be informed of the Committee's view that the current practice should be reaffirmed. No further action was taken on the matter, with the understanding that the Department would convey its response to the Committee at a future meeting.

D. Rule 11(e). Provision Barring Court from Participation in Plea Agreement Discussions

Judge Marovich presented a written and oral report on his subcommittee's consideration of the issue of whether a judge might be permitted to participate in any fashion in plea bargaining. The issue had been discussed at the Committee's Fall 1995 meeting in response to the practice used in the Southern District of California to expedite plea agreements. Under that procedure, a judge, other than a sentencing judge, works with the parties to reach a plea agreement and recommends a particular sentence, a procedure which might be in violation of Rule 11(e) which indicates that the "court" may not participate in plea discussions. The subcommittee, consisting of Judge Marovich (chair), Mr. Martin, and Mr. Pauley recommended that no action be taken to amend the rules. It had learned that it solicited the views of both government and defense attorneys and that the prevailing view was that no change should be made to Rule 11. The subcommittee also learned that the Southern District of California had discontinued the practice which originally gave rise to the Committee's consideration of the issue.

In the ensuing discussion, the Committee focused on the question of whether some change should be made to the rules to provide for some mechanism for determining the appropriate Sentencing Guidelines before trial. Several members expressed support for such a study; Judge Dowd noted that in Alabama, for example, a guilty plea and plea bargain are presented in conjunction with a presentencing report. Judge Stotler raised the question of whether the rules could be amended to provide for what might informally be called a "criminal motion for summary judgment" which would permit the court to resolve controlling issues of law at the pretrial stage.

Judge Jensen asked the subcommittee to continue its study of the issue and added Professor Stith as a member.

Judge Dowd moved that the subcommittee's report be accepted and Judge Davis seconded the motion, which carried by a unanimous vote.

The Committee also addressed the operation of Rule 11 on the two types of plea agreements reflected in Rule 11(e)(A)(B) and (C). Following brief discussion on the problem of predicting what effect the Sentencing Guidelines might have on a particular agreement, the Reporter was instructed to study Rule 11 and how it actually operates in conjunction with those Guidelines.

E. Rule 16(a)(1)(E), (b)(1)(C). Disclosure of Expert Witnesses

Judge Jensen indicated that when the Judicial Conference had considered the Committee's proposed amendments to Rule 16 at its Fall meeting, it had apparently rejected all of the proposed amendments, including the rather noncontroversial amendment requiring disclosure of expert witness' expected testimony. At its January 1996, meeting the Standing Committee had asked the Advisory Committee to consider whether it wished to resubmit those particular amendments to Rule 16. Judge Jensen asked whether the Department of Justice, which originally proposed the amendment, cared to seek further action.

Mr. Pauley noted that the proposed amendments were minor and had passed through the proposal and comment period without opposition; but he expressed reluctance to trigger further discussion of the rejected amendments which would have required the government to disclose the names and statements of its witnesses before trial.

Judge Jensen noted that the proposed amendment might raise a conflict with the Jencks Act which seemed to concern some members of the Standing Committee. Professor Stith noted that the Jencks problem already exists in other provisions of Rule 16.

Following consultation between the representatives of the Department of Justice, Mr. Pauley moved that the Committee approve and resubmit the amendments to Rule 16(a)(1)(E) and (b)(1)(C) to the Standing Committee for transmittal to the Judicial Conference, without additional public comment. Judge Dowd seconded the motion, which carried by a vote of 10 to 1.

F. Rule 31(d). Polling of Jurors

The Reporter indicated that as a result of the Committee's action at its Fall 1995 meeting, he had drafted a proposed amendment to Rule 31(d) which would require individual polling of jurors when a polling was requested by a party, or directed by the court on its own motion.

Judge Dowd indicated that although he had no problem with the rule as drafted, he questioned whether the specifics of carrying out the individual polling might be addressed. Mr. Josefsberg observed that the proposed change would be good for both the defense and the prosecution. Following some minor drafting changes, Judge Marovich moved that the amendment be approved and forwarded to the Standing Committee for publication and comment. Judge Smith seconded the motion, which carried by a unanimous vote.

G. Rule 31(e). Forfeiture Proceedings

Mr. Pauley explained a proposal submitted by the Department of Justice which would address the procedures for criminal forfeiture. In the Department's view, there are a number of inadequacies in Rule 31 for determining whether, and to what extent, the defendant had an interest in the property; the Circuits seem split on what the role of the jury should be in making those decisions. The proposed amendment would attempt to resolve the question of the jury's role and defer determination of the extent of the defendant's interest to an ancillary proceeding. Finally, he noted that in *Libretti v. United States*, ---- U.S. ---- (Nov. 7, 1995), the Court held that criminal forfeiture constitutes a part of sentencing in a criminal trial.

Following some additional discussion on whether the jury should have any role in making forfeiture decisions, Judge Jensen, with the concurrence of Mr. Pauley, indicated that the proposal to amend Rule 31(e) would be deferred to the Committee's Fall 1996 meeting to consider whether the amendment should be made to Rule 31 or Rule 32 or some other rule.

H. Rule 33. Motion for New Trial

The Reporter submitted a draft amendment to Rule 33 in accordance with the Committee's action at its Fall 1995 meeting. The proposed amendment would change the triggering event for a motion for new trial on grounds of newly discovered evidence from "final judgment" to an event at the trial level, i.e., the verdict or finding of guilty.

Mr. Pauley indicated that although the amendment would have the practical effect of shortening the period of time for filing a motion for new trial, it would promote consistency. He added that the Department might be willing to consider extending the period of time from two years, as it now reads, to three years, to come closer the approximate time now spent on a typical appeal.

Justice Wathen noted that it seemed odd to require the defendant to file a motion for new trial before the "final judgment," before he or she would know what the final disposition was. Professor Stith questioned why the time could not run from sentencing, to which Mr. Pauley responded that depending on the circumstances, the time expended for sentencing could run considerably longer in some cases. Following brief discussion on whether the time should be extended to three years, Judge Dowd that the proposal be changed to reflect three years. That motion was seconded by Mr. Martin. The motion failed by a vote of 5 to 6. Judge Davis moved that the proposed amendment, as drafted, be forwarded to the Standing Committee for publication and comment. Following a second by Judge Crigler, the motion carried by a vote of 9 to 2.

I. Rule 35(b). Reduction of Sentence for Substantial Assistance

The Reporter submitted two drafts of an amendment to Rule 35(b) to reflect the Committee's discussion of the issue at its Fall 1995 meeting. Both versions addressed the issue of whether the term "substantial assistance" should include a situation where the aggregate of both pre-trial and post-trial assistance was substantial. The first version included language adopted at that meeting plus bracketed language which would address the issue of possible double dipping by a defendant: "In evaluating whether substantial assistance has been rendered, the court may consider the defendant's presentence assistance, [unless the sentencing court considered such presentence assistance in imposing the original sentence.]." The second version of the amendment, provided by Mr. Pauley, provided a more detailed version of essentially the same approach.

Several members of the Committee expressed concern about whether the amendment needed to address specifically the potential problem of double dipping, noting that if government believes that the defendant has already benefited from non-substantial assistance during sentencing, it need not file a Rule 35(b) motion.

Judge Dowd moved that the proposed amendment in version one (without the bracketed information) be approved and forwarded to the Standing Committee for publication and comment. Following a second by Mr. Martin, the motion carried by a vote of 9 to 1.

J. Rule 43(c)(4). Presence of the Defendant.

The Reporter informed the Committee that the Justice Department had requested the Committee to consider amendments to Rule 43(c)(4) to clarify whether a defendant must be present at a proceeding to reduce a sentence under Rule 35 or to change a sentence under 18 U.S.C. § 3582(c). He indicated that it in the process of amending Rule 43(b), some changes had been made as well to Rule 43(c) cross-referencing Rule 35 which apparently inadvertently changed the existing practice. Mr. Pauley provided additional background information, as reflected in the Department's memo to the Committee, to explain that the various positions taken by the courts on the issue of whether the defendant must be present a proceeding to correct, reduce, or otherwise change the sentence.

Following brief discussion by several members of the Committee about the practical problems of having the defendant appear for a proceeding, and then returned to prison for release, Judge Crigler moved that Rule 43 be amended and forwarded to the Standing Committee for publication and comment. Following a second by Judge Davis, the motion carried by a unanimous vote.

VI. RULES OF APPELLATE PROCEDURE HAVING IMPACT ON CRIMINAL PRACTICE

A. Federal Rule of Appellate Procedure 4. Time for Filing Appeal in Criminal Case

The Reporter informed the Committee that Judge Stotler had inquired whether the Committee desired to make support any changes to Federal Rule of Appellate Procedure 4 as a result of *United States v. Marbley*, ---- F.3d ---- (7th Cir. 1996). In a letter to the Committee, Judge Posner noted that in *Marbley* the defense failed to show excusable neglect for failure to file a timely appeal and that as a result, the defendant would probably argue ineffective assistance of counsel in seeking relief under 28 U.S.C. § 2255. That, he suggests, will only result in more delay when the appellate court might have otherwise waived the untimely filing.

Following brief discussion, the Committee decided to defer to the Appellate Rules Committee on the issue.

B. Federal Rule of Appellate Procedure 9. Release of Defendant in Criminal Case

The Reporter also informed the Committee that Judge Stotler had raised the question of whether the Rules of Criminal Procedure should be amended to reflect the requirements in Appellate Rule 9(a), which requires the court to state reasons for releasing or detaining a criminal defendant. After a brief discussion of the issue, no action was taken. The Committee was generally of the view that Rule 46 currently cross-references 18 U.S.C. §§ 3142, 3143, and 3144, which govern detention and already include very specific requirements for the judicial officer to state reasons and/or findings for detention and conditions for release.

VII. ORAL REPORTS; MISCELLANEOUS

A. Report on Legislation Affecting Rules of Criminal Procedure

Mr. Rabiej informed the Committee that Senator Thurmond had introduced a bill to amend Criminal Rule 31 which would provide for a 5/6 vote on a verdict. Following brief discussion, Judge Jensen indicated that it appeared that the Committee was of the view that Congress should be informed that the proposal should be processed through the Rules Enabling Act procedures which would provide for public comment and input from the appropriate committees in the Judicial Conference.

B. Report on Restyling the Rules of Criminal Procedure

Judge Jensen reported that the effort to restyle the Rules of Criminal Procedure was on hold pending consideration of the restyled Appellate Rules which had been published for comment. The deadline for comments on those rules is December 31, 1996.

C. Report on Activities of Evidence Advisory Committee

Judge Dowd, who serves as the Committee's liaison to the Evidence Rules Committee, reported on proposed amendments to the Rules of Evidence which might have an impact on criminal trials. No action was taken on the proposed changes.

D. Impact of Anti-Terrorism Legislation on Criminal Rules

Judge Jensen indicated that the Committee should be prepared at the Fall 1996 meeting to discuss possible rules amendments resulting from recent legislation, especially in the area of habeas corpus review.

VIII. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Committee was reminded that its next meeting would be held at Portland Oregon on October 7-8, 1996.

Respectfully submitted,

David A. Schlueter
Professor of Law
Reporter

Item 7A

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

TO: Honorable Alicemarie Stotler, Chair, and Members of the Standing Committee on Rules of Practice and Procedure

FROM: Honorable James K. Logan, Chair
Advisory Committee on Appellate Rules

DATE: June 20, 1996

INTRODUCTION

The Advisory Committee on Appellate Rules met on April 15, 1996, in San Francisco, California. The Committee also held a telephone conference on May 1, 1996. The Advisory Committee considered the public comments on the proposed amendments to the Appellate Rules that were published in September, 1995. After making several changes to the proposed amendments, the Advisory Committee approved them for presentation to the Standing Committee for final approval. The Advisory Committee requests, however, that these rules not be forwarded to the Judicial Conference for its fall meeting. The Advisory Committee would like to delay these changes so that they become effective at the same time as the restyled rules currently published for comment.

The Advisory Committee also approved one additional rule change and amendment of a form for presentation to the Standing Committee with a request for publication. The Advisory Committee requests that these proposals be published as soon as possible so that these changes can also proceed on the same schedule as the restyled rules.

Both packages of proposed amendments are discussed in the "Action Items" section of this report.

I. ACTION ITEMS

A. Proposed amendments to Federal Rules of Appellate Procedure 26.1, 29, 35, and 41 submitted for approval by the Standing Committee with a request for delayed transmittal to the Judicial Conference.

These proposed amendments were published for comment by the bench and bar in September 1995. The period for public comment closed on March 1, 1996. Thirty letters were received from commentators. Twenty-six letters commented on particular rules and are discussed below following the text of the relevant proposed amendment. Four letters contained only general statements regarding all published rules. One other letter contained a general comment in addition to comments regarding particular rules. The general comments were as follows:

1. Stanley I. Adelstein, Esquire,
3390 Kersdale Road
Pepper Pike, Ohio 44124-5607

Mr. Adelstein supports requiring:
- recycled paper;
- double-sided copying; and
- non-chlorine bleached recycled paper.

2. Aaron H. Caplan, Esquire
Perkins Coie
1201 Third Avenue, 40th Floor
Seattle, Washington 98101-3099
on behalf of 12 members of the Law Firm Waste Reduction Network

Supports proposals under consideration to permit, or preferably to require, the use of double-sided copies and recycled paper for documents submitted to the federal courts.

3. Anthony J. DiVenere, Esquire
McDonald, Hopkins, Burke & Haber
2100 Bank One Center
600 Superior Avenue, E.
Cleveland, Ohio 44114-2653

Supports requiring: recycled paper for all filings; double-sided

copying of documents; and use of non-chlorine bleached recycled paper.

4. Thomas H. Frankel, Esquire
102 E. Street
Davis, California 95616

Urges the use of recycled paper for all documents submitted to the courts.

5. Philip A. Lacovara, Esquire
Mayer, Brown & Platt
1675 Broadway
New York, New York 10019-5820

States that most of the proposed amendments are well-considered and should be adopted but cautions against continuously fine-tuning the Federal Rules even if the changes are themselves worthwhile.

The first four "general" comments are addressed to the use of recycled paper and double-sided copying. They seem most relevant to Rule 32 (currently republished with the restyled rules). They are summarized here because they were submitted in response to this packet of rules. The comments will be retained for consideration at the close of the comment period for the restyled rules.

1. Synopsis of Proposed Amendments

(a) Rule 26.1 has been divided into three subdivisions to make it more comprehensible. The rule continues to require disclosure of a party's parent corporation but the proposed amendments delete the requirement that a corporate party identify subsidiaries and affiliates that have issued shares to the public. The amendments, however, add a requirement that a party list all its stockholders that are publicly held companies owning 10% or more of the party's stock.

(b) Rule 29 has been entirely rewritten and several significant changes are proposed.

- The provision in the former rule granting permission to conditionally file an amicus brief with the motion for leave to file is changed to require that the brief accompany the motion. In addition to identifying the movant's interest and

stating the general reasons why an amicus brief is desirable, the amended rule requires that the motion state the relevance of the matters asserted to the disposition of the case.

- The contents and form of the brief are specified.
- The amended rule limits an amicus brief to one-half the length of a party's principal brief.
- An amicus brief must be filed no later than 7 days after the principal brief of the party being supported.
- An amicus is not permitted to file a reply brief.

(c) Rule 35 is amended to treat a request for a rehearing en banc like a petition for panel rehearing so that a request for a rehearing en banc will suspend the finality of a court of appeals' judgment and extend the period for filing a petition for writ of certiorari. The sentence in the existing rule stating that a request for rehearing en banc does not suspend the finality of the judgment or stay the mandate is deleted. In keeping with the intent to treat a request for a panel rehearing and a request for a rehearing en banc similarly, the term "petition for rehearing en banc" is substituted for the term "suggestion for rehearing en banc." The amendments also require each petition for en banc consideration to begin with a statement concisely demonstrating that the case meets the criteria for en banc consideration. Intercircuit conflict is cited as an example of a proceeding that might involve a question of "exceptional importance" — one of the traditional criteria for granting an en banc hearing. The amendments limit a petition for en banc review to 15 pages.

(d) Rule 41 is amended to provide that the filing of a petition for rehearing en banc or a motion for a stay of mandate pending petition to the Supreme Court for a writ of certiorari delay the issuance of the mandate until the court disposes of the petition or motion. The amended rule also makes it clear that a mandate is effective when issued. The presumptive period for a stay of mandate pending petition for a writ of certiorari is extended to 90 days.

2. Text of Proposed Amendments, Summary of Comments Relating to Particular Rules, and GAP Report

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 26.1. Corporate Disclosure Statement

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

Committee Note

The rule has been divided into three subdivisions to make it more comprehensible.

Subdivision (a). The amendment deletes the requirement that a corporate party identify subsidiaries and affiliates that have issued shares to the public. Although several circuit rules require identification of such entities, the Committee believes that such disclosure is unnecessary.

A disclosure statement assists a judge in ascertaining whether or not the judge has an interest that should cause the judge to recuse himself or herself from the case. Given that purpose, disclosure of entities that would not be adversely affected by a decision in the case is unnecessary.

Disclosure of a party's parent corporation is necessary because a judgment against a subsidiary can negatively impact the parent. A judge who owns stock in the parent corporation, therefore, has an interest in litigation involving the subsidiary. The rule requires disclosure of all of a party's parent corporations meaning grandparent and great grandparent corporations as well. For example, if a party is a closely held corporation, the majority shareholder of which is a corporation formed by a publicly traded corporation for the purpose of acquiring and holding the shares of the party, the publicly traded grandparent corporation should be disclosed. Conversely, disclosure of a party's subsidiaries or affiliated corporations is ordinarily unnecessary. For example, if a party is a part owner of a corporation in which a judge owns stock, the possibility is quite remote that the judge might be biased by the fact that the judge and the litigant are co-owners of a corporation.

The amendment, however, adds a requirement that the party list all its stockholders that are publicly held companies owning 10% or more of the stock of the party. A judgment against a corporate party can adversely affect the value of the company's stock and, therefore, persons owning stock in the party have an interest in the outcome of the litigation. A judge owning stock in a corporate party ordinarily recuses himself or herself. The new requirement takes the analysis one step further and assumes that if a judge owns stock in a publicly held corporation which in turn owns 10% or more of the stock in the party, the judge may have sufficient interest in the litigation to require recusal. The 10% threshold ensures that the corporation in which the judge may own stock is itself sufficiently invested in the party that a judgment adverse to the party could have an adverse impact upon the investing corporation in which the judge may own stock. This requirement is modeled on the Seventh Circuit's disclosure requirement.

Subdivision (b). The language requiring inclusion of the disclosure statement in a party's principal brief is moved to this subdivision because it deals with the time for filing the statement. No substantive change is intended.

Subdivision (c). The amendments are stylistic and no substantive changes are intended.

Public Comments on Rule 26.1

Eleven letters commenting on the proposed amendments were received; the letter from the A.B.A. Section of Intellectual Property, however, included separate suggestions from two committees so there was a total of 12 commentators. Of the 12, four supported the amendments, none generally opposed the amendments, but 8 suggested revisions.

The comments were as follows:

1. Robert L. Baechtol, Esquire
Chair, Rules Committee
The Federal Circuit Bar Association
1300 I Street, N.W.
Suite 700
Washington, D.C. 20005-3315

The Association agrees that recusal will rarely be required based on a judge's ownership of stock in a litigant's subsidiary or affiliate; but states that "rarely" does not mean "never." The Association urges that the rule continue to require disclosure of subsidiaries and affiliates because it does not impose a significant burden and not requiring it risks adverse reflection on the court's neutrality when a judge would have elected recusal had the facts been disclosed.

2. Robert S. Belovich, Esquire
5638 Ridge Road
Parma, Ohio 44129

The rule will not assure disclosure of publicly held corporations which may be a joint venture partner of a party to an appeal, or of a publicly traded corporation which is a grandparent or great grandparent of a party to an appeal. He gives as an example a party that is a closely held corporation, the majority shareholder of which is a corporation formed by a publicly traded corporation for the purpose of acquiring and holding the majority shares of the party. The publicly traded corporation's disclosure would not be required under a strict reading of the rule.

3. Donald R. Dunner, Esquire
Chair, Section of Intellectual Property Law
American Bar Association
750 N. Lake Shore Drive
Chicago, Illinois 60611

Mr. Dunner submitted comments prepared by two of the section's committees:

a. One committee says that the amendments appear reasonable.

b. Another committee says that the proposed deletions from the rule are well-advised but the committee has two concerns about requiring a party to disclose any publicly-held company owning 10% or more of the party's stock. First, it implies that a judge who owns any stock in a company that owns 10% of the stock in a party should recuse himself or herself; the committee thinks this "over-extends an assumption of disqualification in some circumstances" and that the provisions may prevent a judge from using mutual funds to avoid the appearance of impropriety. Second, the committee thinks that compliance with the disclosure requirement could be burdensome and that the burden is not justified by the indirect and potentially extremely minimal ownership interests it addresses.

4. Kent S. Hofmeister, Esquire
Section Coordinator
Federal Bar Association
1815 H Street, N.W.
Washington, D.C. 20006-3697

Mr. Hofmeister forwarded the comments of Mark Laponsky, Esquire, the Chair of the Labor Law and Labor Relations Section of the Federal Bar Association. Mr. Laponsky thinks the changes generally make the rule more comprehensible but questions whether the new rule will generate adequate information. Substituting "stockholders that are publicly traded companies" for "affiliates" is helpful, but limiting disclosure to stockholders with 10% or greater interest in the party may cause difficulties in obtaining the requisite information from a corporate client. Although he does not disagree that a 10% threshold will identify stockholders whose interests are most likely to be affected by litigation, he thinks it would be easier for the corporation to simply identify all publicly traded stockholders.

5. Jack E. Horsley, Esquire
Craig & Craig
1807 Broadway Avenue
Post Office Box 689
Mattoon, Illinois 61938-0689

Attorney Horsley makes two comments:

a. He suggests that the rule be expanded to require the filing of a statement by the Chief Executive Officer and by members of the Board of Directors of the company.

b. He suggests amending lines 23-28 to state: "If the statement is filed before the principal brief, the party shall file an original and at least three copies, unless the court requires the filing of a ~~different~~ reasonable number by local rule or by order in a particular case."

6. Heather Houston, Esquire
Gibbs Houston Pauw
1111 Third Avenue, Suite 1210
Seattle, Washington 98101
on behalf of the Appellate Practice Committee of the Federal Bar Association for the Western District of Washington

It is not always clear whether a particular corporation is "publicly held." The committee suggests that the rule refer to companies "that have issued shares that are traded on exchanges or markets that are regulated by the Securities and Exchange Commission."

7. Philip A. Lacovara, Esquire
Mayer, Brown & Platt
1675 Broadway
New York, New York 10019-5820

Agrees with eliminating the need to identify a party's subsidiaries or affiliates; but suggests amending lines 12-14 as follows:
"listing any stockholder[s] that is a [are] publicly held company[ies] and that owns[ing] 10% or more of the party's stock."
The changes are intended to make it clear that the rule does not call for identifying public companies that, collectively, might own a total of 10% of the party's stock.

Even though there are other forms of financial involvement other than "stock" that could be effected by a decision for or against a party, e.g. convertible notes and debentures, Attorney Lacovara says that the difficulties of defining a broader category of investments and in tracking the identity of the investors

make the focus on "stock" reasonable.

8. Don W. Martens, Esquire
President
American Intellectual Property Law Association
2001 Jefferson Davis Highway, Suite 203
Arlington, Virginia 22202

The AIPLA supports the additional requirement of listing owners of more than 10% of the stock of the party to the appeal, but it questions the need to delete the identification of subsidiaries and affiliates. Although it is unlikely that a subsidiary or affiliate would be affected by the outcome of the appeal, it may be and the judges should have that information as well.

9. Honorable A. Raymond Randolph
Chair, Committee on Codes of Conduct of the
Judicial Conference of the United States
United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001-2866

The Committee supports the proposed revisions. Disclosure of only parent companies and public companies owning more than 10 percent of the party's stock should be adequate to ensure that the judges are made aware of parties' corporate affiliations and are able to make informed decisions about the need to recuse.

10. James A. Strain, Esquire
Seventh Circuit Bar Association
219 South Dearborn Street, Suite 2722
Chicago, Illinois 60604

Notes only that the proposed amendment brings the Federal Rule in accordance with its Seventh Circuit analogue.

11. Carolyn B. Witherspoon, Esquire
Office of the President
Arkansas Bar Association
P.O. Box 3178
Little Rock Arkansas 72203
(on behalf of the committee members of the Arkansas Bar Association Legislation and Procedures Committee)

Approves the proposed changes.

In addition to the comments submitted during the publication period, Judge James A. Parker wrote to Judge Logan after last summer's Standing Committee meeting. He was concerned that Rule 26.1 is too narrow because it deals only with corporations. Corporations are not the only form of organization that has numerous diverse owners. Judge Parker notes by way of example that the rule does not require a corporation that is a general or limited partner to disclose its interest in a limited partnership in which a judge may also be a limited partner. Judge Parker recommends broadening the language of Rule 26.1 to require identification of all types of organizations in which a party may have an interest that would create a conflict for a judge.

Gap Report on Rule 26.1

Changes were made at lines 11 and 12. Mr. Lacovara's suggestion was adopted so that it is clear the rule applies only when a single corporate stockholder owns at least 10% of a party's stock. And at line 11, the rule now requires disclosure of "all" of a party's parent corporations, rather than "any" parent corporation. The intent of the change is to require disclosure of grandparent and great-grandparent corporations. The Committee Note explains that change.

In addition a stylistic change was made in subdivision (c).

Rule 29. Brief of an Amicus Curiae

~~A brief of an amicus curiae may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion or at the request of the court, except that consent or leave shall not be required when the brief is presented by the United States or an officer or agency thereof, or by a State, Territory or Commonwealth. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. Save as all parties otherwise consent, any amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus brief will support unless the court for cause shown shall grant leave for later filing, in which event it shall specify within what period an opposing party may answer. A motion of an amicus curiae to participate in the oral argument will be granted only for extraordinary reasons.~~

(a) **When Permitted.** The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus-

curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

(b) **Motion for Leave to File.** The motion must be accompanied by the proposed brief and state:

(1) the movant's interest;

(2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

(c) **Contents and Form.** An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1. An amicus brief need not comply with Rule 28, but must include the following:

(1) a table of contents, with page references;

(2) a table of authorities — cases

(alphabetically arranged), statutes and other authorities — with references to the pages of the brief where they are cited;

(3) a concise statement of the identity of the amicus curiae and its interest in the case; and

(4) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review.

(d) **Length.** Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(e) **Time for Filing.** An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae who does not support either party must file its brief no later than 7 days after the

appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer.

(f) **Reply Brief.** Except by the court's permission, an amicus curiae may not file a reply brief.

(g) **Oral Argument.** An amicus curiae may participate in oral argument only with the court's permission.

Committee Note

Rule 29 is entirely rewritten.

Subdivision (a). The major change in this subpart is that when a brief is filed with the consent of all parties, it is no longer necessary to obtain the parties' written consent and to file the consents with the brief. It is sufficient to obtain the parties' oral consent and to state in the brief that all parties have consented. It is sometimes difficult to obtain all the written consents by the filing deadline and it is not unusual for counsel to represent that parties have consented; for example, in a motion for extension of time to file a brief it is not unusual for the movant to state that the other parties have been consulted and they do not object to the extension. If a party's consent has been misrepresented, the party will be able to take action before the court considers the amicus brief.

The District of Columbia is added to the list of entities allowed to file an amicus brief without consent of all parties. The other changes in this material are stylistic.

Subdivision (b). The provision in the former rule, granting permission to conditionally file the brief with the motion, is changed to one requiring that the brief accompany

the motion. Sup. Ct. R. 37.4 requires that the proposed brief be presented with the motion.

The former rule only required the motion to identify the applicant's interest and to generally state the reasons why an amicus brief is desirable. The amended rule additionally requires that the motion state the relevance of the matters asserted to the disposition of the case. As Sup. Ct. R. 37.1 states:

> "An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court. An *amicus* brief which does not serve this purpose simply burdens the staff and facilities of the Court and its filing is not favored."

Because the relevance of the matters asserted by an amicus is ordinarily the most compelling reason for granting leave to file, the Committee believes that it is helpful to explicitly require such a showing.

Subdivision (c). The provisions in this subdivision are entirely new. Previously there was confusion as to whether an amicus brief must include all of the items listed in Rule 28. Out of caution practitioners in some circuits included all those items. Ordinarily that is unnecessary.

The requirement that the cover identify the party supported and indicate whether the amicus supports affirmance or reversal is an administrative aid.

Subdivision (d). This new provision imposes a shorter page limit for an amicus brief than for a party's brief. This is appropriate for two reasons. First, an amicus may omit certain items that must be included in a party's brief. Second, an amicus brief is supplemental. It need not address all issues or all facets of a case. It should treat only matter not adequately addressed by a party.

Subdivision (e). The time limit for filing is changed. An amicus brief must be filed no later than 7 days after the principal brief of the party being supported is filed.

Occasionally, an amicus supports neither party; in such instances, the amendment provides that the amicus brief must be filed no later than 7 days after the appellant's or petitioner's principal brief is filed. Note that in both instances the 7-day period runs from when a brief is filed. The passive voice — "is filed" — is used deliberately. A party or amicus can send its brief to a court for filing and, under Rule 25, the brief is timely if mailed within the filing period. Although the brief is timely if mailed within the filing period, it is not "filed" until the court receives it and file stamps it. "Filing" is done by the court, not by the party. It may be necessary for an amicus to contact the court to ascertain the filing date.

The 7-day stagger was adopted because it is long enough to permit an amicus to review the completed brief of the party being supported and avoid repetitious argument. A 7-day period also is short enough that no adjustment need be made in the opposing party's briefing schedule. The opposing party will have sufficient time to review arguments made by the amicus and address them in the party's responsive pleading. The timetable for filing the parties' briefs is unaffected by this change.

A court may grant permission to file an amicus brief in a context in which the party does not file a "principal brief;" for example, an amicus may be permitted to file in support of a party's petition for rehearing. In such instances the court will establish the filing time for the amicus.

The former rule's statement that a court may, for cause shown, grant leave for later filing is unnecessary. Rule 26(b) grants general authority to enlarge the time prescribed in these rules for good cause shown. This new rule, however, states that when a court grants permission for later filing, the court must specify the period within which an opposing party may answer the arguments of the amicus.

Subdivision (f). This subdivision generally prohibits the filing of a reply brief by an amicus curiae. Sup. Ct. R. 37 and local rules of the D.C., Ninth, and Federal Circuits state that an amicus may not file a reply brief. The role of an amicus should not require the use of a reply brief.

Subdivision (g). The language of this subdivision stating that an amicus will be granted permission to participate in oral argument "only for extraordinary reasons" has been deleted. The change is made to reflect more accurately the current practice in which it is not unusual for a court to permit an amicus to argue when a party is willing to share its argument time with the amicus. The Committee does not intend, however, to suggest that in other instances an amicus will be permitted to argue absent extraordinary circumstances.

Public Comments on Rule 29

Fifteen letters commenting on proposed Rule 29 were submitted. Two of the letters contained separate suggestions from two persons or committees so there was a total of 17 commentators. Of the 17 commentators, none generally opposed the amendments; 3 supported the amendments without reservation; 13 suggested revisions; and 1 made no substantive comment.

The comments were as follows:

1. Chicago Council of Lawyers
One Quincy Court Building
Suite 800
220 S. State Street
Chicago, Illinois 60604

The Council generally agrees with the proposed amendment but suggests amending subpart (d) so that the court has discretion to permit a longer brief. The Council suggests that (d) should read as follows:

> An amicus brief may be no longer than one-half the maximum length of a party's principal brief unless the Court grants the amicus leave to file a longer brief for good cause.

2. Donald R. Dunner, Esquire
Chair, Section of Intellectual Property Law
American Bar Association
750 N. Lake Shore Drive
Chicago, Illinois 60611

Mr. Dunner submits comments from two of the section's committees:

One committee makes no substantive comment.

Another committee offers several suggestions:

a. that the District of Columbia should be added to the list of entities allowed to file an amicus brief without consent;
b. insert the word "or" at the end of subparagraph (a)(1), for clarity;
c. the rule should not require submission of the brief along with a motion for leave to file, instead the rule should require that the motion concisely state the arguments that will be made in the brief;
d. the late filing of an amicus brief should be permitted by stipulation of all parties;
e. subparagraph (f) is unclear; it may leave ambiguity as to whether an amicus may request leave to file a reply;
f. an amicus should be allowed to participate in oral argument if the party supported grants a portion of that party's allotted time to the amicus and the court is so informed.

3. Kent S. Hofmeister, Esquire
Section Coordinator
Federal Bar Association
1815 H Street, N.W.
Washington, D.C. 20006-3697

Mr. Hofmeister forwarded the comments to two different persons.

a. Sydney Powell, Esquire, the Chair of Appellate Law and Trial Practice Committee of the Federal Litigation Section. Attorney Powell suggests:

- It would be simpler to limit an amicus brief to 25 pages rather than "no more than one-half the maximum length of a party's principal brief." Currently it is not clear if "maximum" means maximum length "allowed" for a party's principal brief. She further notes that if a party is granted permission to file a longer brief, the rule appears to give the amicus one-half the expanded length. In which case, what happens if there are two appellants and one is allowed additional pages and the other is not? What happens when permission to file a longer brief is granted to the party very close to or contemporaneous with the deadline for filing the party's brief?
- It would be better to allow the filing of the motion and the brief within 15 days after the filing of the principal brief of the party whose position as to affirmance or reversal the amicus brief will support. The amicus can make an informed decision regarding whether it supports either party and can avoid repetition of the party's arguments. Ms. Powell concedes that special provision would need to be made to allow an appellant to respond to a brief in support of an appellee.

b. Mark Laponsky, Esquire, the Chair of the Labor Law and Labor Relations Section of the Federal Bar Association. Mr. Laponsky supports the amendments including specifically the requirement that the brief be submitted with the motion and the limit on the length of the brief.

4. Jack E. Horsley, Esquire
Craig & Craig
1807 Broadway Avenue
Post Office Box 689
Mattoon, Illinois 61938-0689

Attorney Horsley suggests that the language at lines 53-55 be made mandatory so that a summary of argument is required, not optional.

5. Heather Houston, Esquire
Gibbs Houston Pauw
1111 Third Avenue, Suite 1210
Seattle, Washington 98101
on behalf of the Appellate Practice Committee of the Federal Bar Association for the Western District of Washington

The committee agrees that an amicus brief is most helpful when it does not unnecessarily repeat the arguments and authorities relied upon by the parties. But in order to avoid such repetition, an amicus must be familiar with the party's arguments and authorities well before the time the amicus must file its brief.

- Because the proposed rule requires an amicus to file its brief at the same time as the party being supported, an amicus will rarely have an adequate opportunity to review the party's brief before filing its own.
- In addition to the fact that a draft of the party's brief may not be available until a few days before the filing deadline, the party being supported is not always willing to cooperate with the amicus. If the amicus does not support the position of either party, the amicus brief is due within the time allowed the appellant. An amicus who does not support either party is especially unlikely to receive the cooperation of the parties' counsel and the amicus cannot possibly be confident that it is not repeating the respondent's arguments.

The committee recommends that the brief of an amicus curiae be due within the time that a reply brief may be filed. The amicus would have an opportunity to review the parties' principal briefs. If a party believes additional briefing is necessary to respond to an amicus, a motion for leave to file such a brief should be permitted.

Alternatively the committee suggests:

a. Before the appellant's brief is due, an amicus should be permitted to file a motion for leave to file a brief and the motion need not be accompanied by the brief. If the brief does not accompany the motion, the amicus must indicate whether any of the parties have consented to the participation of the amicus and, if any have consented, the amicus must describe the information it has received from the parties regarding their arguments. The amicus also must state whether it has had an adequate opportunity to review the parties' arguments in the trial court and how much time it needs to prepare its brief. Based on that information, the court will set a deadline for the amicus to file its brief.

b. If an amicus supports neither party, it may file its brief within the time allowed the respondent. If an amicus needs more time to prepare an adequate brief, it may file a motion without the brief and explain why it requires more time. If the parties have consented, the court will determine only whether the extra time will be allowed; if they have not, the court will rule on the motion for leave to file as well as on the request for extra time.

6. Miriam A. Krinsky, Esquire
Assistant United States Attorney
United States Courthouse
312 North Spring Street
Los Angeles, California 90012

Opposes the requirement that a motion for leave to file an amicus brief be accompanied by the brief; the requirement puts the parties and the court in the uncomfortable position of having to disregard the substance of the brief if the request is denied.

If that provision is not changed, she suggests that (e) be amended to require the court to promptly decide the request so that the opposing party is able to respond in its later brief to the arguments made in the amicus brief.

She also suggests that the rule provide for the filing of a short responsive brief if an amicus brief is filed in opposition to a request for rehearing en banc.

7. William J. Genego and Peter Goldberger, Esquires
Co-Chairs, National Association of Criminal
Defense Lawyers, Committee On Rules of Procedure
1627 K. Street, N.W.
Washington, D.C. 20006

The Association makes three suggestions:

a. It opposes limiting an amicus brief to 25 pages under present rules, or 20-22 pages under pending proposals. The Association files amicus briefs for three reasons:

i) to show the flag, such briefs are rare and may be quite short;

ii) when an issue in the case has important ramifications beyond the facts of the particular party's situation; and

iii) when the issue is a good one but the association knows, or suspects, that the skills of the lawyer on the case are not really up to the task, in such cases the Association files an entire "shadow" brief with a full statement of the case and parallel argument.

The Association believes that an amicus brief of the third variety can be very helpful to the court and can "correct the defects in our adversary process that occasionally result from a mismatch of ability between counsel, where important rights hinging on the resolution of difficult issues are at stake." (But in such cases the Association would not be inclined to state for the record the real reason it feels the need to file.) Briefs in the latter two categories often demand more than 25 pages to fulfill their mission.

The Association prefers that an amicus have the same limitations as a party but if something shorter is thought to be necessary, it urges a rule in the 70-80% range so that an amicus has about 35 pages when the party's limit is 50.

b. Consent of parties. NACDL suggests that a representation by amicus counsel located and clearly labeled within the brief itself, that the parties have authorized counsel to state that they consent to the filing should be sufficient.

c. Time for filing. NACDL suggests that the presumptive time for filing an amicus brief should be within 10 days after the filing of the principal brief of the party supported and that the opposing party should have the normal period of time to respond, measured from the filing of the amicus brief.

8. Bert W. Rein, Esquire
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
January 18, 1996
on behalf of 6 attorneys in the firm

They do not oppose the shorter page limits for an amicus brief but note that there is "considerable tension" between the "emphasis on brevity and non-repetition, on the one hand, and the requirement that an amicus brief be submitted within the time allowed for the party being supported, on the other." They assert that it is not justified to assume that an amicus is in a position to coordinate its efforts with the party it is supporting or that the amicus will receive an advance copy of the party's brief well before the filing date. As to the latter, they point out that because appeals often address unpublished district court opinions, even a diligent amicus may not learn of the case until the briefing schedule is underway, making it quite difficult to comply with a contemporaneous filing requirement.

They recommend adopting the Fifth Circuit's local rule 29.1 under which an amicus submits its brief

> "within 15 days after the filing of the principal brief of the party whose position . . . the amicus will support."

Because FRAP 31(a) provides only 14 days for an appellant to file a reply brief, they further suggest amending rule 29(e) to read:

> An amicus curiae shall file its brief, accompanied by a motion for filing when necessary, within 15 days after the filing of the principal brief of the party being supported when that party is the appellant, or within 7 days after the filing of the principal brief of the party being supported when that party is the appellee.

9. Kent S. Scheidegger, Esquire
Criminal Justice Legal Foundation
2131 L Street
Sacramento, California 95816
on behalf of the Criminal Justice Legal Foundation, the American Alliance for Rights and Responsibilities, and the Institute for Justice

The organizations make several suggestions:

a. They object to limiting the length of an *amicus* brief to one-half the length of a party's principal brief. They argue that in the courts of appeals amicus briefing is the exception rather than the rule and is likely to be in cases of greater complexity than average and a 25 page

limit will result in routine motions to exceed the limits or in briefs of reduced usefulness to the court. In circuits such as the Ninth, which limits a principal brief to 35 pages, an amicus brief will be limited to even less than 25 pages. They suggest the following:

> (d) Length. An amicus brief may be no more than 35 pages, except by permission of the court or as specified by local rule.

b. The rule requires written consent of the parties or a motion. With the decline in professional courtesy, counsel for a party increasingly fail to return written consent even though they have no particular objection. The organizations suggest a new subpart (b) with the present subparts (b)-(g) redesignated:

> (b) Consent by Default. When a party fails to respond in writing to a written request for consent to file an amicus brief within two weeks of the request, that party shall be deemed to have consented. A declaration of counsel for amicus setting forth the requisite facts may accompany the brief in lieu of the written consent.

c. The comment to subdivision (e) implies that an amicus brief may be permitted in support of a petition for rehearing; that should be reflected in the body of the rule.

d. The requirement for a formal corporate disclosure statement will very often be unnecessary. They suggest adding a sentence to Rule 26.1 stating: "If the amicus is a nonprofit corporation with no stockholders, a statement to that effect is sufficient.

10. Benjamin G. Shatz, Esquire
Crosby, Heafey, Roach & May
700 South Flower Street, Suite 2200
Los Angeles, California 90017
on behalf of the Appellate Courts Committee of the Los Angeles County Bar Association

The committee opposes limiting the length of an amicus brief to one-half the length of a party's principal brief. An amicus brief can assist the court by compensating for a party's inadequate presentation of an issue, by analyzing the broader impact of a position, and by presenting alternative viewpoints. That may require more than one-half the length allowed the party.

11. Reagan Wm. Simpson, Esquire
Fulbright & Jaworski
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
on behalf of the Tort & Insurance Practice Section (TIPS) of the American Bar Association

TIPS opposes three aspects of the amendments:

a. An amicus brief should not be required to accompany the motion for leave to file. Such a requirement causes a potential amicus to incur the cost of preparing a brief before it knows whether it can be filed.
b. The page limit is too restrictive.
c. The rule should not ban any reply brief by an amicus

12. Arthur B. Spitzer, Esquire
Legal Director
American Civil Liberties Union of the National Capital Area
1400 20th Street, N.W.
Washington, D.C. 20036

The ACLU of the National Capital Area makes two suggestions:

a. Consent of parties. The ACLU suggests that the rule be modified to provide that an amicus brief may be filed if "it is accompanied by a written representation that all parties consent." The D.C. Cir. Rule 29 so provides. The ACLU points out that it is not unusual for an amicus to become aware of a pending appeal in a court of appeal just before briefs are due. It may be difficult to obtain written consents in a very short time. It is common practice for counsel to represent, in a motion or notice, that counsel for other parties have consented to a given matter — for example, an extension of time or a brief exceeding page limits. If a party's consent to file is misrepresented, the party will have time to correct the error before the amicus brief is considered by the court.
b. Filing brief with motion. The ACLU opposes the requirement that the proposed amicus brief be presented with the motion for leave to file. There are two reasons why it is desirable to file the motion for leave to file in advance of the brief. First, filing a notice (when all parties consent) or a motion (when all parties do not consent) in advance allows all potential amici to become known to each other and allows the preparation of a joint amicus brief by those on the same side. That would not be possible if the brief must be filed with the motion. Second, a potential amicus may know that there will be opposition to its motion. It is less wasteful to file the motion and obtain the ruling before writing the brief.

13. James A. Strain, Esquire
Seventh Circuit Bar Association
219 South Dearborn Street, Suite 2722
Chicago, Illinois 60604

The proposed amendments reflect a welcome simplification and unification of appellate practice. In particular, the statement as to why an amicus brief is desirable and that the matters asserted are relevant to the case should be helpful.

14. Carolyn B. Witherspoon, Esquire
Office of the President
Arkansas Bar Association
P.O. Box 3178
Little Rock Arkansas 72203
(on behalf of the committee members of the Arkansas Bar Association Legislation and Procedures Committee)

Approves the proposed changes.

15. Hugh F. Young, Jr.
Executive Director
Product Liability Advisory Council
1850 Centennial Park Drive, Suite 510
Reston, Virginia 22091

The PLAC supports the effort to establish uniformity in determining the length of briefs and believes that 25 pages should be sufficient in virtually every instance. But PLAC points out that the Ninth Circuit limits a party's principal brief to 35 pages, and the D.C. Circuit limits a principal brief to 12,500 words. PLAC suggests that the rule should make it clear that an *amicus* brief may be no more than one-half the maximum length of a principal brief or 25 pages whichever is longer. Also, if a party is granted permission to file a longer principal brief, the *amicus* should automatically be entitled to one-half of the enlarged length.

PLAC also urges that the rule or Committee Note make it clear that an *amicus* may seek leave to file a longer brief.

Gap Report on Rule 29

In subdivision (a) the District of Columbia was added to the list of entities allowed to file an amicus brief without consent. The suggestion was adopted that a

statement that all parties have consented to the filing of the brief should be sufficient and it is not necessary to file the written consent of all the parties.

Subdivision (c) was amended so that the cover must identify the party supported and indicate whether the brief supports affirmance or reversal. In the rare instance in which the amicus does not support any party, the amicus can simply so indicate.

In subdivision (d) the limit on the length of an amicus brief is unchanged except to provide 1) that permission granted to a party to file a longer brief has no effect upon the length of an amicus brief, and 2) that a court may grant an amicus permission to file a longer brief.

Subdivision (e) was changed permit an amicus to file its brief up to 7 days after the principal brief of the party being supported is filed.

Subdivision (f) makes it clear that an amicus may request leave to file a reply.

In subdivision (g) the language stating that an amicus will be granted permission to participate in oral argument "only for extraordinary reasons" has been deleted. The change reflects more accurately current practice in which it is not unusual for a court to permit an amicus to argue when a party is willing to share its argument time with the amicus.

Stylistic changes also were made.

Rule 35. ~~Determination of Causes by the Court In Banc~~ En Banc Determination

(a) **When Hearing or Rehearing ~~in~~ En Banc ~~will~~ May Be Ordered.** A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals ~~in~~ en banc. ~~Such a~~ An en banc hearing or rehearing is not favored and ordinarily will not be ordered ~~except~~ unless:

(1) ~~when~~ en banc consideration ~~by the full court~~ is necessary to secure or maintain uniformity of the court's ~~its~~ decisions ~~;~~ ; or

(2) ~~when~~ the proceeding involves a question of exceptional importance.

(b) **~~Suggestion of a party~~ Petition for Hearing or Rehearing ~~in~~ En Banc.** A party may ~~suggest the appropriateness of~~ petition for a hearing or rehearing ~~in~~ en banc.

(1) The petition must begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States

Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue as to which the panel decision conflicts with the authoritative decisions of every other federal court of appeals that has addressed the issue.

(2) Except by the court's permission, a petition for an en banc hearing or rehearing must not exceed 15 pages,

excluding material not counted under Rule 28(g).

(3) For purposes of the page limit in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately unless separate filing is required by local rule.

~~No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.~~

(c) **Time for ~~suggestion of a party~~ Petition for Hearing or Rehearing ~~in~~ En Banc.** ~~; suggestion does not stay mandate. If a party desires to~~

~~suggest that~~ A petition that an appeal be heard initially ~~in~~ en banc ~~, the suggestion~~ must be ~~made~~ filed by the date ~~on which~~ when the appellee's brief is ~~filed~~ due. A ~~suggestion~~ petition for a rehearing ~~in~~ en banc must be ~~made~~ filed within the time prescribed by Rule 40 for filing a petition for rehearing. ~~, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.~~

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

(e) **Response.** No response may be filed to a petition for an en banc consideration unless the court orders a response.

(f) **Voting on a Petition.** The clerk must forward any such petition to the judges of the court who are in regular active service and, with respect to a

petition for rehearing, to any other members of the panel that rendered the decision sought to be reheard. But a vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge requests a vote.

Committee Note

One of the purposes of the amendments is to treat a request for a rehearing en banc like a petition for panel rehearing so that a request for a rehearing en banc will suspend the finality of the court of appeals' judgment and extend the period for filing a petition for writ of certiorari. Companion amendments are made to Rule 41.

Subdivision (a). The title of this subdivision is changed from "When hearing or rehearing in banc will be ordered" to "When Hearing or Rehearing En Banc May Be Ordered." The change emphasizes the discretion a court has with regard to granting en banc review.

Subdivision (b). The term "petition" for rehearing en banc is substituted for the term "suggestion" for rehearing en banc. The terminology change is not a necessary part of the changes that extend the time for filing a petition for a writ of certiorari when a party requests a rehearing en banc. The terminology change reflects, however, the Committee's intent to treat similarly a petition for panel rehearing and a request for a rehearing en banc.

The amendments also require each petition for en banc consideration to begin with a statement concisely demonstrating that the case meets the usual criteria for en banc consideration. It is the Committee's hope that requiring such a statement will cause the drafter of a petition to focus on the narrow grounds that support en banc consideration and to realize that a petition should not be filed unless the case meets those rigid standards.

Intercircuit conflict is cited as one reason for asserting

that a proceeding involves a question of "exceptional importance." Intercircuit conflicts create problems. When the circuits construe the same federal law differently, parties' rights and duties depend upon where a case is litigated. Given the increase in the number of cases decided by the federal courts and the limitation on the number of cases the Supreme Court can hear, conflicts between the circuits may remain unresolved by the Supreme Court for an extended period of time. The existence of an intercircuit conflict often generates additional litigation in the other circuits as well as in the circuits that are already in conflict. Although an en banc proceeding will not necessarily prevent intercircuit conflicts, an en banc proceeding provides a safeguard against unnecessary intercircuit conflicts.

Some circuits have had rules or internal operating procedures that recognize a conflict with another circuit as a legitimate basis for granting a rehearing en banc. An intercircuit conflict may present a question of "exceptional importance" because of the costs that intercircuit conflicts impose on the system as a whole, in addition to the significance of the issues involved. It is not, however, the Committee's intent to make the granting of a hearing or rehearing en banc mandatory whenever there is an intercircuit conflict.

The amendment states that "a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue as to which the panel decision conflicts with the authoritative decisions of every other federal court of appeals that has addressed the issue." That language contemplates two situations in which a rehearing en banc may be appropriate. The first is when a panel decision creates a conflict. A panel decision creates a conflict when it conflicts with the decisions of all other circuits that have considered the issue. If a panel decision simply joins one side of an already existing conflict, a rehearing en banc may not be as important because it cannot avoid the conflict. The second situation that may be a strong candidate for a rehearing en banc is one in which the circuit persists in a conflict created by a pre-existing decision of the same circuit and no other circuits have joined on that side of the conflict. The amendment states that the conflict must be with an "authoritative" decision of another circuit. "Authoritative" is used rather than "published" because in some circuits unpublished opinions may be treated as authoritative.

Counsel are reminded that their duty is fully discharged without filing a petition for rehearing en banc unless the case meets the rigid standards of subdivision (a) of this Rule and even then the granting of a petition is entirely within the court's discretion.

Paragraph (2) of this subdivision establishes a maximum length for a petition. Fifteen pages is the length currently used in several circuits. Each request for en banc consideration must be studied by every active judge of the court and is a serious call on limited judicial resources. The extraordinary nature of the issue or the threat to uniformity of the court's decision can be established in most cases in less than fifteen pages. A court may shorten the maximum length on a case by case basis but the rule does not permit a circuit to shorten the length by local rule. The Committee has retained page limits rather than using a word count similar to that in proposed Rule 32 because there has not been a serious enough problem to justify importing the word count and typeface requirements that may become applicable to briefs into other contexts.

Paragraph (3), although similar to (2), is separate because it deals with those instances in which a party files both a petition for rehearing en banc under this rule and a petition for panel rehearing under Rule 40.

To improve the clarity of the rule, the material dealing with filing a response to a petition and with voting on a petition have been moved to new subdivisions (e) and (f).

Subdivision (c). Two changes are made in this subdivision. First, the sentence stating that a request for a rehearing en banc does not affect the finality of the judgment or stay the issuance of the mandate is deleted. Second, the language permitting a party to include a request for rehearing en banc in a petition for panel rehearing is deleted. The Committee believes that those circuits that want to require two separate documents should have the option to do so.

Subdivision (e). This is a new subdivision. The substance of the subdivision, however, was drawn from former subdivision (b). The only changes are stylistic; no substantive changes are intended.

Subdivision (f). This is a new subdivision. The substance of the subdivision, however, was drawn from former subdivision (b).

Because of the discretionary nature of the en banc procedure, the filing of a suggestion for rehearing en banc has not required a vote; a vote is taken only when requested by a judge of the court or by a judge who was a member of the panel that rendered the decision sought to be reheard. It is not the Committee's intent to change the discretionary nature of the procedure or to require a vote on a petition for rehearing en banc. The rule continues, therefore, to provide that a court is not obligated to vote on such petitions. It is necessary, however, that each court develop a procedure for disposing of such petitions because they will suspend the finality of the court's judgment and toll the time for filing a petition for certiorari.

Public Comments on Rule 35

Fourteen letters commenting upon the proposed amendments to Rule 35 were received. One letter from an A.B.A. section, however, contained comments from two of the section's committees. There were, therefore, fifteen commentators. Of the fifteen commentators none expressed general opposition to the changes. Eight expressed general approval of the amendments, but 4 of the 8 suggested some revisions. Seven others also suggested revisions.

The comments were as follows:

1. Peter H. Arkison, Esquire
Suite 502
103 East Holly Street
Bellingham, Washington 98225-4728

Points out that there is an unnecessary double negative in both 35(b)(2) and (3) ("excluding material not counted"). The paragraphs are also unnecessarily wordy because they repeat "petition for rehearing and a petition for rehearing en banc." He also suggests excluding "except by the court's permission" because it is in Rule 28(g).

He suggests:

35(b)(2) "Rule 28(g) shall apply with a page limit of 15 pages for a petition."

35(b)(3) "For purposes of Rule 35(b)(2), a petition for panel rehearing and a petition for rehearing en banc shall be considered a single document regardless of whether they are filed separately."

2. Robert L. Baechtol, Esquire
Chair, Rules Committee
The Federal Circuit Bar Association
1300 I Street, N.W.
Suite 700
Washington, D.C. 20005-3315

The Association suggests that 35(b)(1)(B) should be expanded to include an additional consideration:

> . . . or involves an issue which is one of first impression or on which the prior law was unsettled in the circuit.

3. Donald R. Dunner, Esquire
Chair, Section of Intellectual Property Law
American Bar Association
750 N. Lake Shore Drive
Chicago, Illinois 60611

Mr. Dunner submits comments from two of the section's committees:

One committee states that the 15-page limit "may be a bit too restrictive, especially where both a petition for en banc review and a petition for panel rehearing are filed. Perhaps 35(b)(3) could be further amended to provide for additional pages upon leave of court." The committee states that the remaining amendments "appear to be acceptable."

Another committee agrees that the distinction between a petition for rehearing and a petition for rehearing en banc should be abolished but disagrees that a panel decision needs to conflict with every other federal court of appeals in order to "present a question of exceptional importance." If a split is significant and the panel decision illuminates or heightens the conflict, the proceeding may present a question of exceptional importance warranting en banc treatment even when the decision joins one side of a preexisting conflict.

4. William J. Genego and Peter Goldberger, Esquires
Co-Chairs, National Association of Criminal
Defense Lawyers, Committee On Rules of Procedure
1627 K Street, N.W.
Washington, D.C. 20006

NACDL welcomes the elimination of the distinction between a petition for rehearing and a suggestion for rehearing en banc and approves expansion of the grounds for rehearing to include intercircuit conflicts. It does not oppose imposition of a uniform page length. But it does not see the point of changing the spelling of "in banc" which conforms to the statutory usage.

5. Kent S. Hofmeister, Esquire
Section Coordinator
Federal Bar Association
1815 H Street, N.W.
Washington, D.C. 20006-3697

Mr. Hofmeister forwarded the comments of Mark Laponsky, Esquire, the Chair of the Labor Law and Labor Relations Section of the Federal Bar Association. Mr. Laponsky endorses the proposed amendments.

6. Miriam A. Krinsky
Assistant United States Attorney
United States Courthouse
312 North Spring Street
Los Angeles, California 90012

"Wholeheartedly endorse[s]" the change so that a request for rehearing en banc suspends the finality of a judgment and extends the time for filing a petition for a writ of certiorari; the change eliminates a trap that is based upon an ill-advised distinction.

Urges consideration of an amendment that clarifies the precedential value of a panel opinion after rehearing en banc is granted. Most circuits either automatically, or usually, vacate the panel opinion when en banc review is granted; but the Ninth and Tenth Circuits presume that the three-judge panel opinion remains in effect pending disposition of the case by the en banc court. It may be undesirable to have, during the time the case is awaiting en banc resolution, a number of district court judgments handed down based on a panel decision that is likely to be modified.

7. Philip A. Lacovara, Esquire
Mayer, Brown & Platt
1675 Broadway
New York, New York 10019-5820

Supports the change in terminology from "suggestion" to "petition" for rehearing en banc. But objects to two features of the proposed amendments to subpart (b).

a. Requiring in (b)(1) that the petition must explain that either the panel decision conflicts with other decisions or involves a question of exceptional importance implies that these are the only grounds for en banc treatment. The circuits have used en banc rehearings when a majority of the active judges believe that a panel decision is simply wrong. Mr. Lacovara says that the rule should not purport to deprive the circuits of this error-correcting capacity, even if the circuits are not often inclined to use it.
He suggests deleting "either" from line 18 and "or" from line 27 on page 17; striking the period on line 39 and inserting "or" and then adding the following:
"(C) there are other specific and compelling reasons for the court en banc to consider the matter."

b. Subsection (b)(1)(B) may imply that a circuit should not bother with a decision unless it is out of line with "every other" circuit. That test is too demanding and does not represent current, sound appellate practice. It is the prerogative of the full court to have the opportunity to decide, where there is otherwise an intercircuit conflict, whether to align itself with the other side of the split—or to adopt another approach—rather than acquiesce in the position taken by the panel. He suggests amending lined 36-39 to read:
"decisions of [every] other federal courts of appeals that have[as] addressed the issue . . . ."

Mr. Lacovara also questions the assertion in the Committee Note that, in order for a "petition" for rehearing en banc to extend the time for petitioning for certiorari, the Supreme Court would have to amend its Rule 13.3. At most, the commentary should indicate that it is not clear what effect the Supreme Court would extend to the new characterization.

8. Mr. John Mayer
3821 North Adams Road
Bloomfield Hills, Michigan 48304

Suggests using the plain English term "full court" rather than *in banc* or *en banc*.

9. Honorable Jon O. Newman
United States Circuit Judge
450 Main Street
Hartford, Connecticut 06103

Chief Judge Newman opposes three aspects of the proposed revisions.

a. He recommends deleting that portion of 35(b) which relates the existence of a question of exceptional importance to a conflict among circuits.

- He believes that the proposed wording states a bias in favor of an in banc rehearing whenever the panel decision conflicts with a decision of another circuit and it is "not the business of national rule-makers to construe the phrase 'exceptional importance,' which has been one of the two criteria" for a full court rehearing for decades.
- "[T]he rule invokes its new test of importance whenever a decision conflicts with the decision of just one other circuit." Whether a court should rehear such a case in banc is best left to the sound judgment of each court of appeals.

b. The amendment of 35(c) will create confusion by dropping the sentence that makes it clear a suggestion for a rehearing in banc does not stay the issuance of the mandate or affect finality. He suggests that the Committee try to coordinate the effective date of the proposed amendment to Rule 35(c) to coincide with an amendment to Supreme Court Rule 13.3, or provide that the amendment to Rule 35(c) does not become effective unless and until a corresponding change is made in Supreme Court Rule 13.3

c. Chief Judge Newman states that the change in spelling from "in banc" to "en banc" is extremely ill-advised. He would retain "in banc" because it conforms to the spelling used in the statute, 28 U.S.C. § 46(c), and there should be a compelling reason supporting any such variation. Second, "in banc" is a phrase of English words. Third, no rule change should be made unless there are significant reasons for it. The only reason given for the change is in the summary prepared by the Administrative Office; the summary says that "en banc" is in "much wider usage among the courts." That is not a substantial reason.

10. Honorable Jerry E. Smith
United States Circuit Judge
12621 United States Courthouse
515 Rusk
Houston, Texas 77002-2598

Urges the committee to use a word count similar to that in proposed in Rule 32 rather than a page limit. He says that attorneys circumvent the page limits

by using small typeface and single-spaced footnotes, etc. and that the problem is serious enough to warrant attention in the rules.

Judge Smith suggests either that 40(b) require petitions to be in the form prescribed in Rule 32(a) (with a corresponding changed to FRAP 32(b)) or that the rule could permit circuits to implement a local rule to control the use of compressed devices so as not to defeat the intent of the 15 page limit. He further states that it is incongruous to retain restrictions for petitions for panel rehearing but not for rehearing in banc.

11. James A. Strain, Esquire
Seventh Circuit Bar Association
219 South Dearborn Street, Suite 2722
Chicago, Illinois 60604

Favors adoption of the changes and notes that Supreme Court Rule 13.3 will need to be conformed so that a "petition" for rehearing en banc will extend the time for filing a petition for certiorari.

12. Carolyn B. Witherspoon, Esquire
Office of the President
Arkansas Bar Association
P.O. Box 3178
Little Rock Arkansas 72203
(on behalf of the committee members of the Arkansas Bar Association Legislation and Procedures Committee)

Approves the proposed changes.

13. Hugh F. Young, Jr.
Executive Director
Product Liability Advisory Council
1850 Centennial Park Drive, Suite 510
Reston, Virginia 22091

The PLAC suggests clarification of 35(b)(1)(b) on two points:

a. that intercircuit conflicts are not the only questions of exceptional importance that warrant *en banc* review; and
b. that a panel decision should not be required to conflict with <u>every</u> other circuit.

14. Michael Zachary, Esquire
Supervisory Staff Attorney
United States Court of Appeals
United States Courthouse
40 Foley Square
New York, New York 10007

Says it is unclear whether the language in (b)(1)(B) concerning a panel decision that creates a split among the circuits (a) gives an example of a proceeding that presents a question of exceptional importance and that the courts are free to grant en banc consideration in other circumstances presenting questions of exceptional importance; or (b) represents the only circumstance in which a question will be deemed of such exceptional importance as to warrant en banc consideration. He suggests that the Committee Note implies that the latter is true. Mr. Zachary does not state a preference for one approach over the other, however, he suggests that the Committee's intent should be clarified.
He also suggests that the Committee Note is unclear whether the intercircuit conflict language applies only to (b)(1)(B) or also to (b)(1)(A). He suggests that a sentence in the comment be amended as follows:

> The second situation that may be a strong candidate for a rehearing en banc is one in which the circuit persists in <u>an intercircuit</u> conflict created by a pre-existing decision of the same circuit . . . .

<u>Gap Report on Rule 35</u>

Two changes were made in the language of (b)(1)(B).

1. The discussion of intercircuit conflict is labeled as an example of a question of exceptional importance to avoid the implication that intercircuit conflict is the only circumstance in which a question is deemed of exceptional importance. In keeping with that change, the parenthetical (appearing in the published draft) requiring citation to conflicting cases was deleted.
2. The rule attempts to eliminate any suggestion that a court should grant en banc reconsideration whenever there is an intercircuit conflict. New language emphasized that <u>a party may assert</u> that the existence of intercircuit conflict gives rise to a question of exceptional importance.

Paragraph (b)(3) was amended so that if a local rule requires a party to file separate petitions for panel rehearing and petitions for rehearing en banc, the party is not limited to a total of 15 pages.

Subdivision (f) was amended to say that "a judge" may call for a vote on a petition for en banc consideration.

Stylistic changes were also made.

The Committee retained the "en banc" spelling despite some objections. Although 28 U.S.C. § 46 has used "in banc" since 1948, even statutory usage is inconsistent. Pub. L. No. 95-486, 92 Stat. 1633 authorizes a court of appeals having more than 15 active judges to perform its "en banc" functions with some subset of the court's members. The "en banc" spelling is overwhelmingly favored by courts. A computer search conducted in 1996 found that more than 40,000 circuit court cases have used the term "en banc" compared with just under 5,000 cases (11%) that have used the term "in banc." When the search was confined to cases decided after 1990, the pattern remained the same — 12,600 cases using "en banc" compared to 1,600 (11%) using "in banc." The Supreme Court has used "en banc" in 959 of its opinions and "in banc" in 46 opinions. Indeed, the Supreme Court uses "en banc" in its own rules. See Sup. Ct. R. 13.3. The Committee decided to follow the spelling most commonly used.

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

(a) ~~**Date of Issuance**~~ **Contents.** Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(b) **When Issued.** ~~The mandate of the court must issue 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue.~~ The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing or rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

(c) **Effective Date.** The mandate is effective when issued.

~~(b) Stay of Mandate Pending Petition for Certiorari. A party who filed a motion requesting a stay of mandate pending petition to the Supreme Court for a writ of certiorari must file, at the same time, proof of service on all other parties. The motion must~~

(d) **Staying the Mandate.**

(1) **On Petition for Rehearing or Motion.** The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.

(2) **Pending Petition for Certiorari.**

(A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and

must show that ~~a petition for certiorari~~ the certiorari petition would present a substantial question and that there is good cause for a stay.

(B) The stay ~~cannot~~ must not exceed ~~30~~ 90 days, unless the period is extended for good cause ~~shown~~, or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk during the period of the stay. ~~unless during the period of the stay, a notice from the clerk of the Supreme Court is filed showing that the party who has obtained the stay has filed a petition for the writ in which~~ In that case, the stay ~~will~~ continues until ~~final disposition by~~ the Supreme Court's final disposition.

(C) The court may require a bond or

other security as a condition to granting or continuing a stay of the mandate.

(D) The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed. ~~The court may require a bond or other security as a condition to the grant or continuance of a stay of the mandate.~~

Committee Note

The rule has been restructured to add clarity.

Subdivision (a). The sentence describing the contents of a mandate has been rewritten and moved to the beginning of the rule; the substance remains unchanged from the existing rule.

Subdivision (b). The existing rule provides that the mandate issues 7 days after the time to file a petition for panel rehearing expires unless such a petition is timely filed. If the petition is denied, the mandate issues 7 days after entry of the order denying the petition. Those provisions are retained but the amendments further provide that if a timely petition for rehearing en banc or motion for stay of mandate are filed, the mandate does not issue until 7 days after entry of an order denying the last of all such requests. If a petition for rehearing or a petition for rehearing en banc is granted, the court enters

a new judgment after the rehearing and the mandate issues within the normal time after entry of that judgment.

Subdivision (c). Subdivision (c) is new. It provides that the mandate is effective when the court issues it. A court of appeals' judgment or order is not final until issuance of the mandate; at that time the parties' obligations become fixed. This amendment is intended to make it clear that the mandate is effective upon issuance and that its effectiveness is not delayed until receipt of the mandate by the trial court or agency, or until the trial court or agency acts upon it. This amendment is consistent with the current understanding. Unless the court orders that the mandate issue earlier than provided in the rule, the parties can easily calculate the anticipated date of issuance and verify issuance with the clerk's office. In those instances in which the court orders earlier issuance of the mandate, the entry of the order on the docket alerts the parties to that fact.

Subdivision (d) Amended paragraph (1) provides that the filing of a petition for rehearing en banc or a motion for a stay of mandate pending petition to the Supreme Court for a writ of certiorari stays the issuance of the mandate until the court disposes of the petition or motion. The provision that a petition for rehearing en banc stays the mandate is a companion to the amendment of Rule 35 that deletes the language stating that a request for a rehearing en banc does not affect the finality of the judgment or stay the issuance of the mandate. The Committee's objective is to treat a request for a rehearing en banc like a petition for panel rehearing so that a request for a rehearing en banc will suspend the finality of the court of appeals' judgment and extend the period for filing a petition for writ of certiorari. Because the filing of a petition for rehearing en banc will stay the mandate, a court of appeals will need to take final action on the petition but the procedure for doing so is left to local practice.

Paragraph (1) also provides that the filing of a motion for a stay of mandate pending petition to the Supreme Court for a writ of certiorari stays the mandate until the court disposes of the motion. If the court denies the motion, the court must issue the mandate 7 days after entering the order denying the motion. If the court grants the motion, the mandate is stayed according to the terms of the order granting

the stay. Delaying issuance of the mandate eliminates the need to recall the mandate if the motion for a stay is granted. If, however, the court believes that it would be inappropriate to delay issuance of the mandate until disposition of the motion for a stay, the court may order that the mandate issue immediately.

Paragraph (2). The amendment changes the maximum period for a stay of mandate, absent the court of appeals granting an extension for cause, to 90 days. The presumptive 30-day period was adopted when a party had to file a petition for a writ of certiorari in criminal cases within 30 days after entry of judgment. Supreme Court Rule 13.1 now provides that a party has 90 days after entry of judgment by a court of appeals to file a petition for a writ of certiorari whether the case is civil or criminal.

The amendment does not require a court of appeals to grant a stay of mandate that is coextensive with the period granted for filing a petition for a writ of certiorari. The granting of a stay and the length of the stay remain within the discretion of the court of appeals. The amendment means only that a 90-day stay may be granted without a need to show cause for a stay longer than 30 days.

Subparagraph (C) is not new; it has been moved from the end of the rule to this position.

Public Comments on Rule 41

Seven letters were received which comment upon the proposed amendments to Rule 41. Two of the letters from A.B.A. sections, however, contained comments from two of the sections' committees. There were therefore nine commentators. Six of the commentators approved the amendments without reservation. Two other commentators suggested revisions. One commentator made no substantive comments. None of them expressed general disapproval of the proposed changes.

1. Donald R. Dunner, Esquire
Chair, Section of Intellectual Property Law
American Bar Association
750 N. Lake Shore Drive
Chicago, Illinois 60611

Mr. Dunner submitted the comments of two of the section's committees.

One committee makes no substantive comments.

Another committee says that the rule should state when a court's mandate will issue if a petition for rehearing or rehearing en banc is granted. The committee also suggests that in subpart (b) the party, and not the Clerk of the Supreme Court, should have the burden of filing notice that the party has obtained a stay.

2. William J. Genego and Peter Goldberger, Esquires
Co-Chairs, National Association of Criminal
Defense Lawyers, Committee On Rules of Procedure
1627 K Street, N.W.
Washington, D.C. 20006

Thanks the committee for responding to NACDL's suggestions to conform the presumptive duration of a stay of mandate to the 90-day period allowed for filing a petition for a writ of certiorari.

3. Kent S. Hofmeister, Esquire
Section Coordinator
Federal Bar Association
1815 H Street, N.W.
Washington, D.C. 20006-3697

Mr. Hofmeister forwarded the comments of two different persons.

a. Sydney Powell, Esquire, the Chair of the Appellate Law and Trial Practice Committee of the Federal Litigation Section. Ms. Powell commends the committee for clarifying that "the mandate is effective when issued."

b. Mark Laponsky, Esquire, the Chair of the Labor Law and Labor Relations Section. Mr. Laponsky approves the proposed amendments.

4. Miriam A. Krinsky
Assistant United States Attorney
United States Courthouse
312 North Spring Street
Los Angeles, California 90012

Supports the proposed changes and in particular the amendment to subpart (b) that changes the presumptive period for a stay to 90 days.

5. Philip A. Lacovara, Esquire
Mayer, Brown & Platt
1675 Broadway
New York, New York 10019-5820

Approves enlarging the stay-of-mandate period to 90 days in most cases. Suggests language changes in lines 59-61 on page 29 to return to the existing language ("unless during the period of the stay, a notice from the clerk of the Supreme Court is filed showing . . . .") or to substitute new language ("If, however, during the period of the stay, the clerk of the court of appeals receives a notice from the clerk of the Supreme Court indicating that . . . .") Either formulation avoids the inaccurate implication that the Clerk of the Supreme Court files papers in a court of appeals (that is the responsibility of the clerk of the court of appeals; the Supreme Court Clerk does his filing at the Supreme Court).

6. James A. Strain, Esquire
Seventh Circuit Bar Association
219 South Dearborn Street, Suite 2722
Chicago, Illinois 60604

Recommends adoption of the proposed amendments because they mesh with the Supreme Court rules and assist counsel and eliminate unnecessary motion practice.

7. Carolyn B. Witherspoon, Esquire
Office of the President
Arkansas Bar Association
P.O. Box 3178
Little Rock Arkansas 72203
(on behalf of the committee members of the Arkansas Bar Association Legislation and Procedures Committee)

Approves the proposed changes.

Gap Report on Rule 41

All but one of the changes are stylistic. The stylistic changes are the same as those in the restyled rule published in April.

The one new change is in subparagraph (d)(2)(B). The language was changed to make it clear that the party, not the Supreme Court Clerk, has the burden of notifying the court of appeals when the party has filed a petition for a writ or

certiorari.

B. Proposed Amendments to Federal Rule of Appellate Procedure 5 and 5.1 and to Form 4 submitted for approval for publication.

1. Synopsis of Proposed Amendments

(a) Existing Rules 5 and 5.1 are combined in new Rule 5; Rule 5.1 was largely repetitive of Rule 5. New Rule 5 is intended to govern all discretionary appeals from district court orders, judgments, or decrees. Most of the changes are intended only to broaden the language so that the Rule applies to all discretionary appeals. The time for filing provision, for example, states only that the petition must be filed within the time provided by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal. A uniform time — 7 days — is established for filing an answer in opposition or a cross-petition.

(b) Form 4 is substantially revised to obtain more detailed information needed to assess a party's eligibility to proceed in forma pauperis.

2. Text of Proposed Amendments

PROPOSED AMENDMENTS TO THE FEDERAL RULES
OF APPELLATE PROCEDURE
SUBMITTED FOR APPROVAL FOR PUBLICATION

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

~~(a) *Petition for permission to appeal.* An appeal from an interlocutory order containing the statement prescribed by 28 U.S.C. § 1292(b) may be sought by filing a petition for permission to appeal with the clerk of the court of appeals within 10 days after the entry of such order in the district court with proof of service on~~

~~all other parties to the action in the district court. An order may be amended to include the prescribed statement at any time, and permission to appeal may be sought within 10 days after entry of the order as amended.~~

~~(b) *Content of petition; answer.* The petition shall contain a statement of the facts necessary to an understanding of the controlling question of law determined by the order of the district court; a statement of the question itself; and a statement of the reasons why a substantial basis exists for a difference of opinion on the question and why an immediate appeal may materially advance the termination of the litigation. The petition shall include or have annexed thereto a copy of the order from which appeal is sought and of any findings of fact, conclusions of law and opinion relating thereto. Within 7 days after service of the petition an adverse party may file an answer in opposition. The application and answer shall be submitted without oral argument unless otherwise ordered.~~

~~(c) *Form of Papers; Number of Copies.* All papers~~

~~may be typewritten. An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.~~

~~(d) *Grant of permission; cost bond; filing of record.* Within 10 days after the entry of an order granting permission to appeal the appellant shall (1) pay to the clerk of the district court the fees established by statute and the docket fee prescribed by the Judicial Conference of the United States and (2) file a bond for costs if required pursuant to Rule 7. The clerk of the district court shall notify the clerk of the court of appeals of the payment of the fees. Upon receipt of such notice the clerk of the court of appeals shall enter the appeal upon the docket. The record shall be transmitted and filed in accordance with Rules 11 and 12(b). A notice of appeal need not be filed.~~

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

~~(a) *Petition for Leave to Appeal; Answer or Cross Petition.* An appeal from a district court judgment, entered after an appeal under 28 U.S.C. § 636(c)(4) to a district judge from a judgment entered upon direction~~

~~of a magistrate judge in a civil case, may be sought by filing a petition for leave to appeal. An appeal on petition for leave to appeal is not a matter of right, but its allowance is a matter of sound judicial discretion. The petition shall be filed with the clerk of the court of appeals within the time provided by Rule 4(a) for filing a notice of appeal, with proof of service on all parties to the action in the district court. A notice of appeal need not be filed. Within 14 days after service of the petition, a party may file an answer in opposition or a cross petition.~~

~~(b) *Content of Petition; Answer.* The petition for leave to appeal shall contain a statement of the facts necessary to an understanding of the questions to be presented by the appeal; a statement of those questions and of the relief sought; a statement of the reasons why in the opinion of the petitioner the appeal should be allowed; and a copy of the order, decree or judgment complained of and any opinion or memorandum relating thereto. The petition and answer shall be submitted to a panel of judges of the court of appeals without oral argument unless otherwise ordered.~~

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

~~(d) *Allowance of the Appeal; Fees; Cost Bond; Filing of Record.* Within 10 days after the entry of an order granting the appeal, the appellant shall (1) pay to the clerk of the district court the fees established by statute and the docket fee prescribed by the Judicial Conference of the United States and (2) file a bond for costs if required pursuant to Rule 7. The clerk of the district court shall notify the clerk of the court of appeals of the payment of the fees. Upon receipt of such notice, the clerk of the court of appeals shall enter the appeal upon the docket. The record shall be transmitted and filed in accordance with Rules 11 and 12(b).~~

Rule 5 Appeal by Permission

(a) Petition for Permission to Appeal.

(1) To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition for permission to appeal. The petition must

be filed with the circuit clerk with proof of service on all other parties to the district-court action.

(2) The petition must be filed within the time specified by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal.

(3) If a party cannot petition for appeal unless a district court first enters an order granting permission to do so or stating that the necessary conditions are ~~present~~ met, the ~~a district court order may be amended~~ may amend its order or statement to include the required statement and the time to petition runs from ~~entry~~ of the amended order.

(b) Contents of the Petition; Answer or Cross-Petition.

(1) The petition must include the following:

(A) the facts necessary to understand the question to be presented;

(B) the question itself;

(C) the relief sought;

(D) the reasons why, in the opinion of the petitioner, the appeal should be allowed — including reasons that the appeal is within the grounds, if any, established by the statute or rule claimed to authorize the appeal; and

(E) an attached copy of the order, decree, or judgment complained of and any related opinion or memorandum, including any stating the district court's permission or finding of any necessary conditions to appeal, if required.

(2) A party may file an answer in opposition or a cross-petition within 7 days after the petition is served.

(3) The petition and answer will be submitted without oral argument unless the court of appeals orders otherwise.

(c) **Form of Papers; Number of Copies.** All papers

must conform to Rule 32(a)(1). Three copies must be filed with the original, unless the court requires a different number by local rule or by order in a particular case.

(d) **Grant of Permission; Fees; Cost Bond; Filing the Record.**

(1) Within 10 days after the entry of the order granting permission to appeal, the appellant must:

(A) pay the district clerk all required fees; and

(B) file a cost bond if required under Rule 7.

(2) A notice of appeal need not be filed but the date when the order granting permission to appeal is entered serves as the date of the notice of appeal for calculating time under these rules.

(3) The district clerk must notify the circuit clerk once the petitioner has paid the fees. Upon receiving this notice, the circuit clerk must enter the appeal on the docket.

The record must be forwarded and filed in accordance with Rules 11 and 12(c).

Committee Note

The amendment of Federal Rule of Civil Procedure 23, under the power conferred by 28 U.S.C. § 1292(e), prompts the amendment of this Rule 5 and the elimination of Rule 5.1.

In 1992 Congress added paragraph (e) to 28 U.S.C. § 1292. Paragraph (e) says that the Supreme Court has power to prescribe rules that "provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for" in section 1292. Federal Rule of Civil Procedure 23 has been amended to permit interlocutory appeal from an order granting or denying class certification. Such an appeal is permitted in the sole discretion of the court of appeals.

The Committee believes that the amendment of Civil Rule 23 is only the first of what may eventually be several interlocutory appeal provisions. Rather than add a separate rule governing each such appeal, the Committee believes it is preferable to amend Rule 5 so that it will govern all such appeals.

In addition Rule 5.1 has been largely repetitive of Rule 5 and the Committee believes that its provisions could also be subsumed into Rule 5. Although Rule 5.1 did not deal with an interlocutory appeal, the similarity to Rule 5 was based upon the fact that both rules governed discretionary appeals.

This new Rule 5 is intended to govern all discretionary appeals from district court orders, judgments, or decrees. At this time that includes interlocutory appeals under 28 U.S.C. § 1292(b), (c), and (d) and Federal Rule of Civil Procedure 23(f), and the discretionary appeal under 28 U.S.C. § 636(c) from a district-court judgment entered after an appeal from a judgment entered on direction of a magistrate judge in a civil case. If additional interlocutory appeals are authorized under § 1292(e), the new Rule is intended to govern them if the appeals are discretionary.

Subdivision (a). Paragraph (a)(1) says that when granting an appeal is within a court of appeals' discretion, a party may file a petition for permission to appeal. The time for filing provision states only that the petition must be filed within the time provided in the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal.

Section 1292(b), (c), and (d) provide that the petition must be filed within 10 days after entry of the order containing the statement prescribed in the statute. Existing Rule 5(a) provides that if a district court amends an order to contain the prescribed statement, the petition must be filed within 10 days after entry of the amended order. The new rule similarly says that if a party cannot petition without the district court's permission or statement that necessary circumstances are present, the district court may amend its order to include such a statement and the time to petition runs from entry of the amended order.

The provision that the Rule 4(a) time for filing a notice of appeal should apply if the statute or rule is silent about the filing time was drawn from existing Rule 5.1.

Subdivision (b). The changes made in the provisions in paragraph (b)(1) are intended only to broaden them sufficiently to make them appropriate for all discretionary appeals.

In paragraph (b)(2) a uniform time — 7 days — is established for filing an answer in opposition or a cross-petition. Seven days is the time for responding under existing Rule 5 and is an appropriate length of time when dealing with an interlocutory appeal. Although existing Rule 5.1 provides 14 days for responding, the Committee does not believe that the longer response time is necessary because an appeal under § 636(c)(5) is a second appeal and the party involved will have had sufficient time to develop a response or cross-petition.

Subdivision (c). Subdivision (c) is substantively unchanged.

Subdivision (d). Paragraph (d)(2) to state that "the date when the order granting permission to appeal is entered serves as the date of the notice of appeal" for purposes of calculating

time under the rules. That language simply clarifies existing practice.

Form 4. Affidavit to Accompany Motion for Permission to Appeal in Forma Pauperis

United States District Court for the _____ District of _____

United States of America)
v.) No. _____
A. B.)

Affidavit in Support of Motion to Proceed on Appeal in Forma Pauperis

I swear or affirm under penalty of perjury that because of my poverty I am unable to pay the docket fees of my appeal or to post a bond for them. I believe I am entitled to a different result than that reached in the district court. My issues on appeal are:
[List the issues on appeal.]

I further swear or affirm under penalty of perjury that the responses which I have made to the questions and instructions below relating to my ability to pay the fees for my appeal are true.

Instructions. Please complete all questions in this application and then sign it on the last page. If the answer to any question is "0" or "none," or the question is "not applicable", so indicate by writing "0", "none", or "not applicable (N/A)". If additional space is needed to answer any question or to explain your answer to any question, please use and attach a separate sheet of paper identified with your name, the docket number of your case and the number of the question.

1. Are you or your spouse currently employed? Yes _____ No _____

2. If you or your spouse are currently employed, state the name and address of your employer, the length of your employment with that employer, and your monthly gross pay. Gross pay is pay before any taxes or other deductions are taken. If you have more than one employer, please

provide the information requested below about the other employer(s) on a separate sheet of paper and attach it to this application.

Yourself:	Your Spouse:
Name and Address of Employer	Name and Address of Employer
_____	_____
_____	_____
_____	_____
Length of Employment	Length of Employment
_____ Years _____ Months	_____ Years _____ Months
Monthly Gross Pay $_____	Monthly Gross Pay $_____

3. If you are currently unemployed, state the date of your last employment and your monthly gross pay during your last month of employment. Gross pay is pay before any taxes or other deductions are taken.

Date of last employment (Month/Year) for yourself _____; spouse _____

Monthly gross pay during last month of employment $_____

4. State whether you or your spouse have received money from any of the following sources during the past twelve months, and, if so, the average monthly amount from that source. Adjust any money that was received weekly, bi-weekly, quarterly, semi-annually, or annually to show the monthly rate.

Did you receive money from any of the following sources during the past 12 months?	Average monthly amount during past 12 months for you and your spouse if applicable.		Amount expected next month	
	You	Spouse	You	Spouse
Self-employment	Y/N ___ $ _____	$ _____	$ _____	$ _____
Income from real property (such as rental income)	Y/N ___ $ _____	$ _____	$ _____	$ _____
Interest and dividends	Y/N ___ $ _____	$ _____	$ _____	$ _____
Gifts	Y/N ___ $ _____	$ _____	$ _____	$ _____

Alimony	Y/N ___	$ _____	$ _____	$ _____	$ _____
Child Support	Y/N ___	$ _____	$ _____	$ _____	$ _____
Retirement income from sources such as social security, private pensions, annuities, or insurance policies	Y/N ___	$ _____	$ _____	$ _____	$ _____
Disability payments such as social security, other state or federal government, or insurance payments	Y/N ___	$ _____	$ _____	$ _____	$ _____
Unemployment payments	Y/N ___	$ _____	$ _____	$ _____	$ _____
Public assistance payments such as welfare payments	Y/N ___	$ _____	$ _____	$ _____	$ _____
Other sources of money (specify: _____)	Y/N ___	$ _____	$ _____	$ _____	$ _____
TOTAL			$ _____	$ _____	$ _____

5. State the amount of cash you and your spouse have: $ _____

State below any money you or your spouse have in savings, checking, or other accounts in a bank or other financial institution.

Bank or Other Financial Institution:	Type of Account such as savings, checking, or CD:	Amount you have:	Amount your spouse has:
_____	_____	$ _____	$ _____
_____	_____	$ _____	$ _____
_____	_____	$ _____	$ _____

If you have funds in a prison or other similar institutional account, the Certified Statement of Institutional Account for the Past Six Months at the end of this form must be completed by the institution.

6. State below the assets owned by you and your spouse. **Do not list ordinary household furnishings and clothing.**

Home	Address:	Value: $ _____
	_____	Amount owed on mortgages and
	_____	liens: $ _____
Other real	Address:	Value: $ _____
estate	_____	Amount owed on mortgages and
	_____	liens: $ _____
Motor vehicle	Model/Year:	Value: $ _____
	_____	Amount owed: $ _____
Motor vehicle	Model/Year:	Value: $ _____
	_____	Amount owed: $ _____
Other	Description: _____	Value: $ _____
	_____	Amount owed: $ _____

7. State below any person, business, organization, or governmental unit that owes you or your spouse money and the amount that is owed.

Name of Person, Business, or Organization that Owes You or Your Spouse Money	Amount Owed You:	Amount Owed Your Spouse:
_____	$ _____	$ _____
_____	$ _____	$ _____

8. State the individuals who rely on you and your spouse for support. Indicate their relationship to you, their age, and whether they live with you.

Name	Relationship	Age	Does this person live with you?
_____	_____	_____	Yes _____ No _____

_____	_____	_____	Yes ____	No ____
_____	_____	_____	Yes ____	No ____
_____	_____	_____	Yes ____	No ____

9. Complete this question by estimating the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, bi-weekly, quarterly, semi-annually, or annually to show the monthly rate.

	You	Spouse
Rent or home mortgage payment (include lot rented for mobile home)	$ _____	$ _____
Are real estate taxes included? Yes ____ No ____		
Is property insurance included? Yes ____ No ____		
Utilities: Electricity and heating fuel	$ _____	$ _____
Water and sewer	$ _____	$ _____
Telephone	$ _____	$ _____
Other _____	$ _____	$ _____
Home maintenance (Repairs and upkeep)	$ _____	$ _____
Food	$ _____	$ _____
Clothing	$ _____	$ _____
Laundry and dry cleaning	$ _____	$ _____
Medical and dental expenses	$ _____	$ _____
Transportation (not including car payments)	$ _____	$ _____
Recreation, clubs and entertainment, newspapers, magazines, etc.	$ _____	$ _____
Charitable contributions	$ _____	$ _____

Insurance (not deducted from wages or included in home mortgage payments)		
Homeowner's or renter's	$ _____	$ _____
Life	$ _____	$ _____
Health	$ _____	$ _____
Auto	$ _____	$ _____
Other _____	$ _____	$ _____
Taxes (not deducted from wages or included in home mortgage payments) (specify) _____		$ _____
Installment payments		
Auto:	$ _____	$ _____
Credit Card: (name) _____	$ _____	$ _____
Department Store: (name) _____	$ _____	$ _____
Other _____	$ _____	$ _____
Other _____	$ _____	$ _____
Alimony, maintenance, and support paid to others	$ _____	$ _____
Payments for support of additional dependents not living at your home	$ _____	$ _____
Regular expenses from operation of business, profession, or farm (attach detailed statement)	$ _____	$ _____
Other _____	$ _____	$ _____
TOTAL MONTHLY EXPENSES	$ _____	$ _____

10. Do you expect any major changes to your monthly income or expenses during the next four months? Yes _____ No _____

If yes, describe.

Form 4. Affidavit Page 7 -- Docket Number: _____

11. Have you paid an attorney any money for services in connection with this case, including the completion of this form? Yes _____ No _____

If yes, how much? $ _____

If yes, provide the name, address, and telephone number of the attorney:

_____

_____

_____

Have you promised to pay or do you anticipate paying an attorney any money for services in connection with this case, including the completion of this form? Yes _____ No _____

If yes, how much? $ _____

If yes, provide the name, address, and telephone number of the attorney:

_____

_____

_____

12. Have you paid anyone other than an attorney (such as a paralegal, typing service, or another person) any money for services in connection with this case, including the completion of this form? Yes _____ No _____

If yes, how much? $ _____

If yes, provide the name, address, and telephone number of the person or service:

_____

_____

_____

Have you promised to pay or do you anticipate paying anyone other than an attorney (such as a paralegal, typing service, or another person) any money for services in connection with this case, including the completion of this form? Yes _____ No _____

If yes, how much? $ _____

If yes, provide the name, address, and telephone number of the person or service:

_____

_____

_____

13. How much can you pay each month toward the docket fee for your appeal.

$ _____

14. Please provide any other information that helps to explain why you are unable to pay the docket fees for your appeal.

15. State the address of your legal residence:

_____

_____

_____

Your daytime phone number:

(_____)_____

Your age: _____

Years of schooling: _____

Your social security number:

_____

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT. 28 U.S.C. § 1746, 18 U.S.C. § 1621.

Date: _____ Signature: _____

CERTIFIED STATEMENT OF INSTITUTIONAL ACCOUNT

This is to certify that the movant has on deposit drawable funds in the amount of $_____.

In the past six months, the balance in movant's account is certified as follows:

Month:	Amount:
_____	$ _____
_____	$ _____
_____	$ _____
_____	$ _____
_____	$ _____
_____	$ _____

A certified copy of the statement of movant's account (or institutional equivalent) is attached.

Date:_____ Signature of Authorized Officer:

_____

Title: _____

ORDER

Docket number: _____

Let the applicant proceed without prepayment of fees or posting a bond for them.

_____,

District Judge

Form 4. Affidavit Page 11 -- Docket Number: _____

II. INFORMATION ITEMS

A. Restyled Rules

The packet of restyled rule was published in April. Public hearings are scheduled for July 8 in Washington, D.C., and August 2 in Denver, Colorado. Because the comment period does not close until the end of the year and the Advisory Committee does want to begin any new projects until the close of that comment period, the Advisory Committee does not plan to hold a fall meeting.

B. Other Activities

Draft minutes of the Advisory Committee's April meeting and May telephone conference are attached. In addition, a copy of the Advisory Committee's table of agenda items is also attached.

DRAFT

MINUTES OF THE MEETING OF THE ADVISORY COMMITTEE ON APPELLATE RULES APRIL 15, 1996

Judge James K. Logan called the meeting to order on April 15, 1996, at 8:30 a.m. in the Fairmont Hotel in San Francisco, California. In addition to Judge Logan, the Advisory Committee Chair, the following committee members were present: Judge Will L. Garwood, Judge Alex Kozinski, Mr. Michael Meehan, Mr. John Charles Thomas, and Judge Stephen Williams. Mr. Robert Kopp attended the meeting on behalf of Solicitor General Days. Judge Alicemarie Stotler, the Chair of the Standing Rules Committee, and Judge Frank Easterbrook, the liaison member from the Standing Committee, were both present. Mr. Patrick Fisher, the Clerk for the Tenth Circuit, attended on behalf of the clerks. Mr. Peter McCabe, the Committee Secretary, and Mr. John Rabiej, Chief of the Rules Committee Support Office, were present. Ms. Judith McKenna of the Federal Judicial Center was in attendance. Chief Justice Pascal Calogero, a member of the Advisory Committee, joined the meeting later in the morning. Mr. Cole Benson, the Supervising Deputy of the Ninth Circuit Clerks, attended as a guest.

Judge Logan noted the recent publication of the restyled rules and thanked all the committee members once again for all their hard work on that project. He announced the public hearings scheduled on July 8 in Washington, D.C. and August 2 in Denver, Colorado. Judge Logan invited all committee members to attend the hearings.

The minutes of the October 1995 meeting were approved as submitted.

Judge Logan then asked the reporter to begin discussion of the proposed rule amendments that had been published in September 1995.

Rule 26.1

Rule 26.1, as published, was divided into three subdivisions to make it more comprehensible. The rule continued to require disclosure of a party's parent corporation but the amendments deleted the requirement that a corporate party identify subsidiaries and affiliates that have issued shares to the public. The amendments, however, added a requirement that the party list all its stockholders that are publicly held companies owning 10% or more of the stock of the party.

Eleven letters commenting on the proposed amendments were received; the letter from the American Bar Association Section of Intellectual Property, however, included separate suggestions from two committees so there was a total of 12 commentators. Of the 12, four supported the amendments, none generally opposed the amendments, but 8 suggested revisions.

The Advisory Committee had specifically requested that the Committee on Codes of Conduct review the proposed amendments. The Committee on Codes of Conduct approved the proposed draft. Given that approval, the new draft prepared by the reporter at the close of the comment period did not make any fundamental changes in the disclosure requirements. Specifically, the requirement that a party disclose "subsidiaries" and "affiliates" was not reinstated even though 2 of the commentators urged reinsertion of that requirement.

The new draft also continued to require disclosure of a stockholder that owns 10% or more of the party's stock if the stockholder is publicly held. One commentator said that this provision "over-extends" the assumption of disqualification because a judge's interest may be extremely minimal. The disqualification statute is, however, quite demanding. The statute requires a judge to disqualify himself or herself if the judge has a "financial interest" in a party "however small" the interest may be, if the interest could be "substantially affected by the outcome of the proceeding."

The new draft did not require the party to disclose all of the party's stockholders that are publicly held (as one commentator suggested) but continued only to require disclosure of those corporations that own 10% of the party's stock. The ten percent threshold makes the judge's interest in the stockholder a financial interest in the party. The new draft made it clear that the rule applies only when a single corporate stockholder owns at least 10% of the party's stock.

The new draft also required disclosure of "all" of a party's parent corporations rather than "any" parent corporation. The intent of the change was to require disclosure of grandparent and great-grandparent corporations. Corresponding changes were made in the Committee Note.

One of the members stated that the definition of a parent corporation is crucial. Although it was noted that the SEC has a fairly precise definition, the consensus was that in this context it is not necessary to make the definition more scientific by designating the percentage ownership that makes one corporation a parent of another. Nor was there sentiment that the rule needs to be expanded beyond corporations to other organizations. None of the members were familiar with instances in which a judge has been unable to ascertain the judge's interest in limited partnerships, etc.

With regard to the suggestions that the rule should continue to require disclosure of subsidiaries and affiliates, it was noted that none of the persons who suggested retention of that disclosure requirement had been able to identify an instance when failure to provide disclosure would be problematic.

The new draft was approved unanimously. It was agreed that the changes

made after publication were not substantial and that there was no need to republish the rule.

Rule 29

The rule governing amicus briefs was entirely rewritten prior to publication. The former rule granted permission to conditionally file an amicus brief with the motion for leave to file. The published rule required the brief to accompany the motion. In addition to identifying the applicant's interest and the reasons why an amicus brief is desirable, the published rule required that the motion state the relevance of the matters asserted to the disposition of the case. The published rule also specified the contents and form of the brief. The published rule limited an amicus brief to no longer than one-half the maximum length of a party's principal brief.

Seventeen commentators submitted statements about the proposed rule. Of the seventeen, none generally opposed the amendments; 3 supported the amendments without reservation; 13 suggested revisions; and 1 made no substantive comment.

Seven of the commentators who suggested revisions were unhappy with the provision limiting an amicus brief to one-half the length of a party's brief. The new draft prepared at the close of the comment period did not change the limit except to provide 1) that permission granted to a party to file a longer brief has no effect upon the length of an amicus brief, and 2) that a court may grant an amicus permission to file a longer brief.

Four commentators opposed the requirement that the brief accompany a motion for leave to file. The new draft deleted that requirement so that the cost of preparing a brief need not be incurred unless the amicus knows that it will be permitted to file its brief.

The existing rule requires an amicus curiae to file its brief "within the time allowed the party whose position as to affirmance or reversal the amicus brief will support" unless: 1) all parties otherwise consent, or 2) the court for cause shown grants leave for later filing. The published rule dropped the exception based upon consent of all parties, but otherwise left the time for filing the brief unchanged. Four commentators opposed the requirement that the brief be filed within the time allowed the party being supported. Because the Committee had spent considerable time on the timing issues when developing the published amendments, the new draft did not adopt any of the alternative approaches suggested by the commentators and retained the same filing schedule as the published version.

Both the existing and the published rules permitted the filing of an amicus brief by leave of court or when the brief is "accompanied by written consent of all parties." Rather than requiring the applicant to file the written consent of all the parties, the new draft adopted the suggestion that it would be sufficient to submit a statement that all parties consent to the filing of the brief.

In subpart (a) of the new draft the District of Columbia was added to the list of entities allowed to file an amicus brief without consent. The new draft also made it clear in subpart (f) that an amicus may request leave to file a reply.

The Committee began its discussion by considering the length provisions at lines 56-62 of the new draft and the intersection of that provision with the time for filing. One member reiterated some of the arguments advanced by the commentators who urged the Committee to increase the length. He argued that an amicus does not always have an opportunity to review the party's brief; that the party and the amicus may not agree about the way to approach the issues; and, in instances in which the amicus is a better advocate than the party, the amicus brief may become the equivalent of one of the main briefs in the case. He further noted that the length limitation interrelates with whether or not the amicus must file at the same time as the party or is permitted to file later. The shorter limitation is more acceptable if the amicus files after the party being supported

Another member responded that the most helpful amicus briefs are short and to the point.

Two other members responded to the suggestion that a staggered briefing schedule should be considered. They stated that in their experience the party and the amicus ordinarily work cooperatively. They argued, therefore, that the rule should not delay the briefing schedule.

Other members said that they were persuaded by those who argued that if the amicus brief must be short and not repetitious of the party's brief, the amicus should have some short period of time after the party's brief is filed to fine-tune the amicus brief.

A vote was taken on the substantive question of whether an amicus should be permitted to file after the party being supported. The vote was 5 in favor of the staggered schedule and two in opposition. Accordingly the language at lines 66-70 of the redraft was amended to state:

> The brief shall be filed no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae who does not support either party shall file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed.

That new language was approved unanimously. The passive voice — "is filed" — was used deliberately. The filing date of a brief is a bit confusing. A party or amicus can send its brief to a court for filing; although it is timely under Rule 25 if mailed within the filing time, it is not filed until the court receives it. It would be incorrect to say that the brief is due 7 days after "the party files" its brief because filing is done by the court not by the party. It was understood that the amicus may need to contact the court in order to ascertain the filing date.

One member suggested that with a staggered briefing schedule the amicus should be required to effect same day service of the brief on the parties so that the party has sufficient opportunity to address in its responsive brief the issues raised by the amicus. The suggestion was not adopted, however, because same day service on out-of-town parties is possible only by fax and even that may not be possible. Fax machines are not always operational and even when they are, they are often busy.

The language of lines 56-62 was redrafted and unanimously approved. As amended those lines read as follows:

> Except by the court's permission, an amicus brief may be no more than one-half the maximum length of a party's principal brief that is authorized by these rules. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

Lines 73 and 74 of the redraft were amended to read as follows: "Except by the court's permission, an amicus curiae may not file a reply brief." The published draft had said that an amicus "is not entitled to file a reply brief." The "is not entitled" language carried the implication that an amicus could seek permission to file a reply. But with the addition of the introductory phrase — "except by the court's permission" — the opportunity to seek the court's permission is made express and the "may not file" language is appropriate.

The discussion then turned to lines 35-38 of the redraft. The redraft said: "In addition to the requirements of Rule 32, the cover shall identify the party or parties supported or indicate whether the brief supports affirmance or reversal." (emphasis added). One member suggested replacing the word "or" with "and" so that both types of information are required. In the rare instances in which the amicus does not support any party, the amicus could simply so indicate. That change was approved by acclamation.

Lines 23-27 of the redraft make a post-publication change. The published rule, like the existing rule, said that an amicus may file a brief only with the court's permission or if the brief is accompanied by the written consent of all the parties. Three commentators suggested changing the provision dealing with consent of the parties. The redraft eliminated the need to file the other parties'

written consent and provided that it would be sufficient for the brief to state that all parties have consented to its filing. The Committee accepted that change but amended those same lines to improve the syntax. As amended lines 23-27 read as follows: "Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing."

The Committee then discussed the time for an amicus to file its motion for leave to file. One member proposed that lines 28 and 29 should state that the motion may be filed on or before the date the amicus brief is due. It was pointed out that in some circuits any such motion is held until the case is assigned to the panel and, therefore, the would-be amicus does not get a response to the motion until after the brief is presented for filing. The Committee decided, by a vote of 5 in favor and 2 abstentions, to return at lines 28-29 and lines 63-64 to the published draft and require that the brief accompany the motion. That means that the motion must be filed no later than the time for filing the brief.

With regard to participation of an amicus in oral argument, the language of lines 76-78 was amended. The Committee agreed that it is common to allow an amicus to participate in oral argument when the party being supported cedes some of its time to the amicus. The Committee, however, wanted to retain court control over the ability of an amicus to participate, rather than permitting an amicus to participate whenever a party is willing to cede some of its time. Leaving the final decision in the court's hands may lessen the ability of an amicus to exert undue pressure on the party. The published rule said that a motion to participate is granted only for "extraordinary reasons." The Committee agreed to change the language to more accurately reflect current practice. As amended subpart (g) says: "An amicus curiae may participate in oral argument only with the court's permission." The reporter was asked to prepare an accompanying change in the Committee Note indicating that unless a party is willing to cede some of its time to the amicus, oral argument by an amicus will only be permitted in extraordinary circumstances.

Rule 35

The proposed amendments to Rule 35 treat a request for a rehearing en banc like a petition for panel rehearing so that a request for a rehearing en banc will suspend the finality of a court of appeals' judgment and extend the period for filing a petition for writ of certiorari. The sentence in the existing rule stating that a request for rehearing en banc does not suspend the finality of the judgment or stay the mandate was deleted. The term "suggestion" for rehearing en banc was changed to "petition for rehearing en banc."

Fifteen comments on the proposed amendments were received. Six of the

commentators addressed the criteria for granting a rehearing en banc. Because these provisions had been the subject of careful negotiation among the Committee members, the only post-publication changes recommended by the reporter were intended to: 1) make it clear that intercircuit conflict is only one example of a question of "exceptional importance," 2) eliminate any implication that a court should grant en banc reconsideration whenever there is an intercircuit conflict, and 3) avoid the implication that a case cannot present a question of exceptional importance unless it conflicts with every other federal court of appeals.

Justice Calogero, who had experienced travel delays, joined the meeting.

Judge Logan began the discussion with the "spelling issue," that is with the change from "in banc," as used in the existing rule, to "en banc" as used in the published draft. On a vote to retain the "en banc" spelling, 6 members voted in favor of that spelling and one abstained. The Committee generally expressed hope that the spelling question not become an issue that might prevent the rest of the proposed changes from moving forward. The reporter had prepared a new paragraph for insertion in the Committee Note which would explain the reason for the change. The Committee decided that the explanation should be part of the Advisory Committee's report to the Standing Committee, but not part of the Committee Note accompanying the rule.

The Committee then turned its attention to the changes made in part (b)(1)(B) dealing with the "exceptional importance" criteria. The redraft struck the word "every" at the end of line 37, so that the intercircuit conflict example said that a proceeding may present a question of exceptional importance "if it involves an issue as to which the panel decision conflicts with the authoritative decisions of other federal courts of appeals that have addressed the issue." The published draft had limited the example to instances in which the panel decision conflicts with the authoritative decisions of <u>every</u> other federal court of appeals." The dropping of the word "every" was responsive to a comment that objected to the implication that a court should grant en banc rehearing whenever a panel decision conflicts with the decision of even a single other circuit. It was noted, however, that dropping the word "every" also cuts the other way and may imply the desirability of an en banc hearing even when the panel decision only joins one side of an already existing conflict. The Committee voted unanimously to return lines 37 through 39 to the wording used in the published rule. Those lines having been changed, subparagraph (b)(1)(B) was approved unanimously.

One member was concerned that the rule does not authorize a court to hold an en banc hearing to correct an error. Others responded that a party seeking an en banc hearing for such a purpose argues that the proceeding involves a question of "exceptional importance."

Lines 8-10 were amended to read: "en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or". That change eliminates the phrase "consideration by the full court" which the Committee found inconsistent with the statutory authorization for en banc consideration by less than all the members of a court (i.e. the mini en banc hearings authorized in the Ninth Circuit).

Discussion then turned to lines 47-52 which state that when a party files both a petition for panel rehearing and a petition for rehearing en banc, together they cannot exceed 15 pages even if they are filed separately. It was pointed out that some circuits require the use of two separate documents and in such circuits it would be difficult to include all necessary information in both documents and meet the 15 page limit. The Committee, therefore, unanimously voted to amend line 52 by adding the words "unless separate filing is required by local rule."

There was discussion of the retention of "page" limits in this rule as contrasted with the proposed limits in Rule 32 that are based upon word or character counts. The consensus was that the additional complications of the Rule 32 methods, including attorney certification of the length, are not necessary in this context.

Lines 89-92 of the redraft were amended. The redraft said that a vote need not be taken on a petition for rehearing en banc unless a judge in regular active service or any other member of the panel that rendered the decision calls for a vote on the petition. It was noted that at least one circuit permits a senior judge to call for a vote even though a senior judge cannot vote on the petition. The statute is silent about who can call for a vote on the petition even though the statute prohibits a senior judge from voting on the petition unless he or she was a member of the panel rendering the decision. It is Judicial Conference policy that senior judges should be treated like active judges to the extent consistent with statute. The Committee unanimously approved changing line 91 so that "a judge" can request a vote. It was decided that it was unnecessary to discuss that change in the Committee Note.

With regard to the Committee Note it was decided to delete all references to specific local rules. As local rules change over time, the citations become obsolete.

Also, the portion of the Committee Note explaining subdivision (c), which discusses the interrelationship between the changes in Rule 35 and Supreme Court Rule 13.3, was deleted. The Committee Note, as published, said that the changes in Rule 35 did not mean that the filing of a request for a rehearing en banc would extend the time for filing a petition for writ of certiorari and that amendment of Supreme Court Rule 13.3 would be necessary to accomplish that

objective. The Committee agreed with the commentators who felt that the proposed changes arguably would have that effect. Supreme Court Rule 13.3 says if a "petition for rehearing" is timely filed the time to file a petition for a writ of certiorari runs from the date of the denial of the petition or, if the petition is granted, from the entry of judgment. The Supreme Court Rule further says that a "suggestion . . . for a rehearing en banc is not a petition for rehearing within the meaning of [Rule 13] unless so treated by the United States court of appeals." The Committee believed that the change in name from "suggestion" for rehearing en banc to "petition" for rehearing arguably affected the desired change in the time for filing a petition for certiorari. It was, however, the Committee's intent to inform the Supreme Court that amendment of its Rule 13.3 would help prevent potential confusion.

Rule 41

In keeping with the objective of the amendment to Rule 35 that a request for a rehearing en banc be treated like a request for a panel rehearing, the published amendments to Rule 41 provided that the filing of a petition for rehearing en banc or a motion for a stay of mandate pending petition to the Supreme Court for a writ of certiorari delay the issuance of the mandate until the court disposes of the petition or motion. The published rule also provided that a mandate is effective when issued. The published rule further provided that the presumptive period for a stay of mandate pending petition for a writ of certiorari would be 90 days.

Nine commentators submitted letters discussing Rule 41. Six of them approved the amendments without reservation. One made no substantive comments. Two suggested revisions.

The post-publication redraft adopted the suggestion that the language of the rule be modified to make it clear that the party, not the Supreme Court Clerk, has the burden of notifying the court of appeals when a petition for certiorari has been filed.

The other suggestion, that the rule should specify when the mandate issues if a petition for rehearing or a petition for rehearing en banc is granted, resulted in an addition to the Committee Note.

Lines 48-57 were amended by the Committee to reflect the fact that ordinarily the court of appeals learns about the filing of a petition of certiorari by telephone conversation with the office of the Clerk of the Supreme Court. The actual notice that a cert petition has been filed is often not received until after the original stay has expired. As amended those line read:

The stay shall not exceed 90 days, unless the period is extended for good cause, or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk during the period of the stay.

Rule 41, as amended, was approved for submission to the Standing Committee.

Need for Republication?

Judge Logan then asked whether any of the post-publication changes made to the rules were substantial; if so, those rules must be republished. Only the staggered briefing schedule for amicus brief was discussed as possibly substantial. The Committee consensus, however, was that because the changes made would not extend the briefing schedule, even that change did not require republication.

Timing?

Judge Logan asked the Committee to consider, in light of the recent publication of the restyled rules, the time at which these rules should be moved forward to the Standing Committee and the Judicial Conference.

Judge Logan recommended sending them forward this summer because delaying would put these changes on the same schedule as the restyled rules. There are already 3 rules in the restyled packet that contain substantive changes. If these 4 are delayed, then the packet would contain 7 substantively altered rules. If the restyled packet were to fail, then these 7 rules would be further delayed another year.

Committee reaction was mixed. Several members said that it is easier to have changes come all at once. Another member urged going forward now because we do not know what the reaction will be to the restyled rules. If the restyled rules become very controversial, the substantive changes proposed in the 4 rules dealt with at this meeting may be unduly delayed.

A motion was made to submit the rules to the Standing Committee for its approval but to ask the Standing Committee to hold these rules and send them to the Judicial Conference with the restyled rules. It was noted that there are changes in the 4 rules dealt with at this meeting that are not reflected in the restyled rules. It would be easier to reconcile the rules all at once. Indeed, if these 4 rules were to become effective on December 1, 1997, they would need to be amended again on December 1, 1998, if only to change "shall" to "must." The only urgent problem addressed in the 4 rules is the timing trap created by the current difference between a petition for panel rehearing and a suggestion for rehearing en banc. Even that problem is cured in many circuits by local practice

that automatically treats a suggestion for rehearing en banc as containing a petition for panel rehearing. The motion passed by a vote of 5 to 3.

Form 4

Mr. William K. Suter, the Clerk of the Supreme Court, wrote to the Committee to recommend amendment of Form 4, the affidavit that accompanies a motion to proceed in forma pauperis. Mr. Suter suggested that the form is deficient in several respects. Judge Logan had asked Mr. Fisher to prepare a draft of a more complete form.

The Committee spent only a brief time considering the draft when it decided that it wanted to make more sweeping changes and that attempting to rewrite the form on the floor of the Committee was unwise. It was suggested that Mr. Fisher use the form developed by the IFP pilot project in bankruptcy as a model for a new draft for later consideration. It was also suggested that special effort be taken to use simple, clear language.

Judge Stotler said that there is a need across the judiciary for a generic IFP/CJA form. She was uncertain whether the development of such a form falls within the jurisdiction of the FRAP Advisory Committee or any of the rules committees, but the need exists nonetheless. She further noted that the development of such a form must be undertaken with the understanding that any such form could be fertile ground for discrimination suits and thus one needs to give careful consideration to the information that is actually essential. The project may be a very large one. The CJA form was developed by the Defender Services Committee.

Given the possible delay of this project, Judge Logan introduced the topic of the need for a fall meeting. The Advisory Committee had earlier decided to delay any new projects until at least the completion of the publication period for the restyled rules. Since that period does not conclude until the end of December, Judge Logan and Mr. Rabiej had earlier discussed the possibility of not holding a fall meeting. Would consideration of a new Form 4 create a need for a fall meeting? It was suggested that this sort of item could probably be handled by mail or by conference call. A phone conference was scheduled for May 1 at 4:00 EDT.

Judge Stotler pointed out that amendment of the FRAP forms currently requires compliance with the full Rules Enabling Act procedures followed for amendment of the rules. In contrast, Bankruptcy Rule 9009 confers on the Judicial Conference the power to approve bankruptcy forms without the need for approval from the Supreme Court and Congress. Bankruptcy Rule 9009 says:

> The Official Forms prescribed by the Judicial Conference of the United States shall be observed and used with alterations as may be appropriate. Forms may be combined and their contents rearranged to permit economies in their use. The forms shall be construed to be consistent with these rules. (emphasis added)

She wondered whether the FRAP should have a similar provision. Adoption of any such FRAP provision would not affect adoption of this particular form, but could make future changes easier.

The Committee noted that bankruptcy forms present unique problems because the bankruptcy forms are mandatory and they are keyed at many points to the statutes which Congress has frequently amended. Without the ability to quickly change the forms following a statutory amendment, there would be substantial confusion.

FRAP Form 4 is not mandatory for a party seeking to proceed ifp in the court of appeals. FRAP 24(a) says that a party desiring to proceed ifp in the court of appeals shall file a motion "showing, in the detail prescribed by Form 4 of the Appendix of Form, the party's inability to pay fees and costs or to give security . . ." FRAP Form 4 is, however, mandatory for a party seeking to proceed ifp in the Supreme Court. Supreme Court Rule 39 says that a party seeking to proceed ifp in the Supreme Court "shall file a motion for leave to do so . . . in the form prescribed by the Federal Rules of Appellate Procedure, Form 4."

Other than FRAP Form 4 the other forms are so bare bones that the consensus was that they are unlikely to need amendment.

Civil Rule 23(f) Interlocutory Appeals

At its spring meeting, the Civil Rules Advisory Committee planned to consider amendments to Rule 23. The proposed amendments would add the following provision to Rule 23:

> **(f) Appeals.** A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying a request for class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

At present FRAP deals with permissive appeals in Rule 5 (dealing with appeals under 28 U.S.C. § 1292(b)) and Rule 5.1 (dealing with the second appeal from a judgment entered upon direction of a magistrate judge). None of the

existing rules would govern the new 23(f) appeals. The reporter prepared two drafts for the Committee's consideration. The first included the 23(f) appeals within Rule 5.1. (Because Rule 5 has provisions relating to specific features of § 1292(b) appeals, the 23(f) appeals did not fit as well into Rule 5.) The second was a separate draft Rule 5.2 dealing exclusively with 23(f) appeals.

The Committee fairly quickly decided that it would prefer to combine Rules 5 and 5.1 and broaden new Rule 5 so that it would cover all discretionary appeals. The Committee members said that the Rule 23(f) proposal is likely only the first of possibly several rule changes that would authorize interlocutory appeals and it would be preferable to try to handle all of them with a generic rule. The Committee asked the reporter to prepare such a draft for consideration during its upcoming telephone conference call.

The reporter noted that Rules 5 and 5.1 provide different time periods for filing a response to a petition for leave to appeal. Rule 5.1 provides a 14-day period for filing a response to a petition under § 636(c)(5) whereas Rule 5 gives only 7 days for filing a response to a petition for leave to appeal under § 1292(b). There does not appear to be a statutory basis for the 14-day response period in Rule 5.1; it may be based, however, upon the 14-day response period provided in Civil Rule 74(a), governing an appeal to a district court from a decision made by a magistrate judge. A preliminary vote was taken on the response time that should be included in the generic draft. Although there was some support for 10-day or 14-day periods, more members preferred a 7-day period than any other. Given that the petition itself must be filed within 10 days after entry of the order, there was some sentiment that it would be anomalous to give a longer response period. Also since the rule would deal with interlocutory appeals and with the second appeal from a magistrate's decision, a longer period did not seem either necessary or desirable.

Rule 22

Judge Logan reported that a senate bill that would amend FRAP 22, along with making statutory changes regarding habeas and § 2255 actions, has passed both the house and the senate. There are inconsistencies in the language amending Rule 22. Last winter when the bill was in the development stage Judge Logan sent a letter to senate staffers working on the bill; the letter pointed out the inconsistencies and recommended ways to cure them. Unfortunately, the inconsistencies still remain in the bill. Judge Logan wrote this spring to each member of the conference committee again pointing out the inconsistencies and recommending ways to cure the inconsistencies. He hopes that before the bill is signed the problems will be corrected.

Restyled Rules

Mr. Rabiej asked the Committee for suggestions of people to whom the restyled rules should be sent.

Judge Williams noted that unless Judge Logan's chairmanship is extended by the Chief Justice, this will be Judge Logan's last meeting. Judge Williams led the Committee in thanking Judge Logan for his leadership and hard work. Judge Stotler, however, expressed her hope that the Chief Justice would extend Judge Logan's term for a year so that he could complete the first cycle of work on the restyled rules.

The meeting adjourned at 4:30 p.m.

Respectfully submitted,

Carol Ann Mooney
Reporter

DRAFT

MINUTES OF THE TELEPHONE CONFERENCE OF THE ADVISORY COMMITTEE ON APPELLATE RULES MAY 1, 1996

Judge James K Logan began the telephone conference at 4:00 EDT on May 1, 1996. In addition to Judge Logan the following Advisory Committee members participated in the conference: Chief Justice Pascal Calogero, Judge Will L. Garwood, Judge Alex Kozinski, Mr. Michael Meehan, Mr. Luther Munford, Mr. John Charles Thomas, and Judge Stephen Williams. Mr. Robert Kopp represented Solicitor General Days. Judge Frank Easterbrook, the liaison member from the Standing Committee, participated as did Mr. Patrick Fisher, representing the circuit clerks. Professor Carol Ann Mooney, the reporter, and Mr. John Rabiej from the Administrative Office also participated.

Proposed Rule 5

As requested at the April meeting the reporter had prepared and circulated a draft Rule 5 that would replace both existing Rules 5 and 5.1. That draft was circulated on April 19. Committee members then submitted suggestions for improvement in the draft and a new draft was circulated on April 29. The draft under discussion was that later draft. A copy of that draft is attached to these minutes.

The Committee members expressed general satisfaction with the basic approach.

It was noted that the caption to the rule was titled "Appeal by Leave" but subdivision (a) was titled "Petition for Permission to Appeal." The consensus was that the rule should consistently use either "leave" or "permission" but not both. By a vote of 5 to 3 it was decided to use "permission."

Discussion then turned to lines 3 through 5. To eliminate the word "may" at the end of line 4 the sentence was rewritten, with unanimous approval, to read as follows:

> "To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition for permission to appeal. "

One member questioned the need for paragraph (a)(3). Paragraph (a)(3) was added to the second draft to deal with the possibility that a problem that existed before the 1967 adoption of Rule 5 might resurface. The problem concerns a district court's amendment of an order to include the § 1292(b) statement when the order originally entered did not include such a statement. The problem was whether the 10-day period for filing an interlocutory appeal should be measured from entry of the original order or from entry of the

amended order. A split in the circuits arose until the 1967 adoption of Rule 5.

Since 1967 Rule 5 has said that if a district court amends an order to contain the statement prescribed by § 1292(b), the petition must be filed within 10 days after entry of the amended order. The April 19 draft did not include that provision on the assumption that with the passage of time and the habits developed under Rule 5 the problem would not resurface. Two members agreed with that approach believing that the chance of the problem returning was remote. Others thought that the addition of (a)(3), while not absolutely necessary, provided helpful clarification and removed a litigable issue. Judge Logan called for a vote on retention of paragraph (a)(3); all members voted in favor of retaining it.

Lines 40 through 43 were amended, with unanimous approval, to improve the flow of the language. As amended they provide that a petition must include a copy of the order complained of and any related opinion or memorandum, "including any stating the district court's permission or finding of any necessary conditions to appeal, if required."

Line 45 of the draft says that a response or a cross-petition must be filed within 7 days after the petition is served. One member suggested that the response time should be 14 days. Another suggested 10 days. Another noted that the respondent has not only 7 days but also all the time the petitioner has. Since most petitions are denied, it was suggested that expanding the response time beyond 7 days would cause unnecessary delay. The consensus was to retain the 7-day response time.

Lines 47 through 49 state that oral argument occurs only if the court orders it. It was suggested that there should be a provision in the rules, perhaps in Rule 34, that oral argument is heard as to the substance of an appeal, but as to all other matters the presumption is that there will be no oral argument. The reporter was asked to add that suggestion to the table of agenda items.

The second draft added language at lines 64-67. Existing Rule 5 says that if permission to appeal is granted no notice of appeal is necessary. The new language says that "the date when the order granting permission to appeal is entered serves as the date of the notice of appeal for calculating time under these rules." Mr. Fisher confirmed that the new language simply clarifies existing practice. The Committee approved the change unanimously and requested the reporter to amend the Committee Note to state that its purpose is simply to clarify existing practice.

Judge Logan had spoken with Judge Stotler that morning. She asked what the Committee would want to do with the proposed Rule 5 if the amendments to

Rule 23 do not move forward at this time. The consensus was that even if the Rule 23 amendments do not go forward, the consolidation of Rules 5 and 5.1 is a good idea and should move forward. In addition the expansion of the rule so that it covers any new type of interlocutory appeal by permission would eliminate the need for future amendments to the Rule.

A subsidiary question is the timing of the publication. Judge Logan asked whether the rule should be published this summer or after the conclusion of the publication period for the style package. It was decided to recommend July publication. With July publication, this change could become effective simultaneously with the restyled rules.

Form 4

As promised at the April meeting Mr. Fisher revised the bankruptcy form used for in forma pauperis (ifp) applications to make the form appropriate for use in the courts of appeals and in the Supreme Court.

One of the first questions was whether the form was too long and complex for the task. It was noted that the CJA form is shorter although much greater sums of money - attorney fees - are at stake. The ifp form is for filing fees, transcripts, and copying costs. It was noted, however, that quite detailed financial information is needed to establish that a person is unable to pay as small a sum as the filing fee. Whereas less detail is needed to establish that a person is unable to pay a larger sum such as attorney fees. While that is logically true, one member still questioned whether the amount of paperwork is justified by the sums of money at stake.

One member suggested that the CJA and ifp forms could be combined. If a person is too poor to pay filing fees, then one should be able to assume that the person is unable to pay attorney fees. Another member, however, felt that the forms should be kept separate because there are many ifp applications but far fewer CJA applications. The suggestion was tabled. It was noted that any such move would need to be coordinated with the Committee on Defender Services as well as with the Advisory Committee on Criminal Rules.

Judge Logan called for a vote on whether to proceed with development of a more detailed Form 4. Four members voted to proceed, 2 opposed proceeding, and 1 abstained.

In the opening paragraphs on the first page it was unanimously decided to amend the language to conform to the statutory language in 28 U.S.C. § 1915(a). It was also decided that both of the opening paragraphs would include the "under

penalty of perjury" language that currently appears only at the end of the form. And question 13 was amended to read: "Please provide any other information that helps to explain why you are unable to pay the docket fee or costs of your appeal."

Throughout the form it was decided that additional space should be provided for information about the spouse's income, assets, expenses, etc.

On pages 2 and 5 the word "prorate" was used. It was decided to change that to "adjust".

On page 3 question 5 was amended to say: "State the amount of cash you have" rather than the amount of "cash on hand".

Mr. Fisher agreed to revise the form to reflect the decisions made during the conference and to circulate it among the members for further comment.

The conference concluded at 6:00 p.m. EDT.

Respectfully submitted,

Carol Ann Mooney
Reporter

Rule 5 Appeal by Leave

(a) Petition for Permission to Appeal.

(1) When granting an appeal is within the court of appeals' discretion, a party may file a petition for permission to appeal. The petition must be filed with the circuit clerk with proof of service on all other parties to the district-court action.

(2) The petition must be filed within the time specified by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal.

(3) If a party cannot petition for appeal unless a district court first enters an order granting permission to do so or stating that the necessary conditions are present, a district court order may be amended to include the required statement and the time to petition runs from entry of the amended order.

(b) Contents of the Petition; Answer or Cross-Petition.

(1) The petition must include the following:

(A) the facts necessary to understand the question to be presented;

(B) the question itself;

(C) the relief sought;

(D) the reasons why, in the opinion of the petitioner, the appeal should be allowed — including reasons that the appeal is within the grounds, if any, established by the statute or rule claimed to authorize the appeal; and

(E) an attached copy of the order, decree, or judgment complained of and any related opinion or memorandum, including any in which the district court's permission to appeal, if required, is stated.

(2) A party may file an answer in opposition

or a cross-petition within 7 days after the petition is served.

(3) The petition and answer will be submitted without oral argument unless the court of appeals orders otherwise.

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

(d) **Grant of Permission; Fees; Cost Bond; Filing the Record.**

(1) Within 10 days after the entry of the order granting permission to appeal, the appellant must:

(A) pay the district clerk all required fees; and

(B) file a cost bond if required under Rule 7.

(2) A notice of appeal need not be filed <u>but the date when the order granting leave to appeal is entered serves as the date of</u>

the notice of appeal for calculating time under these rules.

(3) The district clerk must notify the circuit clerk once the petitioner has paid the fees. Upon receiving this notice, the circuit clerk must enter the appeal on the docket. The record must be forwarded and filed in accordance with Rules 11 and 12(c).

Committee Note

The amendment of Federal Rule of Civil Procedure 23, under the power conferred by 28 U.S.C. § 1292(e), prompts the amendment of this Rule 5 and the elimination of Rule 5.1.

In 1992 Congress added paragraph (e) to 28 U.S.C. § 1292. Paragraph (e) says that the Supreme Court has power to prescribe rules that "provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for" in section 1292. Federal Rule of Civil Procedure 23 has been amended to permit interlocutory appeal from an order granting or denying class certification. Such an appeal is permitted in the sole discretion of the court of appeals.

The Committee believes that the amendment of Civil Rule 23 is only the first of what may eventually be several interlocutory appeal provisions. Rather than add a separate rule governing each such appeal, the Committee believes it is preferable to amend Rule 5 so that it will govern all such appeals.

In addition Rule 5.1 has been largely repetitive of

Rule 5 and the Committee believes that its provisions could also be subsumed into Rule 5. Although Rule 5.1 did not deal with an interlocutory appeal, the similarity to Rule 5 was based upon the fact that both rules governed discretionary appeals.

This new Rule 5 is intended to govern all discretionary appeals from district court orders, judgments, or decrees. At this time that includes interlocutory appeals under 28 U.S.C. § 1292(b),(c), and (d) and Federal Rule of Civil Procedure 23(f), and the discretionary appeal under 28 U.S.C. § 636(c) from a district-court judgment entered after an appeal from a judgment entered on direction of a magistrate judge in a civil case. If additional interlocutory appeals are authorized under § 1292(e), the new Rule is intended to govern them if the appeals are discretionary.

Subdivision (a). Paragraph (a)(1) says that when granting an appeal is within a court of appeals' discretion, a party may file a petition for permission to appeal. The time for filing provision states only that the petition must be filed within the time provided in the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal.

Section 1292(b), (c), and (d) provide that the petition must be filed within 10 days after entry of the order containing the statement prescribed in the statute. Existing Rule 5(a) provides that if a district court amends an order to contain the prescribed statement, the petition must be filed within 10 days after entry of the amended order. The new rule <u>similarly says that if a party cannot petition without the district court's permission or statement that necessary circumstances are present, the district court may amend its order to include such a statement and the time to petition runs from entry of the amended order.</u>

The provision that the Rule 4(a) time for filing a notice of appeal should apply if the statute or rule is silent about the filing time was drawn from existing Rule 5.1.

Subdivision (b). The changes made in the provisions

in paragraph (b)(1) are intended only to broaden them sufficiently to make them appropriate for all discretionary appeals.

In paragraph (b)(2) a uniform time — 7 days — is established for filing an answer in opposition or a cross-petition. Seven days is the time for responding under existing Rule 5 and is an appropriate length of time when dealing with an interlocutory appeal. Although existing Rule 5.1 provides 14 days for responding, the Committee does not believe that the longer response time is necessary because an appeal under § 636(c)(5) is a second appeal and the party involved will have had sufficient time to develop a response or cross-petition.

Subdivisions (c) and (d). Subdivision (c) and (d) are substantively unchanged.

Advisory Committee on the Federal Appellate Rules
Table of Agenda Items -- Revised May 1996

FRAP Item	Proposal	Source	Current Status
89-5	Amendment of FRAP 35(c).	Mr. Robert St. Vrain (CA-8)	Under study by reporter Discussion with Supreme Court Clerk to precede any further action 10/90 Additional drafts requested 12/91 Approved for submission to Standing Committee 4/92 Standing Committee requested that Advisory Committee reconsider 6/92 Draft approved for submission to Standing Committee 4/93. Check all other FRAP for cross-references to "suggestions" for rehearing en banc Approved by Standing Committee for publication to bench and bar 6/93 Publication delayed pending completion of Items 91-25 and 92-4, 9/93 Published 9/95 Approved for submission to Standing Committee 4/96
90-1	Amend FRAP 35(b) and (c) to change "suggestion" for an en banc to a "petition" for an en banc.	Hon. Jon Newman (CA-2) Mr. St. Vrain (CA-8)	Under study See notes under item 89-5
91-3	Final decision by rule/expanding interlocutory appeal by rule.	Federal Courts Study Committee Judicial Improvement Act of 1990, P.L. No. 101-650; and Federal Courts Administration Act of 1992, P.L. No. 102-572	Discussion on-going 4/91 Consideration of interlocutory review of rulings on class certification. Referral from Civil Rules Committee 6/93

FRAP Item	Proposal	Source	Current Status
91-4	Typeface, re: rule 32.	Mr. Greacen (CA-5)	Reporter asked to draft language 12/91 Approved for submission to Standing Committee 11/92 Approved by Standing Committee for publication to bench and bar 12/92 Advisory Committee approved new drafts for submission to Standing Committee for re-publication 5/93 Standing Committee approved new draft for re-publication 6/93 Published 11/93 Advisory Committee approved new draft for submission to Standing Committee for republication 4/94 Approved by Standing Committee for republication 6/94 Published 9/94 New draft approved by Advisory Committee 4/95 Standing Committee referred back to Advisory Committee 6/96 New draft approved by Advisory Committee 10/95 Standing Committee approved new draft for publication 1/96 Published 4/96

FRAP Item	Proposal	Source	Current Status
91-9	Amendment of Rule 32(a) to require counsel to include their telephone numbers on the covers of briefs and appendices.	Local Rules Project	Approved for submission to Standing Committee 12/91 Approved by Standing Committee for publication 1/92 Approved for resubmission to Standing Committee 4/93 Approved by Standing Committee 6/93 but not forwarded to the Judicial Conference, republished along with other changes to Rule 32 under item 91-4 Published 11/93 Republished 9/94 New draft approved by Advisory Committee 4/95 Standing Committee referred back to Advisory Committee 6/95 New draft approved by Advisory Committee 10/95 Standing Committee approved new draft for publication 1/96 Published 4/96

FRAP Item	Proposal	Source	Current Status
91-14	Amendment of Rule 21 so that a petition for mandamus does not bear the name of the district judge and the judge is represented pro forma by counsel for the party opposing the relief unless the judge requests an order permitting the judge to appear.	Local Rules Project	Reporter asked to draft language 12/91 Approved for submission to Standing Committee 10/92 Standing Committee referred the proposal back to to Advisory Committee for further consideration 12/92 New draft approved for submission to Standing Committee 4/93 Approved by Standing Committee for publication to bench and bar 6/93 Published 11/93 Advisory Committee approved new draft for submission to Standing Committee for republication 4/94 Approved by Standing Committee for republication 6/94 Published 9/94 Approved for resubmission to Standing Committee 4/95 Standing Committee approved forwarding to Judicial Conference 6/95 Approved by Judicial Conference 9/95
91-17	Uniform plan for publication of opinions.	Local Rules Project & Federal Courts Study Committee	Further study recommended 12/91
91-24	Page limits for and contents of amicus briefs.	CA-5 in response to Local Rules Project	For future discussion 12/91 Approved in substance; Reporter to prepare new draft 9/93 Discussion of new draft postponed until fall meeting 4/94 Draft approved 10/94 to be submitted to Style Subcommittee Revised draft approved for submission to Standing Committee 4/95 Published 9/95 Approved for submission to Standing Committee 4/96

FRAP Item	Proposal	Source	Current Status
91-25	Amendment of Rule 35 to specify contents of suggestions for rehearing en banc.	CA-5 in response to Local Rules Project	For future discussion 12/91 Approved in substance; Reporter to prepare new draft 9/93 Discussion of new draft postponed until fall meeting 4/94 Draft approved 10/94 to be submitted to Style Subcommittee Revised draft approved for submission to Standing Committee 4/95 Published 9/95
91-28	Updating Rule 27.	Advisory Committee	Mr. Kopp asked to prepare memo 12/91 Held over 10/92 Subcommittee appointed 4/93 Approved in substance; subcommittee to prepare new draft 9/93 Approved for submission to Standing Committee 4/94 Approved by Standing Committee for publication 6/94 Published 9/94 Approved for resubmission to Standing Committee 4/95 Standing Committee referred back to Advisory Committee 6/95 New draft approved by Advisory Committee 10/95 Standing Committee approved new draft for publication 1/96 Published 4/96

FRAP Item	Proposal	Source	Current Status
92-4	Amendment of Rule 35 to include intercircuit conflict as ground for seeking en banc.	Solicitor General Starr	Subcommittee consisting of Judges Logan and Williams and Mr. Kopp to consult with Reporter Report from FJC pending 1/93 On hold pending views of Solicitor General 4/93 Approved in substance; subcommittee to prepare new draft 9/93 Discussion of new draft postponed until fall meeting 4/94 Draft approved 10/94 to be submitted to Style Subcommittee Revised draft approved for submission to Standing Committee 4/95 Published 9/95 Approved for submission to Standing Committee 4/96
92-5	Amendment of Rule 25 re "most expeditious form . . . except special delivery".	Advisory Committee	Approved for submission to Standing Committee 4/93 Approved by Standing Committee for publication to bench and bar 6/93 Published 11/93 Advisory Committee approved new draft for submission to Standing Committee for republication 4/94 Approved by Standing Committee for republication 6/94 Published 9/94 Revised draft approved for resubmission to Standing Committee 4/95 Standing Committee approved forwarding to Judicial Conference 6/95 Approved by Judicial Conference 9/95
92-11	Consideration of local rules that do not exempt government attorneys from being required to join court bar or from paying admission fees.	Attorney General Barr and Standing Committee	On hold pending views of Solicitor General 4/93

FRAP Item	Proposal	Source	Current Status
93-3	Amend Rule 41 re: 7-day period for issuance of mandate.	Advisory Committee	Draft approved 10/94 to be submitted to Style Subcommittee Revised draft approved for submission to Standing Committee 4/95 Published 9/95 Approved for submission to Standing Committee 4/96
93-4	Amend Rule 41 re: length of time for stay of mandate.	Advisory Committee	Draft approved 10/94 to be submitted to Style Subcommittee Revised draft approved for submission to Standing Committee 4/95 Published 9/95 Approved for submission to Standing Committee 4/96
93-5	Amend Rule 26.1 to delete use of term "affiliate."	Mr. Joseph Spaniol	Draft approved 10/94 to be submitted to Style Subcommittee Revised draft approved for submission to Standing Committee 4/95 Published 9/95 Approved for submission to Standing Committee 4/96
93-6	Amend Rule 41 re: effective date of mandate.	Solicitor General Days	Draft approved 10/94 to be submitted to Style Subcommittee] Revised draft approved for submission to Standing Committee 4/95 Published 9/95 Approved for submission to Standing Committee 4/96
95-1	Amend Civil Rule 23 so class members do not need to intervene to appeal.	Mr. Alan Morrison	Awaiting initial discussion
95-2	Amend Rules 3 and 24 re: denial of in forma pauperis status.	Mr. Wm. Johnson, Sr. & Mr. Kenneth Bonds	Awaiting initial discussion

FRAP Item	Proposal	Source	Current Status
95-3	Amend Rule 15(f) to conform to recent amendments to 4(a)(4).	Hon. Stephen Williams (CA-DC)	Awaiting initial discussion
95-4	Amend computation of time to conform to Civil Rules method.	Mr. James B. Doyle	Awaiting initial discussion
95-5	Amend Rule 31 to require submission of digitally readable copy of brief, when available.	Hon. Frank Easterbrook (CA-7)	Awaiting initial discussion
95-6	Amend Rule 3(d) & 15(5) to require appellant/petitioner to serve copies of notice of appeal.	Advisory Committee	Awaiting initial discussion
95-7	Amend Rule 4(a)(5) to make it clear that a "good cause" extension is available after expiration of original period.	Advisory Committee	Awaiting initial discussion
95-8	Does Rule 4(a)(7) repeal collateral order doctrine?	Advisory Committee	Awaiting initial discussion
95-9	Amend Rules 5 & 5.1 so that time for ordering transcript runs from entry of order granting permission to appeal.	Advisory Committee	Approved for submission to Standing Committee 4/96
96-1	Amend Form 4 to obtain information about living expenses.	Wm. Suter, Clerk of the Supreme Court	Approved for submission to Standing Committee 4/96
96-2	Amend Rule 4(b) so that an extension of time to file a notice of appeal can be granted in a criminal case even without excusable neglect.	Hon. R. Posner (CA-7)	Awaiting initial discussion
96-3	Add presumption against oral argument for all matters other than the substance of the appeal (in Rule 34?).	Advisory Committee	Awaiting initial discussion

Item 8A

TO: Honorable Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice
and Procedure

FROM: Paul Mannes, Chair
Advisory Committee on Bankruptcy Rules

DATE: May 13, 1996

RE: Report of the Advisory Committee on Bankruptcy Rules

Introduction

The Advisory Committee on Bankruptcy Rules met on March 21-22, 1996, in Memphis, Tennessee. The Committee considered public comments regarding the proposed amendments to the Bankruptcy Rules that were published in September, 1995. After making several changes, the Committee approved the proposed amendments for presentation to the Standing Committee for final approval. Following the meeting, the Committee added to the package of proposed amendments a technical amendment to Rule 1010 that was not published for comment.

At its March meeting, the Committee also approved a package of proposed amendments to the Official Bankruptcy Forms, and two new Official Bankruptcy Forms, for presentation to the Standing Committee with a request to publish them for comment.

I. Action Items

A. Proposed Amendments to Bankruptcy Rules 1010, 1019, 2002, 2007.1, 3014, 3017, 3018, 3021, 8001, 8002, 9011, and 9035, and Proposed New Rules 1020, 3017.1, 8020, and 9015 Submitted for Approval by the Standing Committee and Transmittal to the Judicial Conference.

A preliminary draft of these proposed amendments (except for the proposed amendments to Rule 1010) were published for comment by the bench and bar in September 1995. Only five letters were received during the comment period. Comments were submitted by the following judges, lawyers, and organizations:

(1) Hon. Geraldine Mund, United States Bankruptcy Judge, Central District of California

(2) Hon. James E. Yacos, United States Bankruptcy Judge, District of New Hampshire

(3) James Gadsden, Esq., New York City, New York

(4) Anthony Michael Sabino, Esq., Chair of the Bankruptcy Section of the Federal Bar

Association (submitting the Bankruptcy Section's comments)

(5) Joseph Patchan, Esq., Director of the Executive Office for United States Trustees

These comments are discussed below following the text of the relevant proposed amendments.

The public hearing on the preliminary draft of the proposed amendments, scheduled to be held in Washington, D.C., on February 9, 1996, was cancelled for lack of witnesses.

The proposed amendments to Rule 1010, which were not published for comment, are technical and are necessary to conform to changes in subdivision designations in Civil Rule 4 and in Bankruptcy Rule 7004. The Advisory Committee requests that the amendments to Rule 1010 be approved and transmitted to the Judicial Conference without the need for publication. (Rule 4(d) of the Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure provides that "[t]he 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.").

1. Synopsis of Proposed Amendments

(a) Rule 1010, which contains references to certain subdivisions of Civil Rule 4 and Bankruptcy Rule 7004, is amended solely to conform to the 1993 changes in subdivision designations in Civil Rule 4 and the 1996 changes in subdivision designations in Bankruptcy Rule 7004.

(b) Rule 1019(3) and (5) are amended to delete such phrases as "superseded case" and "original petition" because they give the erroneous impression that conversion of a case to a different chapter of the Bankruptcy Code results in a new case or a new petition for relief, and to make stylistic improvements.

(c) Rule 1020 is added to provide procedures and time limits for a small business to elect to be considered a small business in a chapter 11 case under § 1121(e) and 1125(f) of the Code as amended by the Bankruptcy Reform Act of 1994.

(d) Rule 2002(a) is amended to provide for notice of a meeting called for the purpose of electing a chapter 11 trustee under § 1104(b) of the Code as amended by the Bankruptcy Reform Act of 1994.

(e) Rule 2002(n) is amended, consistent with the 1994 amendment to § 342(c) of the Code, to provide for the inclusion of certain information in the caption of every notice required to be given by a debtor to a creditor.

(f) Rule 2007.1 is amended to provide procedures for the election of a chapter 11 trustee under § 1104(b) of the Code as amended by the Bankruptcy Reform Act of 1994.

(g) Rule 3014 is amended to provide a time limit for secured creditors to make an election under § 1111(b)(2) of the Code in a small business chapter 11 case.

(h) Rule 3017 is amended to give the court flexibility in fixing the record date for the purpose of determining the holders of securities who are entitled to receive a disclosure statement, ballot, and other materials in connection with the solicitation of votes on a plan.

(i) Rule 3017.1 is added to provided procedures, consistent with the Bankruptcy Reform Act of 1994, for the conditional and final approval of a disclosure statement in a small business chapter 11 case.

(j) Rule 3018 is amended to give the court flexibility in fixing the record date for the purpose of determining the holders of securities who may vote on a plan.

(k) Rule 3021 is amended (a) to provide flexibility in fixing the record date for the purpose of determining the holders of securities who are entitled to receive distributions under a confirmed plan, (b) to treat the holders of debt securities the same as other creditors by requiring that their claims be allowed in order to receive a distribution, and (c) to clarify that all interest holders (not only those that are "equity security holders") may receive a distribution under a confirmed plan.

(l) Rule 8001(a) is amended to conform to the Bankruptcy Reform Act of 1994 which amended 28 U.S.C. § 158 to permit an appeal as of right from an order extending or reducing the exclusivity period for filing a chapter 11 plan under § 1121.

(m) Rule 8001(e) is amended to provide a procedure for electing under 28 U.S.C. 158(c)(1), as amended by the Bankruptcy Reform Act of 1994, to have an appeal heard by the district court rather than by a bankruptcy appellate panel.

(n) Rule 8002(c) is amended (1) to provide that a request for an extension of time to appeal must be "filed" (rather than "made") within the applicable time period; (2) to give the court discretion -- more than 20 days after the expiration of the time to file a notice of appeal -- to order that a party may file a notice of appeal if the motion for an extension was timely and the notice of appeal is filed not later than ten days after entry of the order extending the time; and (3) to prohibit any extension of time to file a notice of appeal if the appeal is from certain types of orders.

(o) Rule 8020 is added to clarify that a district court hearing an appeal, or a bankruptcy appellate panel, may award damages and costs for a frivolous appeal.

(p) Rule 9011 is amended to conform to the 1993 amendments to Civil Rule 11, except that the safe harbor provision -- prohibiting the filing of a motion for sanctions unless the challenged paper is not withdrawn or corrected within a prescribed time after service of the motion -- does not apply if the challenged paper is a bankruptcy petition.

(q) Rule 9015 is added to provide procedures relating to jury trials in bankruptcy cases and proceedings, including procedures for consenting to have a jury trial conducted by a bankruptcy judge under 28 U.S.C. § 157(e) that was added by the Bankruptcy Reform Act of 1994.

(r) Rule 9035 is amended to clarify that the Bankruptcy Rules do not apply to the extent that they are inconsistent with any federal statutory provision relating to bankruptcy administrators in the judicial districts in North Carolina and Alabama.

2. Text of Proposed Amendments, GAP Report, and Summary of Comments Relating to Particular Rules:

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

Rule 1010. Service of Involuntary Petition and Summons; Petition Commencing Ancillary Case

On the filing of an involuntary petition or a petition commencing a case ancillary to a foreign proceeding the clerk shall forthwith issue a summons for service. When an involuntary petition is filed, service shall be made on the debtor. When a petition commencing an ancillary case is filed, service shall be made on the parties against whom relief is sought pursuant to § 304(b) of the Code and on any other parties as the court may direct. The summons shall be served with a copy of the petition in the manner provided for service of a summons and complaint by Rule 7004(a) or (b). If service cannot be so made, the court may order that the summons and petition be served by mailing copies to the party's last known

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

address, and by at least one publication in a manner and form directed by the court. The summons and petition may be served on the party anywhere. Rule ~~7004(f)~~ 7004(e) and Rule ~~4(g) and (h)~~ 4(l) F.R.Civ.P. apply when service is made or attempted under this rule.

COMMITTEE NOTE

The amendments to this rule are technical, are promulgated solely to conform to changes in subdivision designations in Rule 4, F.R.Civ.P., and in Rule 7004, and are not intended to effectuate any material change in substance.

In 1996, the letter designation of subdivision (f) of Rule 7004 (Summons; Time Limit for Service) was changed to subdivision (e). In 1993, the provisions of Rule 4, F.R.Civ.P., relating to proof of service contained in Rule 4(g) (Return) and Rule 4(h) (Amendments), were placed in the new subdivision (l) of Rule 4 (Proof of Service). The technical amendments to Rule 1010 are designed solely to conform to these new subdivision designations.

The 1996 amendments to Rule 7004 and the 1993 amendments to Rule 4, F.R.Civ.P., have not affected the

availability of service by first class mail in accordance with Rule 7004(b) for the service of a summons and petition in an involuntary case commenced under § 303 or an ancillary case commenced under § 304 of the Code.

GAP Report on Rule 1010. These amendments, which are technical and conforming, were not published for comment.

Rule 1019. Conversion of Chapter 11 Reorganization Case, Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case to Chapter 7 Liquidation Case

When a chapter 11, chapter 12, or chapter 13 case has been converted or reconverted to a chapter 7 case:

* * * * *

(3) CLAIMS FILED BEFORE CONVERSION ~~IN SUPERSEDED CASES~~. All claims actually filed by a creditor ~~in the superseded case~~ before conversion of the case are ~~shall be~~ deemed filed in the chapter 7 case.

8 RULES OF BANKRUPTCY PROCEDURE

* * * * *

(5) FILING FINAL REPORT AND SCHEDULE OF POSTPETITION DEBTS.

(A) *Conversion of Chapter 11 or Chapter 12 Case.* Unless the court directs otherwise, if a chapter 11 or chapter 12 case is converted to chapter 7, the debtor in possession or, if the debtor is not a debtor in possession, the trustee serving at the time of conversion, shall:

(i) not later than 15 days after conversion of the case, file a schedule of unpaid debts incurred after the filing of the petition and before conversion of the case, including the name and address of each holder of a claim; and

(ii) not later than 30 days after conversion of the case, file and transmit to the United States trustee a final report and account;

(B) *Conversion of Chapter 13 Case.* Unless the court directs otherwise, if a chapter 13 case is converted to chapter 7,

(i) the debtor, not later than 15 days after conversion of the case, shall file a schedule of unpaid debts incurred after the filing of the petition and before conversion of the case, including the name and address of each holder of a claim; and

(ii) the trustee, not later than 30 days after

conversion of the case, shall file and transmit to the United States trustee a final report and account;

(C) *Conversion After Confirmation of a Plan.* Unless the court orders otherwise, if a chapter 11, chapter 12, or chapter 13 case is converted to chapter 7 after confirmation of a plan, the debtor shall file:

(i) a schedule of property not listed in the final report and account acquired after the filing of the petition but before conversion, except if the case is converted from chapter 13 to chapter 7 and § 348(f)(2) does not apply;

(ii) a schedule of unpaid debts not listed in the final report and account incurred after confirmation but before the conversion; and

(iii) a schedule of executory contracts and unexpired leases entered into or assumed after the filing of the petition but before conversion.

(D) *Transmission to United States Trustee.* The clerk shall forthwith transmit to the United States trustee a copy of every schedule filed pursuant to Rule 1019(5).

~~Unless the court directs otherwise, each debtor in possession or trustee in the superseded case shall: (A) within 15~~

~~days following the entry of the order of conversion of a chapter 11 case, file a schedule of unpaid debts incurred after commencement of the superseded case including the name and address of each creditor; and (B) within 30 days following the entry of the order of conversion of a chapter 11, chapter 12, or chapter 13 case, file and transmit to the United States trustee a final report and account. Within 15 days following the entry of the order of conversion, unless the court directs otherwise, a chapter 13 debtor shall file a schedule of unpaid debts incurred after the commencement of a chapter 13 case, and a chapter 12 debtor in possession or, if the chapter 12 debtor is not in possession, the trustee shall file a schedule of unpaid debts incurred after~~

~~the commencement of a chapter 12 case. If the conversion order is entered after confirmation of a plan, the debtor shall file (A) a schedule of property not listed in the final report and account acquired after the filing of the original petition but before entry of the conversion order; (B) a schedule of unpaid debts not listed in the final report and account incurred after confirmation but before entry of the conversion order; and (C) a schedule of executory contracts and unexpired leases entered into or assumed after the filing of the original petition but before entry of the conversion order. The clerk shall forthwith transmit to the United States trustee a copy of every schedule filed pursuant to this paragraph.~~

* * * * *

COMMITTEE NOTE

The amendments to subdivisions (3) and (5) are technical corrections and stylistic changes. The phrase "superseded case" is deleted because it creates the erroneous impression that conversion of a case results in a new case that is distinct from the original case. Similarly, the phrase "original petition" is deleted because it erroneously implies that there is a second petition with respect to a converted case. See § 348 of the Code.

Public Comments on Rule 1019. None.

GAP Report on Rule 1019. No changes to the published draft.

Rule 1020. Election to be Considered a Small Business in a Chapter 11 Reorganization Case

In a chapter 11 reorganization case, a debtor that is a small business may elect to be considered a small business by filing a written statement of election not later than 60 days after the date of the order for relief.

COMMITTEE NOTE

This rule is designed to implement §§ 1121(e) and 1125(f) that were added to the Code by the Bankruptcy Reform Act of 1994.

Public Comments on Rule 1020:

(1) Mr. Patchan, Director of the Executive Office for U.S. Trustees, made a "minor suggestion" that the deadline for filing an election to be treated as a small business in a chapter 11 case be the first date set for the meeting of creditors under § 341 of the Code (rather than 60 days after the order for relief).

(2) Mr. Sabino of the Federal Bar Association suggested that (a) the rule state that only a debtor that is qualified under the Code as a small business may elect to be treated as a small business, and (b) the rule provide that the court may extend the 60-day period to file an election only "if the debtor seeks such an extension within those original 60 days and the court signs an order granting such extension."

GAP Report on Rule 1020. The phrase "or by a later date as the court, for cause, may fix" at the end of the published draft was deleted. The general provisions on reducing or extending time periods under Rule 9006 will be applicable.

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

(a) TWENTY-DAY NOTICES TO PARTIES IN INTEREST. Except as provided in subdivisions (h), (i), and (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least ~~not less than~~ 20 days' ~~days~~ notice by mail of:

(1) the meeting of creditors ~~pursuant to~~ under § 341 or § 1104(b) of the Code;

* * * * *

(n) CAPTION. The caption of every notice given under this rule shall comply with Rule 1005. The caption of every notice required to be given by the debtor to a creditor shall include the

information required to be in the notice by § 342(c) of the Code.

* * * * *

COMMITTEE NOTE

Paragraph (a)(1) is amended to include notice of a meeting of creditors convened under § 1104(b) of the Code for the purpose of electing a trustee in a chapter 11 case. The court for cause shown may order the 20-day period reduced pursuant to Rule 9006(c)(1).

Subdivision (n) is amended to conform to the 1994 amendment to § 342 of the Code. As provided in § 342(c), the failure of a notice given by the debtor to a creditor to contain the information required by § 342(c) does not invalidate the legal effect of the notice.

Public Comments on Rule 2002. None.

GAP Report on Rule 2002. No changes to the published draft.

Rule 2007.1. Appointment of Trustee or Examiner in a Chapter 11 Reorganization Case

(a) ORDER TO APPOINT TRUSTEE OR EXAMINER. In a chapter 11 reorganization

case, a motion for an order to appoint a trustee or an examiner ~~pursuant to~~ under § 1104(a) or § ~~1104(b)~~ 1104(c) of the Code shall be made in accordance with Rule 9014.

(b) ELECTION OF TRUSTEE.

(1) *Request for an Election.* A request to convene a meeting of creditors for the purpose of electing a trustee in a chapter 11 reorganization case shall be filed and transmitted to the United States trustee in accordance with Rule 5005 within the time prescribed by § 1104(b) of the Code. Pending court approval of the person elected, any person appointed by the United States trustee under § 1104(d) and approved in accordance with

subdivision (c) of this rule shall serve as trustee.

(2) *Manner of Election and Notice.* An election of a trustee under § 1104(b) of the Code shall be conducted in the manner provided in Rules 2003(b)(3) and 2006. Notice of the meeting of creditors convened under § 1104(b) shall be given as provided in Rule 2002. The United States trustee shall preside at the meeting. A proxy for the purpose of voting in the election may be solicited only by a committee of creditors appointed under § 1102 of the Code or by any other party entitled to solicit a proxy pursuant to Rule 2006.

(3) *Report of Election and Resolution of Disputes.*

(A) *Report of Undisputed Election.* If the election is not disputed, the United States trustee shall promptly file a report of the election, including the name and address of the person elected and a statement that the election is undisputed. The United States trustee shall file with the report an application for approval of the appointment in accordance with subdivision (c) of this rule. The report constitutes appointment of the elected person to serve as trustee, subject to court approval, as of the date of entry of the order approving the appointment.

(B) *Disputed Election.* If the election is disputed, the United States trustee shall promptly file a report stating that the election is disputed, informing the court of the nature of the dispute, and listing the name and address of any candidate elected under any alternative presented by the dispute. The report shall be accompanied by a verified statement by each candidate elected under each alternative presented by the dispute, setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the

United States trustee, and any person employed in the office of the United States trustee. Not later than the date on which the report of the disputed election is filed, the United States trustee shall mail a copy of the report and each verified statement to any party in interest that has made a request to convene a meeting under § 1104(b) or to receive a copy of the report, and to any committee appointed under § 1102 of the Code. Unless a motion for the resolution of the dispute is filed not later than 10 days after the United States trustee files the

report, any person appointed by the United States trustee under § 1104(d) and approved in accordance with subdivision (c) of this rule shall serve as trustee. If a motion for the resolution of the dispute is timely filed, and the court determines the result of the election and approves the person elected, the report will constitute appointment of the elected person as of the date of entry of the order approving the appointment.

~~(b)~~ (c) APPROVAL OF APPOINTMENT. An order approving the appointment of a trustee elected under § 1104(b) or appointed under § 1104(d), or the appointment of an examiner ~~pursuant to~~

~~§ 1104(c)~~ under § 1104(d) of the Code, shall be made ~~only~~ on application of the United States trustee~~,~~. The application shall state ~~stating~~ the name of the person appointed~~, the names of the parties in interest with whom the United States trustee consulted regarding the appointment,~~ and, to the best of the applicant's knowledge, all the person's connections with the debtor, creditors, any other parties in interest, their respective attorneys and accountants, the United States trustee, and persons employed in the office of the United States trustee. Unless the person has been elected under § 1104(b), the application shall state the names of the parties in interest with whom the United States trustee consulted regarding the appointment. The application shall be

accompanied by a verified statement of the person appointed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, and any person employed in the office of the United States trustee.

COMMITTEE NOTE

This rule is amended to implement the 1994 amendments to § 1104 of the Code regarding the election of a trustee in a chapter 11 case.

Eligibility for voting in an election for a chapter 11 trustee is determined in accordance with Rule 2003(b)(3). Creditors whose claims are deemed filed under § 1111(a) are treated for voting purposes as creditors who have filed proofs of claim.

Proxies for the purpose of voting in the election may be solicited only by a creditors' committee appointed under § 1102 or by any other party entitled to solicit proxies pursuant to Rule 2006. Therefore, a trustee or examiner who has served in the case, or a committee of

equity security holders appointed under § 1102, may not solicit proxies.

The procedures for reporting disputes to the court derive from similar provisions in Rule 2003(d) applicable to chapter 7 cases. An election may be disputed by a party in interest or by the United States trustee. For example, if the United States trustee believes that the person elected is ineligible to serve as trustee because the person is not "disinterested," the United States trustee should file a report disputing the election.

The word "only" is deleted from subdivision (b), redesignated as subdivision (c), to avoid any negative inference with respect to the availability of procedures for obtaining review of the United States trustee's acts or failure to act pursuant to Rule 2020.

Public Comments on Rule 2017.1:

(1) Mr. Patchan, Director of the Executive Office for U.S. Trustees, recommended that the proposed amendments be changed to provide that the U.S. trustee's report of the election of a chapter 11 trustee constitute the appointment of the trustee, rather than requiring the U.S. Trustee to appoint the person elected. That is, rather than the U.S. Trustee *making* the appointment, the U.S. Trustee's report to the court *is* the appointment. He

also suggested that the committee note clarify that (a) scheduled creditors whose claims are deemed filed under § 1111(a) of the Code are treated, for voting purposes, as creditors who have filed proofs of claim, and (2) any examiner or trustee who has served in the case, or an equity security holders' committee, may not solicit proxies for the purpose of the election of a trustee.

(2) Mr. Sabino of the Federal Bar Association suggested that the rule require the U.S. trustee to file a motion asking the court to resolve a disputed election, rather than waiting for a party in interest to file such a motion.

GAP Report on Rule 2017.1. The published draft of proposed new subdivision (b)(3) of Rule 2017.1, and the Committee Note, was substantially revised to implement Mr. Patchan's recommendations (described above), to clarify how a disputed election will be reported, and to make stylistic improvements.

Rule 3014. Election ~~Pursuant to~~ Under § 1111(b) by Secured Creditor in Chapter 9 Municipality or ~~and~~ Chapter 11 Reorganization Case ~~Cases~~

An election of application of § 1111(b)(2) of the Code by a class of

secured creditors in a chapter 9 or 11 case may be made at any time prior to the conclusion of the hearing on the disclosure statement or within such later time as the court may fix. If the disclosure statement is conditionally approved pursuant to Rule 3017.1, and a final hearing on the disclosure statement is not held, the election of application of § 1111(b)(2) may be made not later than the date fixed pursuant to Rule 3017.1(a)(2) or another date the court may fix. The election shall be in writing and signed unless made at the hearing on the disclosure statement. The election, if made by the majorities required by § 1111(b)(1)(A)(i), shall be binding on all members of the class with respect to the plan.

COMMITTEE NOTE

This amendment provides a deadline for electing application of § 1111(b)(2) in a small business case in which a conditionally approved disclosure statement is finally approved without a hearing.

Public Comment on Rule 3014. Mr. Sabino of the Federal Bar Association suggested that the rule be amended to provide that any extension of time to file a § 1111(b)(2) election may not be extended unless the extension is ordered before the conclusion of the disclosure statement hearing. This comment was unrelated to the proposed amendments to the rule.

GAP Report on Rule 3014. No changes to the published draft.

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

(a) HEARING ON DISCLOSURE STATEMENT AND OBJECTIONS ~~THERETO~~. Except as provided in Rule 3017.1, after a disclosure statement is filed in accordance with Rule 3016(b) ~~Following~~

~~the filing of a disclosure statement as provided in Rule 3016(c)~~, the court shall hold a hearing on ~~not less than~~ at least 25 ~~days~~ days' notice to the debtor, creditors, equity security holders and other parties in interest as provided in Rule 2002 to consider ~~such~~ the disclosure statement and any objections or modifications thereto. The plan and the disclosure statement shall be mailed with the notice of the hearing only to the debtor, any trustee or committee appointed under the Code, the Securities and Exchange Commission, and any party in interest who requests in writing a copy of the statement or plan. Objections to the disclosure statement shall be filed and served on the debtor, the trustee, any committee appointed under the Code, and any ~~such~~

other entity ~~as may be~~ designated by the court, at any time before the disclosure statement is approved ~~prior to approval of the disclosure statement~~ or by ~~such~~ an earlier date as the court may fix. In a chapter 11 reorganization case, every notice, plan, disclosure statement, and objection required to be served or mailed pursuant to this subdivision shall be transmitted to the United States trustee within the time provided in this subdivision.

(b) DETERMINATION ON DISCLOSURE STATEMENT. Following the hearing the court shall determine whether the disclosure statement should be approved.

(c) DATES FIXED FOR VOTING ON PLAN AND CONFIRMATION. On or before approval of the disclosure statement, the court shall fix a time within which the

holders of claims and interests may accept or reject the plan and may fix a date for the hearing on confirmation.

(d) TRANSMISSION AND NOTICE TO UNITED STATES TRUSTEE, CREDITORS, AND EQUITY SECURITY HOLDERS. Upon ~~On~~ approval of a disclosure statement, ~~unless~~ -- except to the extent that the court orders otherwise with respect to one or more unimpaired classes of creditors or equity security holders~~,~~ -- the debtor in possession, trustee, proponent of the plan, or clerk as ~~ordered by~~ the court orders shall mail to all creditors and equity security holders, and in a chapter 11 reorganization case shall transmit to the United States trustee,

(1) the plan~~,~~ or a ~~court approved~~ court-approved summary of the

plan;

(2) the disclosure statement approved by the court;

(3) notice of the time within which acceptances and rejections of ~~such~~ the plan may be filed; and

(4) any ~~such~~ other information as the court may direct, including any court opinion ~~of the court~~ approving the disclosure statement or a ~~court approved~~ court-approved summary of the opinion.

In addition, notice of the time fixed for filing objections and the hearing on confirmation shall be mailed to all creditors and equity security holders in accordance with ~~pursuant to~~ Rule 2002(b), and a form of ballot conforming

to the appropriate Official Form shall be mailed to creditors and equity security holders entitled to vote on the plan. ~~In the event~~ If the ~~opinion of the~~ court opinion is not transmitted or only a summary of the plan is transmitted, the ~~opinion of the~~ court opinion or the plan shall be provided on request of a party in interest at the plan proponent's expense ~~of the proponent of the plan~~. If the court orders that the disclosure statement and the plan or a summary of the plan shall not be mailed to any unimpaired class, notice that the class is designated in the plan as unimpaired and notice of the name and address of the person from whom the plan or summary of the plan and disclosure statement may be obtained upon request and at the plan proponent's

expense ~~of the proponent of the plan~~, shall be mailed to members of the unimpaired class together with the notice of the time fixed for filing objections to and the hearing on confirmation. For the purposes of this subdivision, creditors and equity security holders shall include holders of stock, bonds, debentures, notes, and other securities of record on ~~at~~ the date the order approving the disclosure statement is ~~was~~ entered or another date fixed by the court, for cause, after notice and a hearing.

(e) TRANSMISSION TO BENEFICIAL HOLDERS OF SECURITIES. At the hearing held pursuant to subdivision (a) of this rule, the court shall consider the procedures for transmitting the documents and information required by

subdivision (d) of this rule to beneficial holders of stock, bonds, debentures, notes, and other securities, ~~and~~ determine the adequacy of the ~~such~~ procedures, and enter any ~~such~~ orders ~~as~~ the court deems appropriate.

COMMITTEE NOTE

Subdivision (a) is amended to provide that it does not apply to the extent provided in new Rule 3017.1, which applies in small business cases.

Subdivision (d) is amended to provide flexibility in fixing the record date for the purpose of determining the holders of securities who are entitled to receive documents pursuant to this subdivision. For example, if there may be a delay between the oral announcement of the judge's order approving the disclosure statement and entry of the order on the court docket, the court may fix the date on which the judge orally approves the disclosure statement as the record date so that the parties may expedite preparation of the lists necessary to facilitate the distribution of the plan, disclosure statement, ballots, and other related documents.

The court may set a record date

pursuant to subdivision (d) only after notice and a hearing as provided in § 102(1) of the Code. Notice of a request for an order fixing the record date may be included in the notice of the hearing to consider approval of the disclosure statement mailed pursuant to Rule 2002(b).

If the court fixes a record date pursuant to subdivision (d) with respect to the holders of securities, and the holders are impaired by the plan, the judge also should order that the same record date applies for the purpose of determining eligibility for voting pursuant to Rule 3018(a).

Other amendments to this rule are stylistic.

Public Comments on Rule 3017. James Gadsden, Esq., inquired as to the need for the amendments to Rule 3017(d) that will give the court discretion, for cause and after notice and a hearing, to fix a record date -- for the purpose of receiving vote solicitation materials -- that differs from the date on which the order approving the disclosure statement is entered. He believes that the rule works fine as is and that the effect of the amendment could operate as an injunction against transfers of securities without the protections of Rule 7065.

GAP Report on Rule 3017. No changes to the published draft.

Rule 3017.1 Court Consideration of Disclosure Statement in a Small Business Case

(a) CONDITIONAL APPROVAL OF DISCLOSURE STATEMENT. If the debtor is a small business and has made a timely election to be considered a small business in a chapter 11 case, the court may, on application of the plan proponent, conditionally approve a disclosure statement filed in accordance with Rule 3016(b). On or before conditional approval of the disclosure statement, the court shall:

(1) fix a time within which the holders of claims and interests may accept or reject the plan;

(2) fix a time for filing objections to the disclosure statement;

(3) fix a date for the hearing on final approval of the disclosure statement to be held if a timely objection is filed; and

(4) fix a date for the hearing on confirmation.

(b) APPLICATION OF RULE 3017. Rule 3017(a), (b), (c), and (e) do not apply to a conditionally approved disclosure statement. Rule 3017(d) applies to a conditionally approved disclosure statement, except that conditional approval is considered approval of the disclosure statement for the purpose of applying Rule 3017(d).

(c) FINAL APPROVAL.

(1) *Notice.* Notice of the time fixed for filing objections

and the hearing to consider final approval of the disclosure statement shall be given in accordance with Rule 2002 and may be combined with notice of the hearing on confirmation of the plan.

(2) *Objections.* Objections to the disclosure statement shall be filed, transmitted to the United States trustee, and served on the debtor, the trustee, any committee appointed under the Code and any other entity designated by the court at any time before final approval of the disclosure statement or by an earlier date as the court may fix.

(3) *Hearing.* If a timely objection to the disclosure

statement is filed, the court shall hold a hearing to consider final approval before or combined with the hearing on confirmation of the plan.

COMMITTEE NOTE

This rule is added to implement § 1125(f) that was added to the Code by the Bankruptcy Reform Act of 1994.

The procedures for electing to be considered a small business are set forth in Rule 1020. If the debtor is a small business and has elected to be considered a small business, § 1125(f) permits the court to conditionally approve a disclosure statement subject to final approval after notice and a hearing. If a disclosure statement is conditionally approved, and no timely objection to the disclosure statement is filed, it is not necessary for the court to hold a hearing on final approval.

Public Comment on Rule 3017.1. Bankruptcy Judge Geraldine Mund recommended that the proposed new rule be expanded to apply to any debtor (rather than being limited to debtors that are small businesses) for whom the court orders conditional approval of a

disclosure statement and a combined hearing on final approval of the disclosure statement and plan confirmation.

GAP Report on Rule 3017.1. No change to the published draft.

Rule 3018. Acceptance or Rejection of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case

(a) ENTITIES ENTITLED TO ACCEPT OR REJECT PLAN; TIME FOR ACCEPTANCE OR REJECTION. A plan may be accepted or rejected in accordance with § 1126 of the Code within the time fixed by the court pursuant to Rule 3017. Subject to subdivision (b) of this rule, an equity security holder or creditor whose claim is based on a security of record shall not be entitled to accept or reject a plan unless the equity security holder or creditor is the holder of record of the security on the date the order

approving the disclosure statement is entered or on another date fixed by the court, for cause, after notice and a hearing. For cause shown, the court after notice and hearing may permit a creditor or equity security holder to change or withdraw an acceptance or rejection. Notwithstanding objection to a claim or interest, the court after notice and hearing may temporarily allow the claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting a plan.

* * * * *

COMMITTEE NOTE

Subdivision (a) is amended to provide flexibility in fixing the record date for the purpose of determining the holders of securities who are entitled to vote on the plan. For example, if there may be a delay between the oral announcement of the judge's decision approving the disclosure statement and

entry of the order on the court docket, the court may fix the date on which the judge orally approves the disclosure statement as the record date for voting purposes so that the parties may expedite preparation of the lists necessary to facilitate the distribution of the plan, disclosure statement, ballots, and other related documents in connection with the solicitation of votes.

The court may set a record date pursuant to subdivision (a) only after notice and a hearing as provided in § 102(1) of the Code. Notice of a request for an order fixing the record date may be included in the notice of the hearing to consider approval of the disclosure statement mailed pursuant to Rule 2002(b).

If the court fixes the record date for voting purposes, the judge also should order that the same record date shall apply for the purpose of distributing the documents required to be distributed pursuant to Rule 3017(d).

Public Comments on Rule 3018. James Gadsden, Esq., inquired as to the need for the amendments to Rule 3018(a) that will give the court discretion, for cause and after notice and a hearing, to fix a record date -- for the purpose of voting eligibility -- that differs from the date on which the order approving the disclosure statement is entered. He believes that the rule works fine as is and that the effect of the amendment

could operate as an injunction against transfers of securities without the protections of Rule 7065.

GAP Report on Rule 3017. No changes to the published draft.

Rule 3021. Distribution Under Plan

After confirmation of a plan, distribution shall be made to creditors whose claims have been allowed, to interest holders ~~of stock, bonds, debentures, notes, and other securities of record at the time of commencement of distribution whose claims or equity security~~ whose interests have not been disallowed, and to indenture trustees who have filed claims pursuant to Rule 3003(c)(5) ~~and which~~ that have been allowed. For the purpose of this rule, creditors include holders of bonds, debentures, notes, and other debt

securities, and interest holders include the holders of stock and other equity securities, of record at the time of commencement of distribution unless a different time is fixed by the plan or the order confirming the plan.

COMMITTEE NOTE

This rule is amended to provide flexibility in fixing the record date for the purpose of making distributions to holders of securities of record. In a large case, it may be impractical for the debtor to determine the holders of record with respect to publicly held securities and also to make distributions to those holders at the same time. Under this amendment, the plan or the order confirming the plan may fix a record date for distributions that is earlier than the date on which distributions commence.

This rule also is amended to treat holders of bonds, debentures, notes, and other debt securities the same as any other creditors by providing that they shall receive a distribution only if their claims have been allowed. Finally, the amendments clarify that distributions are to be made to all interest holders -- not only those that

are within the definition of "equity security holders" under § 101 of the Code -- whose interests have not been disallowed.

Public Comments on Rule 3021. James Gadsden, Esq., inquired as to the need to change the present rule (providing that the record date for distribution purposes is the date on which distributions commence) to provide that the record date for distribution purposes is the date on which distributions commence unless the plan or confirmation order fixes a different date. He believes that the rule works fine as is and that the effect of the amendment could operate as an injunction against transfers of securities without the protections of Rule 7065.

GAP Report on Rule 3021. No changes to the published draft.

Rule 8001. Manner of Taking Appeal; Voluntary Dismissal

(a) APPEAL AS OF RIGHT; HOW TAKEN. An appeal from a ~~final~~ judgment, order, or decree of a bankruptcy judge to a district court or bankruptcy appellate panel as permitted by 28 U.S.C. § 158(a)(1) or (a)(2) shall be taken by

filing a notice of appeal with the clerk within the time allowed by Rule 8002. An appellant's failure ~~Failure of an appellant~~ to take any step other than ~~the~~ timely filing ~~of~~ a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court or bankruptcy appellate panel deems appropriate, which may include dismissal of the appeal. The notice of appeal shall (1) conform substantially to the appropriate Official Form, (2) ~~shall~~ contain the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their respective attorneys, and (3) be accompanied by the prescribed fee. Each appellant shall file a sufficient number of copies of the

notice of appeal to enable the clerk to comply promptly with Rule 8004.

(b) APPEAL BY LEAVE; HOW TAKEN. An appeal from an interlocutory judgment, order, or decree of a bankruptcy judge as permitted by 28 U.S.C. § 158(a)(3) shall be taken by filing a notice of appeal, as prescribed in subdivision (a) of this rule, accompanied by a motion for leave to appeal prepared in accordance with Rule 8003 and with proof of service in accordance with Rule 8008.

* * * * *

(e) ELECTION TO HAVE APPEAL HEARD BY DISTRICT COURT INSTEAD OF BANKRUPTCY APPELLATE PANEL. ~~CONSENT TO APPEAL TO BANKRUPTCY APPELLATE PANEL. Unless otherwise provided by a rule promulgated pursuant to Rule 8018, consent to have an appeal heard by a bankruptcy~~

~~appellate panel may be given in a separate statement of consent executed by a party or contained in the notice of appeal or cross appeal. The statement of consent shall be filed before the transmittal of the record pursuant to Rule 8007(b), or within 30 days of the filing of the notice of appeal, whichever is later.~~ An election to have an appeal heard by the district court under 28 U.S.C. § 158(c)(1) may be made only by a statement of election contained in a separate writing filed within the time prescribed by 28 U.S.C. § 158(c)(1).

COMMITTEE NOTE

This rule is amended to conform to the Bankruptcy Reform Act of 1994 which amended 28 U.S.C. § 158. As amended, a party may -- without obtaining leave of the court -- appeal from an interlocutory order or decree of the bankruptcy court issued under § 1121(d) of the Code increasing or reducing the

time periods referred to in § 1121.

Subdivision (e) is amended to provide the procedure for electing under 28 U.S.C. § 158(c)(1) to have an appeal heard by the district court instead of the bankruptcy appellate panel service. This subdivision is applicable only if a bankruptcy appellate panel service is authorized under 28 U.S.C. § 158(b) to hear the appeal.

Public Comments on Rule 8001. Mr. Sabino of the Federal Bar Association commented that the amendments to Rule 8001(e) (election to have appeal heard by district court) are "premature" because the goal of having a bankruptcy appellate panel (BAP) in every circuit is "far from being achieved."

GAP Report on Rule 8001. The heading of subdivision (e) is amended to clarify that it applies to the election to have an appeal heard by the district court instead of the BAP. The final paragraph of the Committee Note is revised to clarify that subdivision (e) is applicable only if a BAP is authorized to hear the appeal.

Rule 8002. Time for Filing Notice of Appeal

* * * * *

(c) EXTENSION OF TIME FOR APPEAL.

(1) The bankruptcy judge may extend the time for filing the notice of appeal by any party ~~for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule~~ , unless the judgment, order, or decree appealed from:

(A) grants relief from an automatic stay under § 362, § 922, § 1201, or § 1301;

(B) authorizes the sale or lease of property or the use of cash collateral under § 363;

(C) authorizes the obtaining of credit under § 364;

(D) authorizes the assumption or assignment of an

executory contract or unexpired lease under § 365;

(E) approves a disclosure statement under § 1125, or;

(F) confirms a plan under § 943, § 1129, § 1225, or § 1325 of the Code.

(2) A request to extend the time for filing a notice of appeal must be made by written motion filed before the time for filing a notice of appeal has expired, except that such a motion filed not later ~~request made no more~~ than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect ~~if the judgment or order appealed from does not authorize the sale of any property~~

~~or the obtaining of credit or the incurring of debt under § 364 of the Code, or is not a judgment or order approving a disclosure statement, confirming a plan, dismissing a case, or converting the case to a case under another chapter of the Code~~. An extension of time for filing a notice of appeal may not exceed 20 days from the expiration of the time for filing a notice of appeal otherwise prescribed by this rule or 10 days from the date of entry of the order granting the motion, whichever is later.

COMMITTEE NOTE

Subdivision (c) is amended to provide that a request for an extension of time to file a notice of appeal must be filed within the applicable time

period. This amendment will avoid uncertainty as to whether the mailing of a motion or an oral request in court is sufficient to request an extension of time, and will enable the court and the parties in interest to determine solely from the court records whether a timely request for an extension has been made.

The amendments also give the court discretion to permit a party to file a notice of appeal more than 20 days after expiration of the time to appeal otherwise prescribed, but only if the motion was timely filed and the notice of appeal is filed within a period not exceeding 10 days after entry of the order extending the time. This amendment is designed to protect parties that file timely motions to extend the time to appeal from the harshness of the present rule as demonstrated in In re Mouradick, 13 F.3d 326 (9th Cir. 1994), where the court held that a notice of appeal filed within the 3-day period expressly prescribed by an order granting a timely motion for an extension of time did not confer jurisdiction on the appellate court because the notice of appeal was not filed within the 20-day period specified in subdivision (c).

The subdivision is amended further to prohibit any extension of time to file a notice of appeal -- even if the motion for an extension is filed before the expiration of the original time to appeal -- if the order appealed from grants relief from the automatic stay,

authorizes the sale or lease of property, use of cash collateral, obtaining of credit, or assumption or assignment of an executory contract or unexpired lease under § 365, or approves a disclosure statement or confirms a plan. These types of orders are often relied upon immediately after they are entered and should not be reviewable on appeal after the expiration of the original appeal period under Rule 8002(a) and (b).

Public Comment on Rule 8002. None.

GAP Report on Rule 8002. No changes to the published draft.

Rule 8020. Damages and Costs for Frivolous Appeal

If a district court or bankruptcy appellate panel determines that an appeal from an order, judgment, or decree of a bankruptcy judge is frivolous, it may, after a separately filed motion or notice from the district court or bankruptcy appellate panel and reasonable opportunity to respond, award just damages and single or double costs

to the appellee.

COMMITTEE NOTE

This rule is added to clarify that a district court hearing an appeal, or a bankruptcy appellate panel, has the authority to award damages and costs to an appellee if it finds that the appeal is frivolous. By conforming to the language of Rule 38 F.R.App.P., this rule recognizes that the authority to award damages and costs in connection with frivolous appeals is the same for district courts sitting as appellate courts, bankruptcy appellate panels, and courts of appeals.

Public Comment on Rule 8020. None.

GAP Report on Rule 8020. No changes to the published draft.

Rule 9011. Signing ~~and~~ of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers

(a) SIGNATURE. Every petition, pleading, written motion, and other paper ~~served or filed in a case under the Code on behalf of a party represented by an attorney~~, except a

list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. ~~whose office address and telephone number shall be stated. A party who is not represented by an attorney shall sign all papers and state the party's address and telephone number.~~ Each paper shall state the signer's address and telephone number, if any. ~~The signature of an attorney or a party constitutes a certificate that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law~~

~~or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation or administration of the case. If a document is not signed, it~~ An unsigned paper shall be stricken unless ~~it is signed promptly after the~~ omission of the signature is corrected promptly after being called to the attention of the ~~person whose signature is required~~ attorney or party. ~~If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may~~

~~include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.~~

(b) REPRESENTATIONS TO THE COURT. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, --

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) SANCTIONS. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) *How Initiated.*

(A) *By Motion.* A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004. The motion for sanctions may not be filed

with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b). If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional

circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) *On Court's Initiative.* On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) *Nature of Sanction; Limitations.* A sanction imposed for violation of this rule shall be limited to what is sufficient to

deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or , if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) *Order.* When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) INAPPLICABILITY TO DISCOVERY. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses,

objections, and motions that are subject to the provisions of Rules 7026 through 7037.

~~(b)~~ (e) VERIFICATION. Except as otherwise specifically provided by these rules, papers filed in a case under the Code need not be verified. Whenever verification is required by these rules, an unsworn declaration as provided in 28 U.S.C. § 1746 satisfies the requirement of verification.

~~(c)~~ (f) COPIES OF SIGNED OR VERIFIED PAPERS. When these rules require copies of a signed or verified paper, it shall suffice if the original is signed or verified and the copies are conformed to the original.

COMMITTEE NOTE

This rule is amended to conform to the 1993 changes to F.R.Civ.P. 11. For an explanation of these amendments, see

the advisory committee note to the 1993 amendments to F.R.Civ.P. 11.

The "safe harbor" provision contained in subdivision (c)(1)(A), which prohibits the filing of a motion for sanctions unless the challenged paper is not withdrawn or corrected within a prescribed time after service of the motion, does not apply if the challenged paper is a petition. The filing of a petition has immediate serious consequences, including the imposition of the automatic stay under § 362 of the Code, which may not be avoided by the subsequent withdrawal of the petition. In addition, a petition for relief under chapter 7 or chapter 11 may not be withdrawn unless the court orders dismissal of the case for cause after notice and a hearing.

Public Comments to Rule 9011:

(1) Bankruptcy Judge Geraldine Mund observed that subdivision (c)(1)(B) does not give a 21-day safe harbor when the court discovers the wrongful conduct and brings it to light by an order to show cause, asked whether this is intentional, and suggested that the committee "may wish to discuss and clarify" this. Judge Mund also suggested that subdivision (c)(2)(B) should permit the court to order monetary sanctions even if the matter is settled or dismissed.

(2) Bankruptcy Judge Yacos suggested that Rule 9011(a) expressly

provide that unsigned papers will not be accepted for filing by the clerk and that the provision regarding the striking of unsigned papers should apply only with respect to papers that clerks "inadvertently and through a mistake" accept for filing.

GAP Report on Rule 9011. The proposed amendments to subdivision (a) were revised to clarify that a party not represented by an attorney must sign lists, schedules, and statements, as well as other papers that are filed.

Rule 9015. Jury Trials

(a) APPLICABILITY OF CERTAIN FEDERAL RULES OF CIVIL PROCEDURE. Rules 38, 39, and 47-51 F.R.Civ.P., and Rule 81(c) F.R.Civ.P. insofar as it applies to jury trials, apply in cases and proceedings, except that a demand made pursuant to Rule 38(b) F.R.Civ.P. shall be filed in accordance with Rule 5005.

(b) CONSENT TO HAVE TRIAL CONDUCTED BY BANKRUPTCY JUDGE. If the right to a jury trial applies, a timely demand has

been filed pursuant to Rule 38(b) F.R.Civ.P., and the bankruptcy judge has been specially designated to conduct the jury trial, the parties may consent to have a jury trial conducted by a bankruptcy judge under 28 U.S.C. § 157(e) by jointly or separately filing a statement of consent within any applicable time limits specified by local rule.

COMMITTEE NOTE

This rule provides procedures relating to jury trials. This rule is not intended to expand or create any right to trial by jury where such right does not otherwise exist.

Public Comment on Rule 9015. Mr. Sabino of the Federal Bar Association commented that the language of the proposed amendment (speaking of bankruptcy judges being "specially designated") does not comport with the statute. He also suggested that the statement of consent track specific language (he suggested that reference to Civil Rule 38 "might be helpful in this regard as a reference point").

GAP Report on Rule 9015. No changes to the published draft.

Rule 9035. Applicability of Rules in Judicial Districts in Alabama and North Carolina

In any case under the Code that is filed in or transferred to a district in the State of Alabama or the State of North Carolina and in which a United States trustee is not authorized to act, these rules apply to the extent that they are not inconsistent with any federal statute ~~the provisions of title 11 and title 28 of the United States Code~~ effective in the case.

COMMITTEE NOTE

Certain statutes that are not codified in title 11 or title 28 of the United States Code, such as § 105 of the Bankruptcy Reform Act of 1994, Pub. L. 103-394, 108 Stat. 4106, relate to bankruptcy administrators in the judicial districts of North Carolina and Alabama. This amendment makes it clear

that the Bankruptcy Rules do not apply to the extent that they are inconsistent with these federal statutes.

Public Comment on Rule 9035. None.

GAP Report on Rule 9035. No changes to the published draft.

B. Preliminary Draft of Proposed Amendments to Official Bankruptcy Forms 1, 3, 6, 8, 9, 10, 14, 17, and 18, and New Forms 20A and 20B, Submitted for Approval to Publish for Comment by the Bench and Bar

1. The Preliminary Draft of the Proposed Amendments to the Official Bankruptcy Forms, and the Proposed New Official Bankruptcy Forms, and the Committee Notes thereto, are attached as Exhibit A. For the convenience of the Standing Committee, copies of the current forms are attached as Exhibit B.

2. Synopsis of Preliminary Draft of Proposed Amendments to the Official Bankruptcy Forms and Proposed New Forms:

(a) Form 1 (Voluntary Petition) is amended to simplify the form and make it easier to complete correctly. Information from bankruptcy clerks regarding frequent errors in completing the form has led to proposed amendments to reduce the amount of information requested, to re-label statistical ranges for reporting assets and liabilities, to reduce the number of places for signatures, and to delete the request for information regarding the filing of a plan. The form also has been redesigned by a graphics expert to make it easier to understand.

(b) Form 3 (Application and Order to Pay Filing Fee in Installments) is amended to include an acknowledgement by the debtor of the potential for dismissal of the case if the debtor fails to pay any installment, and to clarify that a debtor is not disqualified under Rule 1006 from paying the fee in installments solely because the debtor has paid money to a bankruptcy petition preparer.

(c) Form 6 (Schedules) is amended to add to Schedule F (Creditors Holding Unsecured

Nonpriority Claims) a reference to community claims; this is a technical amendment.

(d) Form 8 (Chapter 7 Individual Debtor's Statement of Intention) is amended to be more consistent with the language of the Bankruptcy Code, and to clarify that debtors may not be limited to the options stated on the form.

(e) Form 9 (Notice of Commencement of Case Under the Bankruptcy Code, Meeting of Creditors, and Fixing of Dates) has nine variations (including alternatives for two of them), each designed for a particular type of debtor (individual, partnership or corporation), the particular chapter of the Bankruptcy Code in which the case is pending, and the nature of the estate (assets or no-assets). This form is expanded to two pages to make it easier to read, and the explanatory material is rewritten in plain English. This form also has been redesigned by a graphics expert.

(f) Form 10 (Proof of Claim) is amended to provide definitions and instructions for completing the form. It also has been redesigned by a graphics expert.

(g) Form 14 (Ballot for Accepting or Rejecting Plan) is amended to simplify its format and make it easier to complete correctly. The amended form separates the directions provided to the plan proponent from the text to be transmitted to the creditors and equity security holders who will vote on the plan.

(h) Form 17 (Notice of Appeal under 28 U.S.C. § 158(a) or (b) from a Judgment, Order, or Decree of a Bankruptcy Court) is amended to direct the appellant to provide the addresses and telephone numbers of the attorneys for all parties to the

judgment, order, or decree appealed from, as required by Rule 8001(a).

(i) Form 18 (Discharge of Debtor) is amended to clarify that this form applies only in a chapter 7 case and to delete paragraphs that stated some, but not all, of the effects of the discharge. A comprehensive explanation, in plain English, is added to the back of the form to assist both debtors and creditors to understand the bankruptcy discharge.

(j) Form 20A (Notice of Motion or Objection) and Form 20B (Notice of Objection to Claim) are added to the Official Bankruptcy Forms to provide uniform, plain English explanations to parties as to the procedures they must follow to respond to certain motions or objections that are frequently filed in bankruptcy cases.

II. Information Items

A. The Subcommittee on Litigation, which met on February 9, 1996, in Washington, D.C., and on March 23, 1996, in Memphis (following the Advisory Committee meeting), and which will meet again on May 20, 1996, in New York City, has been working on amendments that will substantially revise the rules governing motion practice and other litigation procedures. It is anticipated that the Litigation Subcommittee will present proposals for discussion at the September 1996 meeting of the Advisory Committee.

B. The Subcommittee on Rule 2014 Disclosure Requirements is working on revising the rule that requires professionals seeking to be retained in a case to disclose all connections with parties in interest. It is anticipated that the Subcommittee will present proposals for discussion at the September 1996 meeting of the Advisory Committee.

C. The Subcommittee on Rule 7062 is working on proposed revisions dealing with the application of the stay of court orders under Civil Rule 62 and alternative approaches to staying the effectiveness or implementation of court orders in bankruptcy cases. It is anticipated that the Subcommittee will present proposals for discussion at the September 1996 meeting of the Advisory Committee.

Attachments:

(1) Exhibit A: Preliminary Draft of Proposed Amendments to the Official Bankruptcy Forms

(2) Exhibit B: Present Official Bankruptcy Forms 1, 3, 6, 8, 9, 10, 14, 17, and 18

(3) Draft of minutes of the Advisory Committee meeting of March 22-23, 1996



















Exhibit "A"

Preliminary Draft of Proposed Amendments

to the

Official Bankruptcy Forms

FORM B1

UNITED STATES BANKRUPTCY COURT _____ DISTRICT OF _____	Voluntary Petition
Name of Debtor (If individual, enter Last, First, Middle):	Name of Joint Debtor (Spouse) (Last, First, Middle):
All Other Names used by the debtor in the last 6 years (include married, maiden, and trade names):	All Other Names used by the joint debtor in the last 6 years (include married, maiden and trade names):
Soc.Sec./Tax I.D. No. (If more than one, state all):	Soc.Sec./Tax I.D. No. (If more than one, state all):
Street Address of Debtor (No. and Street, City, State and Zip Code):	Street Address of Joint Debtor (No. and Street, City, State and Zip Code):
County of Residence or of the Principal Place of Business:	County of Residence or of the Principal Place of Business:
Mailing Address of Debtor (if different from street address):	Mailing Address of Joint Debtor (if different from street address):
Location of Principal Assets of Business Debtor (if different from street address above):	Venue: (Check any applicable box) ☐ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District. ☐ There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District.

Information Regarding the Debtor (Check the Applicable Boxes)

Type of Debtor (Check any applicable box)

☐ Individual(s) ☐ Railroad
☐ Corporation ☐ Stockbroker
☐ Partnership ☐ Commodity Broker
☐ Other_____

Nature of Debts (Check one box)

☐ Consumer/Non-Business ☐ Business

Small Business (Chapter 11 only)

☐ Debtor is a small business as defined in 11 U.S.C. § 101
☐ Debtor is and elects to be considered a small business under 11 U.S.C. § 1121(e) (Optional)

Chapter or Section of Bankruptcy Code Under Which the Petition is Filed (Check one box)

☐ Chapter 7 ☐ Chapter 11 ☐ Chapter 13
☐ Chapter 9 ☐ Chapter 12
☐ Sec. 304 – Case ancillary to foreign proceeding

Filing Fee (Check one box)

☐ Filing Fee is attached
☐ Filing Fee to be paid in installments (Applicable to individuals only.) Must attach signed application for the court's consideration certifying that the debtor is unable to pay fee except in installments. Rule 1006(b). See Official Form No. 3.

Statistical/Administrative Information (Estimates Only)

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

THIS SPACE IS FOR COURT USE ONLY

Estimated Number of Creditors

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

Estimated Assets (Check one box)

$0 to $50,000	$50,001 to $100,000	$100,001 to $500,000	$500,001 to $1 million	$1,000,001 to $10 million	$10,000,001 to $100 million	More than $100 million
☐	☐	☐	☐	☐	☐	☐

Estimated Debts (Check one box)

$0 to $50,000	$50,001 to $100,000	$100,001 to $500,000	$500,001 to $1 million	$1,000,001 to $10 million	$10,000,001 to $100 million	More than $100 million
☐	☐	☐	☐	☐	☐	☐

Voluntary Petition

(This page must be completed and filed in every case)

Name of Debtor(s):

Prior Bankruptcy Case Filed Within Last 6 Years (If more than one, attach additional sheet)

Location Where Filed:	Case Number:	Date Filed:

Pending Bankruptcy Case Filed by any Spouse, Partner or Affiliate of this Debtor (If more than one, attach additional sheet)

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

Signatures

Signature(s) of Debtor(s) (Individual/Joint)

I declare under penalty of perjury that the information provided in this petition is true and correct.
[If petitioner is an individual whose debts are primarily consumer debts and has chosen to file under chapter 7] I am aware that I may proceed under chapter 7, 11, 12 or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7.
I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X _____
Signature of Debtor

X _____
Signature of Joint Debtor

_____
Telephone Number (if not represented by attorney)
Date:

Signature of Debtor (Corporation/Partnership)

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

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

X _____
Signature of Authorized Individual

X _____
Printed Name of Authorized Individual

_____
Title of Authorized Individual
Date:

Signature of Attorney

X _____
Signature of Attorney for Debtor(s)

_____
Printed Name of Attorney for Debtor(s)

_____
Firm Name

_____
Address

_____

_____
Telephone Number
Date:

Exhibit A

(To be completed if debtor is required to file periodic reports (*e.g.*, forms 10K and 10Q) with the Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 and is requesting relief under chapter 11.)

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

Exhibit B

(To be completed if debtor is an individual whose debts are primarily consumer debts)

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

X _____
Signature of Attorney for Debtor(s) Date

Signature of Non-Attorney Petition Preparer

I certify that I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document.

_____
Printed or Typed Name of Bankruptcy Petition Preparer

_____
Social Security Number

_____
Address

_____

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document: If more than one person prepared this document, attach additional signed sheets conforming to the appropriate official form for each person.

X _____
Signature of Bankruptcy Petition Preparer
Date:

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

Exhibit "A"

[If debtor is required to file periodic reports (*e.g.*, forms 10K and 10Q) with the Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 and is requesting relief under chapter 11 of the Code, this Exhibit "A" shall be completed and attached to the petition.]

[Caption as in Form 16B]

Exhibit "A" to Voluntary Petition

1. If any of the debtor's securities are registered under Section 12 of the Securities Exchange Act of 1934, the SEC file number is _____.

2. The following financial data is the latest available information and refers to the debtor's condition on _____.

a. Total assets $ _____

b. Total debts $ _____

					Approximate number of holders
c. Debt securities held by more than 500 holders.					
	secured / /	unsecured / /	subordinated / /	$ _____	_____
	secured / /	unsecured / /	subordinated / /	$ _____	_____
	secured / /	unsecured / /	subordinated / /	$ _____	_____
	secured / /	unsecured / /	subordinated / /	$ _____	_____
	secured / /	unsecured / /	subordinated / /	$ _____	_____
d. Number of shares of preferred stock				_____	_____
e. Number of shares common stock				_____	_____

Comments, if any: _____

_____

_____

3. Brief description of debtor's business: _____

_____

_____

4. List the names of any person who directly or indirectly owns, controls, or holds, with power to vote, 5% or more of the voting securities of debtor:

_____

_____

_____

Form 1

COMMITTEE NOTE

The form has been substantially amended to simplify its format and make the form easier to complete correctly. The Latin phrase "In re" has been deleted as unnecessary. The amount of information requested in the boxes labeled "Type of Debtor" and "Nature of Debt" has been reduced, and the reporting by a corporation of whether it is a publicly held entity has been moved to Exhibit "A" of the petition. The box labeled "Representation by Attorney" has been deleted; the information it contained is requested in the signature boxes on the second page of the form.

In the statistical information section, the labels on the ranges of estimated assets and liabilities have been rewritten to improve the accuracy of reporting. Requests for information in chapter 11 and chapter 12 cases concerning the number of the debtor's employees and equity security holders have been deleted.

The second page of the form has been simplified so that a debtor need only sign the petition once. The request for information concerning the filing of a plan has been deleted.

Exhibit "A" has been simplified. In addition, the category of chapter 11 debtors required to file Exhibit "A" is modified to include a corporation, partnership, or other entity, but only if the debtor has issued publicly-traded equity securities or debt instruments. Most small corporations will not be required to file Exhibit "A."

Form 3. APPLICATION AND ORDER TO PAY FILING FEE IN INSTALLMENTS

[Caption as in Form 16B]

APPLICATION TO PAY FILING FEES IN INSTALLMENTS

1. In accordance with Fed. R. Bankr. P. 1006, I apply for permission to pay the filing fee amounting to $_____ in installments.

2. I certify that I am unable to pay the filing fee(s) except in installments.

3. I further certify that I have not paid any money or transferred any property to an attorney for services in connection with this case and that I will neither make any payment nor transfer any property for services in connection with this case until the filing fee is paid in full.

4. I propose the following terms for the payment of the filing fee(s):*

$_____ With the filing of the petition

$_____ On or before _____

$_____ On or before _____

$_____ On or before _____

$_____ On or before _____

* The number of installments proposed shall not exceed four (4), and the final installment shall be payable not later than 120 days after filing the petition. For cause shown, the court may extend the time of any installment, provided the last installment is paid not later than 180 days after filing the petition. Fed. R. Bankr. P. 1006(b)(2).

5. I understand that if I fail to pay any installment when due my bankruptcy case may be dismissed and I may not receive a discharge of my debts.

_____
Signature of Attorney Date

_____
Name of Attorney

_____
Signature(s) of Applicant(s) Date
(In a joint case, both spouses must sign.)

CERTIFICATION AND SIGNATURE OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

I certify that I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document. I also certify that I will not accept money or any other property from the debtor before the filing fee is paid in full.

_____
Printed or Typed Name of Bankruptcy Petition Preparer

_____
Social Security No.

_____

_____
Address

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document:

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate Official Form for each person.

X _____
Signature of Bankruptcy Petition Preparer

_____
Date

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

UNITED STATES BANKRUPTCY COURT
_____ DISTRICT OF _____

In re _____, Debtor

Case No. _____

Chapter _____

ORDER

IT IS ORDERED that the debtor(s) may pay the filing fee in installments on the terms proposed in the foregoing application.

IT IS FURTHER ORDERED that until the filing fee is paid in full the debtor shall not pay any money for services in connection with this case, and the debtor shall not relinquish any property as payment for services in connection with this case.

BY THE COURT

Date: _____

_____
United States Bankruptcy Judge

Form 3

COMMITTEE NOTE

The form has been reorganized and the paragraphs numbered. The debtor's certification concerning payment for services in the case has been placed ahead of the statement of proposed terms for installment payment of court fees. Acknowledgement by the debtor of the potential consequences of failure to pay any installment when due has been added. (See 11 U.S.C. § 707(a)(2).) The language of the form also has been changed to conform to Rule 1006 and to clarify that a debtor is not disqualified from paying the filing fee in installments because the debtor has paid money to a bankruptcy petition preparer.

FORM B6F

In re _____, Debtor

Case No. _____ (If known)

SCHEDULE F—CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS

State the name, mailing address, including zip code, and account number, if any, of all entities holding unsecured claims without priority against the debtor or the property of the debtor, as of the date of filing of the petition. Do not include claims listed in Schedules D and E. If all creditors will not fit on this page, use the continuation sheet provided.

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

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

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

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

CREDITOR'S NAME AND MAILING ADDRESS INCLUDING ZIP CODE	CODEBTOR	HUSBAND, WIFE, JOINT OR COMMUNITY	DATE CLAIM WAS INCURRED AND CONSIDERATION FOR CLAIM. IF CLAIM IS SUBJECT TO SETOFF, SO STATE.	CONTINGENT	UNLIQUIDATED	DISPUTED	AMOUNT OF CLAIM
ACCOUNT NO.							
ACCOUNT NO.							
ACCOUNT NO.							
ACCOUNT NO.							

_____ continuation sheets attached

Subtotal ▶ $

Total ▶ $

(Report total also on Summary of Schedules)

Form 6

COMMITTEE NOTE

The form is amended to add to the column labels a reference to community liability for claims. The amendment is technical and corrects an editorial oversight.

Form B8
DRAFT

Form 8. INDIVIDUAL DEBTOR'S STATEMENT OF INTENTION

[Caption as in Form 16B]

CHAPTER 7 INDIVIDUAL DEBTOR'S STATEMENT OF INTENTION

1. I have filed a schedule of assets and liabilities which includes consumer debts secured by property of the estate.

2. I intend to do the following with respect to the property of the estate which secures those consumer debts:

a. *Property to Be Surrendered.*

Description of Property **Creditor's name**

b. *Property to Be Retained.* *[Check any applicable statement.]*

Description of Property	Creditor's name	Property is claimed as exempt	Property will be redeemed pursuant to § 722	Debt will be reaffirmed pursuant to § 524(c)

Date: _____

_____
Signature of Debtor

CERTIFICATION OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

I certify that I am a bankruptcy petitioner preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document.

_____ _____
Printed or Typed Name of Bankruptcy Petition Preparer Social Security No.

_____

_____
Address

Names and Social Security Numbers of all other individuals who prepared or assisted in preparing this document.

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate Official Form for each person.

X_____ _____
Signature of Bankruptcy Petition Preparer Date

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedures may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

Form 8

COMMITTEE NOTE

The form is amended to conform more closely to the language of the Bankruptcy Code. The amendments also make clear that the form is not intended to take a position regarding whether the options stated on the form are the only choices available to the debtor. Compare Lowry Federal Credit Union v. West, 882 F.2d 1543 (10th Cir. 1989), with In re Taylor, 3 F.3d 1512 (11th Cir. 1993).

FORM B9A (Individual or Joint Debtor No Asset Case)

UNITED STATES BANKRUPTCY COURT _____ District of _____

Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____ (date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter _____ on _____ (date) and was converted to a case under chapter 7 on _____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor(s) (name(s) and address):	Case Number: Social Security/Taxpayer ID Nos.:
Attorney for Debtor(s) (name and address): Telephone number:	Bankruptcy Trustee (name and address): Telephone number:

Meeting of Creditors:

Date: / / Time: ( ) A.M. ( ) P.M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Complaint Objecting to Discharge of the Debtor *or* to Determine Dischargeability of Certain Debts:

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Please Do Not File A Proof of Claim Unless You Receive a Notice To Do So.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

EXPLANATIONS

FORM B9A

Filing of Chapter 7 Bankruptcy Case	A bankruptcy case under chapter 7 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered.
Creditors May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.
Do Not File a Proof of Claim at This Time	There does not appear to be any property available to the trustee to pay creditors. *You therefore should not file a proof of claim at this time.* If it later appears that assets are available to pay creditors, you will be sent another notice telling you that you may file a proof of claim, and telling you the deadline for filing your proof of claim.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that the debtor is not entitled to receive a discharge under Bankruptcy Code § 727(a) *or* that a debt owed to you is not dischargeable under Bankruptcy Code § 523(a)(2), (4), (6), or (15), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint Objecting to Discharge of the Debtor or to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and the required filing fee by that Deadline.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case must be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. You may want to consult an attorney to protect your rights.

—Refer To Other Side For Important Deadlines and Notices—

FORM B9B (Corporation/Partnership No Asset Case)

UNITED STATES BANKRUPTCY COURT _____ District of _____

Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was filed on _____(date).]

or [A bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was originally filed under chapter ____ on _____ (date) and was converted to a case under chapter 7 on_____.]

You may be a creditor of the debtor. You may want to consult an attorney to protect your rights.
All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor (name(s) and address):	Case Number: Taxpayer ID Nos.:
Attorney for Debtor (name and address): Telephone number:	Bankruptcy Trustee (name and address): Telephone number:

Meeting of Creditors:

Date: / / Time: ( ) A.M. ( ) P.M.. Location:

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Please Do Not File A Proof of Claim Unless You Receive a Notice To Do So.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

EXPLANATIONS

FORM B9B

Filing of Chapter 7 Bankruptcy Case	A bankruptcy case under chapter 7 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor listed on the front side, and an order for relief has been entered.
Creditors May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time and location listed on the front side. *The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.
Do Not File a Proof of Claim at This Time	There does not appear to be any property available to the trustee to pay creditors. *You therefore should not file a proof of claim at this time.* If it later appears that assets are available to pay creditors, you will be sent another notice telling you that you may file a proof of claim, and telling you the deadline for filing your proof of claim.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case must be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts, at the bankruptcy clerk's office.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. You may want to consult an attorney to protect your rights.

—Refer To Other Side For Important Deadlines and Notices—

FORM B9C (Individual or Joint Debtor Asset Case)

UNITED STATES BANKRUPTCY COURT _____ District of _____

Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____ (date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter _____ on _____ (date) and was converted to a case under chapter 7 on _____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor(s) (name(s) and address):	Case Number: Social Security/Taxpayer ID Nos.:
Attorney for Debtor(s) (name and address): Telephone number:	Bankruptcy Trustee (name and address): Telephone number:

Meeting of Creditors:

Date: / / Time: ( ) A.M. ( ) P.M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit): For a governmental unit:

Deadline to File a Complaint Objecting to Discharge of the Debtor or to Determine Dischargeability of Certain Debts:

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

EXPLANATIONS

FORM B9C

Filing of Chapter 7 Bankruptcy Case	A bankruptcy case under chapter 7 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered.
Creditors May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. If you do not file a Proof of Claim by the "Deadline to File of Proof of Claim" listed on the front side, you might not be paid any money on your claim against the debtor in the bankruptcy case. To be paid you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that the debtor is not entitled to receive a discharge under Bankruptcy Code § 727(a) *or* that a debt owed to you is not dischargeable under Bankruptcy Code § 523(a)(2), (4), (6), or (15), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint Objecting to Discharge of the Debtor or to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and the required filing fee by that Deadline.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Liquidation of the Debtor's Property and Payment of Creditors' Claims	The bankruptcy trustee listed on the front of this notice will collect and sell the debtor's property that is not exempt. If the trustee can collect enough money, creditors may be paid some or all of the debts owed to them, in the order specified by the Bankruptcy Code. To make sure you receive any share of that money, you must file a Proof of Claim, as described above.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case must be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. You may want to consult an attorney to protect your rights.

—Refer To Other Side For Important Deadlines and Notices—

FORM B9D (Corporation/Partnership Asset Case)

UNITED STATES BANKRUPTCY COURT _____ District of _____

Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was filed on _____(date).]

or [A bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was originally filed under chapter ____ on _____ (date) and was converted to a case under chapter 7 on_____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor (name(s) and address):	Case Number: Taxpayer ID Nos.:
Attorney for Debtor (name and address): Telephone number:	Bankruptcy Trustee (name and address): Telephone number:

Meeting of Creditors:

Date: / / Time: ( ) A.M. ( ) P.M.. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit): For a governmental unit:

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

EXPLANATIONS

FORM B9D

Filing of Chapter 7 Bankruptcy Case	A bankruptcy case under chapter 7 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor listed on the front side, and an order for relief has been entered.
Creditors May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time and location listed on the front side. *The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. If you do not file a Proof of Claim by the "Deadline to File of Proof of Claim" listed on the front side, you might not be paid any money on your claim against the debtor in the bankruptcy case. To be paid you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor.
Liquidation of the Debtor's Property and Payment of Creditors' Claims	The bankruptcy trustee listed on the front of this notice will collect and sell the debtor's property that is not exempt. If the trustee can collect enough money, creditors may be paid some or all of the debts owed to them, in the order specified by the Bankruptcy Code. To make sure you receive any share of that money, you must file a Proof of Claim, as described above.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case must be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts, at the bankruptcy clerk's office.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. You may want to consult an attorney to protect your rights.

—Refer To Other Side For Important Deadlines and Notices—

FORM B9E (Individual or Joint Debtor Case)

UNITED STATES BANKRUPTCY COURT _____ District of _____

Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on _____ (date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter _____ on _____ (date) and was converted to a case under chapter 11 on _____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor(s) (name(s) and address):	Case Number: Social Security/Taxpayer ID Nos.:
Attorney for Debtor(s) (name and address):	Telephone number:

Meeting of Creditors:

Date: / / Time: ( ) A.M. ( ) P.M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

Notice of deadline will be sent at a later time.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Deadline to File a Complaint Objecting to Discharge of the Debtor:

First date set for hearing on confirmation of plan.
Notice of that date will be sent at a later time.

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

EXPLANATIONS

FORM B9E

Filing of Chapter 11 Bankruptcy Case	A bankruptcy case under chapter 11 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 11 allows a debtor to reorganize or liquidate pursuant to a plan. A plan is not effective unless confirmed by the court. You may be sent a copy of the plan and a disclosure statement telling you about the plan, and you might have the opportunity to vote on the plan. You will be sent notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. The debtor will remain in possession of its property and may continue to operate any business unless a trustee is serving.
Creditors May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. You may look at the schedules that have been or will be filed at the bankruptcy clerk's office. If your claim is scheduled and is *not* listed as disputed, contingent, or unliquidated, it will be allowed in the amount scheduled unless you file a Proof of Claim or you are sent further notice about the claim. Whether or not your claim is scheduled, you are permitted to file a Proof of Claim. If your claim is not listed at all *or* if your claim is listed as disputed, contingent, or unliquidated, then you must file a Proof of Claim or you might not be paid any money on your claim against the debtor in the bankruptcy case. The court has not yet set a deadline to file a Proof of Claim. If a deadline is set, you will be sent another notice.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523(a)(2), (4), (6), or (15), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and the required filing fee by that Deadline. If you believe that the debtor is not entitled to receive a discharge under Bankruptcy Code § 1141(d)(3), you must file a complaint with the required filing fee in the bankruptcy clerk's office not later than the first date set for the hearing on confirmation of the plan. You will be sent another notice informing you of that date.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case must be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. You may want to consult an attorney to protect your rights.

—Refer To Other Side For Important Deadlines and Notices—

FORM B9E Alt. (Individual or Joint Debtor)

UNITED STATES BANKRUPTCY COURT _____ District of _____

Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on _____ (date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter _____ on _____ (date) and was converted to a case under chapter 11 on_____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor(s) (name(s) and address):	Case Number: Social Security/Taxpayer ID Nos.:
Attorney for Debtor(s) (name and address):	Telephone number:

Meeting of Creditors:

Date: / / Time: ( ) A.M. ( ) P.M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit): For a governmental unit:

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Deadline to File a Complaint Objecting to Discharge of the Debtor:

First date set for hearing on confirmation of plan.
Notice of that date will be sent at a later time.

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

EXPLANATIONS

FORM B9E (Alt.)

Filing of Chapter 11 Bankruptcy Case	A bankruptcy case under chapter 11 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 11 allows a debtor to reorganize or liquidate pursuant to a plan. A plan is not effective unless confirmed by the court. You may be sent a copy of the plan and a disclosure statement telling you about the plan, and you might have the opportunity to vote on the plan. You will be sent notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. The debtor will remain in possession of its property and may continue to operate any business unless a trustee is serving.
Creditors May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. You may look at the schedules that have been or will be filed at the bankruptcy clerk's office. If your claim is scheduled and is *not* listed as disputed, contingent, or unliquidated, it will be allowed in the amount scheduled unless you file a Proof of Claim or you are sent further notice about the claim. Whether or not your claim is scheduled, you are permitted to file a Proof of Claim. If your claim is not listed at all *or* if your claim is listed as disputed, contingent, or unliquidated, then you must file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, or you might not be paid any money on your claim against the debtor in the bankruptcy case.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523(a)(2), (4), (6), or (15), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and the required filing fee by that Deadline. If you believe that the debtor is not entitled to receive a discharge under Bankruptcy Code § 1141(d)(3), you must file a complaint with the required filing fee in the bankruptcy clerk's office not later than the first date set for the hearing on confirmation of the plan. You will be sent another notice informing you of that date.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case must be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. You may want to consult an attorney to protect your rights.

—Refer To Other Side For Important Deadlines and Notices—

FORM B9F (Corporation/Partnership Case)

UNITED STATES BANKRUPTCY COURT _____ District of _____

Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on _____ (date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter _____ on _____ (date) and was converted to a case under chapter 11 on _____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor (name(s) and address):	Case Number: Taxpayer ID Nos.:
Attorney for Debtor (name and address):	Telephone number:

Meeting of Creditors:

Date: / / Time: ( ) A.M. ( ) P.M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

Notice of deadline will be sent at a later time.

Deadline to File a Complaint Objecting to Discharge of the Debtor:

First date set for hearing on confirmation of plan.
Notice of that date will be sent at a later time.

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

EXPLANATIONS

FORM B9F

Filing of Chapter 11 Bankruptcy Case	A bankruptcy case under chapter 11 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 11 allows a debtor to reorganize or liquidate pursuant to a plan. A plan is not effective unless confirmed by the court. You may be sent a copy of the plan and a disclosure statement telling you about the plan, and you might have the opportunity to vote on the plan. You will be sent notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. The debtor will remain in possession of its property and may continue to operate any business unless a trustee is serving.
Creditors May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time and location listed on the front side. *The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. You may look at the schedules that have been or will be filed at the bankruptcy clerk's office. If your claim is scheduled and is *not* listed as disputed, contingent, or unliquidated, it will be allowed in the amount scheduled unless you file a Proof of Claim or you are sent further notice about the claim. Whether or not your claim is scheduled, you are permitted to file a Proof of Claim. If your claim is not listed at all *or* if your claim is listed as disputed, contingent, or unliquidated, then you must file a Proof of Claim or you might not be paid any money on your claim against the debtor in the bankruptcy case. The court has not yet set a deadline to file a Proof of Claim. If a deadline is set, you will be sent another notice.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that the debtor is not entitled to receive a discharge under Bankruptcy Code § 1141(d)(3), you must file a complaint with the required filing fee in the bankruptcy clerk's office not later than the first date set for the hearing on confirmation of the plan. You will be sent another notice informing you of that date.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case must be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. You may want to consult an attorney to protect your rights.

—Refer To Other Side For Important Deadlines and Notices—

FORM B9F (Alt.) (Corporation/Partnership Case)

UNITED STATES BANKRUPTCY COURT _____ District of _____

Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on _____ (date).]

or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter _____ on _____ (date) and was converted to a case under chapter 11 on _____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor (name(s) and address):	Case Number: Taxpayer ID Nos.:
Attorney for Debtor (name and address):	Telephone number:

Meeting of Creditors:

Date: / / Time: ( ) A.M. ( ) P.M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit): For a governmental unit:

Deadline to File a Complaint Objecting to Discharge of the Debtor:

First date set for hearing on confirmation of plan.
Notice of that date will be sent at a later time.

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

EXPLANATIONS

FORM B9F (Alt.)

Filing of Chapter 11 Bankruptcy Case	A bankruptcy case under chapter 11 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 11 allows a debtor to recognize or liquidate pursuant to a plan. A plan is not effective unless confirmed by the court. You may be sent a copy of the plan and a disclosure statement telling you about the plan, and you might have the opportunity to vote on the plan. You will be sent notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. The debtor will remain in possession of its property and may continue to operate any business unless a trustee is serving.
Creditors May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time and location listed on the front side. *The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. You may look at the schedules that have been or will be filed at the bankruptcy clerk's office. If your claim is scheduled and is *not* listed as disputed, contingent, or unliquidated, it will be allowed in the amount scheduled unless you file a Proof of Claim or you are sent further notice about the claim. Whether or not your claim is scheduled, you are permitted to file a Proof of Claim. If your claim is not listed at all *or* if your claim is listed as disputed, contingent, or unliquidated, then you must file a Proof of Claim by the "Deadline to File of Proof of Claim" listed on the front side, or you might not be paid any money on your claim against the debtor in the bankruptcy case.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that the debtor is not entitled to receive a discharge under Bankruptcy Code § 1141(d)(3), you must file a complaint with the required filing fee in the bankruptcy clerk's office not later than the first date set for the hearing on confirmation of the plan. You will be sent another notice informing you of that date.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case must be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts, at the bankruptcy clerk's office.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. You may want to consult an attorney to protect your rights.

—Refer To Other Side For Important Deadlines and Notices—

FORM B9G (Individual or Joint Debtor Family Farmer)

UNITED STATES BANKRUPTCY COURT _____ District of _____

Notice of Chapter 12 Bankruptcy Case, Meeting of Creditors, & Deadlines

[The debtor(s) listed below filed a chapter 12 bankruptcy case on _____ (date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter _____ on _____ (date) and was converted to a case under chapter 12 on _____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

~~FORM B9F (Alt.)~~

See Reverse Side For Important Explanations.

Debtor(s) (name(s) and address):	Case Number: Social Security/Taxpayer ID Nos.:
Attorney for Debtor(s) (name and address): Telephone number:	Bankruptcy Trustee (name and address): Telephone number:

Meeting of Creditors:

Date: / / Time: ( ) A.M. ( ) P.M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit): For a governmental unit:

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Deadline to Object to Exemptions:
Thirty (30) days after the *conclusion* of the meeting of creditors.

Filing of Plan, Hearing on Confirmation of Plan

[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held: Date: _____ Time: _____ Location: _____
or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.]
or [The debtor has not filed a plan as of this date. You will be sent separate notice of the hearing on confirmation of the plan.]

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

EXPLANATIONS

FORM B9G

Filing of Chapter 12 Bankruptcy Case	A bankruptcy case under chapter 12 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 12 allows family farmers to adjust their debts pursuant to a plan. A plan is not effective unless confirmed by the court. You may object to confirmation of the plan and appear at the confirmation hearing. A copy or summary of the plan [is included with this notice] *or* [will be sent to you later], and [the confirmation hearing will be held on the date indicated on the front of this notice] *or* [you will be sent notice of the confirmation hearing]. The debtor will remain in possession of the debtor's property and may continue to operate the debtor's business unless a trustee is serving.
Creditors May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362 and § 1201. Common examples of prohibited actions include contacting the debtor by telephone, mail or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim against the debtor in the bankruptcy case. To be paid you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523(a)(2), (4), (6), or (15), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and the required filing fee by that Deadline.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case must be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. You may want to consult an attorney to protect your rights.

—Refer To Other Side For Important Deadlines and Notices—

FORM B9H (Corporation/Partnership Family Farmer)

UNITED STATES BANKRUPTCY COURT _____ District of _____

Notice of Chapter 12 Bankruptcy Case, Meeting of Creditors, & Deadlines

[The debtor [corporation] *or* [partnership] listed below filed a chapter 12 bankruptcy case on _____(date).]
or [A bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was originally filed under chapter ____ on _____ (date) and was converted to a case under chapter 12 on_____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor (name and address):	Case Number: Social Security/Taxpayer ID Nos.:
Attorney for Debtor (name and address): Telephone number:	Bankruptcy Trustee (name and address): Telephone number:

Meeting of Creditors:

Date: / / Time: ( ) A.M. ( ) P.M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit): For a governmental unit:

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Filing of Plan, Hearing on Confirmation of Plan

[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held: Date: _____ Time: _____ Location: _____
or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.]
or [The debtor has not filed a plan as of this date. You will be sent separate notice of the hearing on confirmation of the plan.]

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

EXPLANATIONS

FORM B9H

Filing of Chapter 12 Bankruptcy Case	A bankruptcy case under chapter 12 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by the debtor listed on the front side, and an order for relief has been entered. Chapter 12 allows family farmers to adjust their debts pursuant to a plan. A plan is not effective unless confirmed by the court. You may object to confirmation of the plan and appear at the confirmation hearing. A copy or summary of the plan [is included with this notice] *or* [will be sent to you later], and [the confirmation hearing will be held on the date indicated on the front of this notice] *or* [you will be sent notice of the confirmation hearing]. The debtor will remain in possession of the debtor's property and may continue to operate the debtor's business unless a trustee is serving.
Creditors May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362 and § 1201. Common examples of prohibited actions include contacting the debtor by telephone, mail or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time and location listed on the front side. *The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim against the debtor in the bankruptcy case. To be paid you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523(a)(2), (4), or (6), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and the required filing fee by that Deadline.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case must be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts, at the bankruptcy clerk's office.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. You may want to consult an attorney to protect your rights.

—Refer To Other Side For Important Deadlines and Notices—

FORM B9I

UNITED STATES BANKRUPTCY COURT _____ District of _____

Notice of Chapter 13 Bankruptcy Case, Meeting of Creditors, & Deadlines

[The debtor(s) listed below filed a chapter 13 bankruptcy case on _____ (date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter _____ on _____ (date) and was converted to a case under chapter 13 on_____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor(s) (name(s) and address):	Case Number: Social Security/Taxpayer ID Nos.:
Attorney for Debtor(s) (name and address): Telephone number:	Bankruptcy Trustee (name and address): Telephone number:

Meeting of Creditors:

Date: / / Time: ( ) A.M. ( ) P.M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit): For a governmental unit:

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Filing of Plan, Hearing on Confirmation of Plan

[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held: Date: _____ Time: _____ Location: _____
or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.]
or [The debtor has not filed a plan as of this date. You will be sent separate notice of the hearing on confirmation of the plan.]

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

EXPLANATIONS

FORM B9I

Filing of Chapter 13 Bankruptcy Case	A bankruptcy case under chapter 13 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 13 allows an individual with regular income and debts below a specified amount to adjust their debts pursuant to a plan. A plan is not effective unless confirmed by the bankruptcy court. You may object to confirmation of the plan and appear at the confirmation hearing. A copy or summary of the plan [is included with this notice] *or* [will be sent to you later], and [the confirmation hearing will be held on the date indicated on the front of this notice] *or* [you will be sent notice of the confirmation hearing]. The debtor will remain in possession of the debtor's property and may continue to operate the debtor's business, if any, unless the court orders otherwise.
Creditors May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362 and § 1201. Common examples of prohibited actions include contacting the debtor by telephone, mail or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim against the debtor in the bankruptcy case. To be paid you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523(a)(2), (4), (6), or (15), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and the required filing fee by that Deadline.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case must be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. You may want to consult an attorney to protect your rights.

—Refer To Other Side For Important Deadlines and Notices—

Form 9

COMMITTEE NOTE

Forms 9A - 9I (and the alternate versions of Forms 9E and 9F) have been amended, redesigned, and rewritten. Minor conforming changes have been made to respond to amendments made in the Bankruptcy Reform Act of 1994: the longer claims filing period for governmental units in section 502(b)(9) of the Code (see Forms 9C, 9D, 9E(Alt.), 9F(Alt.), 9G, 9H, and 9I); and a reference to dischargeability actions under section 523(a)(15) (see Forms 9A, 9C, 9E, and 9E(Alt.), 9G, and 9H). All of the forms have been substantially revised to make them easier to read and understand. The titles have been simplified. Recipients are told why they are receiving the notice. Explanations are provided on the back of the form and are set in larger type. Plain English is used. Deadlines are highlighted on the front of the form. Recipients are told that papers must be received by the bankruptcy clerk's office by the applicable deadline. The box for the trustee has been deleted from the chapter 11 notices (Forms 9E and 9F and the alternates). Various alternatives are set out in brackets in many of the forms, permitting each bankruptcy clerk's office to tailor the forms even more precisely to fit the needs of a particular case.

FORM B10 (Official Form 10)

UNITED STATES BANKRUPTCY COURT _____ **DISTRICT OF** _____ | **PROOF OF CLAIM**

Name of Debtor	Case Number

NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.

Name of Creditor (The person or other entity to whom the debtor owes money or property):	☐ Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.
Name and address where notices should be sent: Telephone number:	☐ Check box if you have never received any notices from the bankruptcy court in this case. ☐ Check box if the address differs from the address on the envelope sent to you by the court.
Account or other number by which creditor identifies debtor:	Check here if this claim ☐ replaces ☐ amends a previously filed claim, dated:_____

THIS SPACE IS FOR COURT USE ONLY

1. Basis for Claim

- ☐ Goods sold
- ☐ Services performed
- ☐ Money loaned
- ☐ Personal injury/wrongful death
- ☐ Taxes
- ☐ Other_____

- ☐ Retiree benefits as defined in 11 U.S.C. § 114(a)
- ☐ Wages, salaries, and compensation (fill out below)

  Your SS #: _____ _____ _____

  Unpaid compensation for services performed

  from _____ (date) to _____ (date)

2. Date debt was incurred:

3. If court judgment, date obtained:

4. Classification of Claim. Under the Bankruptcy Code all claims are classified as one or more of the following: (a) Secured, (b) Unsecured nonpriority, (c) Unsecured priority. It is possible for part of a claim to be in one category and part in another.

Check the appropriate box or boxes that best describe your claim and state the amount of the claim at time case filed:

4a. ☐ **Secured Claim $**_____

Brief Description of Collateral:

☐ Real Estate ☐ Motor Vehicle ☐ Other_____

Amount of arrearage and other charges at time case filed included in secured claim above, if any $_____

4b. ☐ **Unsecured nonpriority claim $**_____

A claim is unsecured if there is no collateral or lien on property of the debtor securing the claim or to the extent that the value of such property is less than the amount of the claim.

4c. ☐ **Unsecured priority Claim $**_____

Specify the priority of the claim:

- ☐ Wages, salaries, or commissions (up to $4000),* earned not more than 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier – 11 U.S.C. § 507(a)(3).
- ☐ Contributions to an employee benefit plan – 11 U.S.C. § 507(a)(4).
- ☐ Up to $1,800* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. § 507(a)(6).
- ☐ Alimony, maintenance, or support owed to a spouse, former spouse, or child – 11 U.S.C. § 507(a)(7).
- ☐ Taxes or penalties owed to governmental units - 11 U.S.C. § 507(a)(8).
- ☐ Other — Specify applicable paragraph of 11 U.S.C. § 507(a)(_____).

** Amounts are subject to adjustment on 4/1/98 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.*

5. Total Amount of Claim at Time Case Filed: $_____ (Unsecured Nonpriority) $_____ (Secured) $_____ (Unsecured Priority) $_____ (Total)

☐ Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.

6. Credits: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.

7. Supporting Documents: *Attach copies of supporting documents,* such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. If the documents are not available, explain. If the documents are voluminous, attach a summary.

8. Time-Stamped Copy: To receive an acknowledgment of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.

Date	Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any):

THIS SPACE IS FOR COURT USE ONLY

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general explanations of the law. In particular types of cases or circumstances, such as bankruptcy cases that are not filed voluntarily by a debtor, there may be exceptions to these general rules.

DEFINITIONS

Debtor

The person, corporation, or other entity that has filed a bankruptcy case is called the debtor.

Creditor

A creditor is any person, corporation, or other entity to whom the debtor owed a debt on the date that the bankruptcy case was filed.

Proof of Claim

A form filed with the clerk of the bankruptcy court where the bankruptcy case was filed, to tell the bankruptcy court how much the debtor owed a creditor when the bankruptcy case was filed (the amount of the creditor's claim).

Secured Claim

A claim is a secured claim if the creditor has a lien on property of the debtor (collateral) that gives the creditor the right to be paid from that property before creditors who do not have liens on the property.

Examples of liens are a mortgage on real estate and a security interest in a car, truck, boat, television set or other item of property. A lien may have been obtained through a court proceeding before the bankruptcy case began; in some states a court judgment is a lien. In addition, to the extent a creditor owes money to the debtor, the creditor's claim is a secured claim. (See also *Unsecured Claim*, below.)

Unsecured Claim

If a claim is not a secured claim it is an unsecured claim. A claim may be partly secured and partly unsecured if the property on which a creditor has a lien is not worth enough to pay the creditor in full.

Unsecured Priority Claim

Certain types of unsecured claims are given priority, so they are to be paid in bankruptcy cases before most other unsecured claims (if there is sufficient money or property available to pay these claims). The most common types of priority claims are listed on the proof of claim form. Unsecured claims that are not specifically given priority status by the bankruptcy laws are classified as *Unsecured Nonpriority Claims.*

Items to be completed in Proof of Claim form (if not already filled in)

Court, Name of Debtor and Case Number:
Fill in the name of the federal judicial district where the bankruptcy case was filed (for example, Central District of California), the name of the debtor in the bankruptcy case, and the bankruptcy case number. If you received a notice of the case from the court, all of this information is near the top of the notice.

Information about Creditor:
Complete the section giving the name, address, and telephone number of the creditor to whom the debtor owes money or property, and the debtor's account number, if any. If anyone else has already filed a proof of claim relating to this debt, if you never received notices from the bankruptcy court about this case, if your address differs from that to which the court sent notice, or if this proof of claim replaces or changes a proof of claim that was already filed, check the appropriate box on the form.

1. Basis for Claim:
Check the type of debt for which the proof of claim is being filed. If the type of debt is not listed, check "Other" and briefly describe the type of debt. If you were an employee of the debtor, fill in your social security number and the dates of work for which you were not paid.

2. Date debt incurred:
Fill in the date when the debt first was owed by the debtor.

3. Court judgments:
If you have a court judgment for this debt, state the date the court entered the judgment.

4. Classification of Claim:
Check the appropriate place to state whether the claim is a secured claim, an unsecured priority claim, or an unsecured nonpriority claim, and state the amount. If the claim is a secured claim, you must state the type of property that is collateral for the claim, attach copies of the documentation of your lien, and state the amount past due on the claim as of the date the bankruptcy case was filed. A claim may be partly secured and partly unsecured. (See DEFINITIONS, above.) A claim may also be partly priority and partly nonpriority if, for example, the claim is for more than the amount given priority by the law. For partly secured claims or partly priority claims, state the amount of each part in the applicable separate designated section of the form.

5. Total Amount of Claim:
Fill in the total amount of each type of claim included in the proof of claim and the total amount of the entire claim. If interest or other charges in addition to the principal amount of the claim are included, check the appropriate place on the form and attach an itemization of the interest and charges.

6. Credits:
By signing this proof of claim, you are stating under oath that in calculating the amount of your claim you have given the debtor credit for all payments received from the debtor.

7. Supporting documents:
You must attach to this proof of claim form copies of documents that show the debtor owes the debt claimed or, if the documents are too lengthy, a summary of those documents. If documents are not available, you must attach an explanation of why they are not available.

Form 10

COMMITTEE NOTE

Explanatory definitions and instructions for completing the form have been added.

Form 14. BALLOT FOR ACCEPTING OR REJECTING A PLAN

[Caption as in Form 16A]

CLASS [ ] BALLOT FOR ACCEPTING OR REJECTING PLAN OF REORGANIZATION

[Proponent] filed a plan of reorganization dated *[Date]* (the "Plan") for the Debtor in this case. The Court has *[conditionally]* approved a disclosure statement with respect to the Plan (the "Disclosure Statement"). The Disclosure Statement provides information to assist you in deciding how to vote your ballot. If you do not have a Disclosure Statement, you may obtain a copy from *[name, address, telephone number and telecopy number of proponent/proponent's attorney.]* Court approval of the disclosure statement does not indicate approval of the plan by the Court.

You should review the Disclosure Statement and the Plan before you vote. You may wish to seek legal advice concerning the Plan and your classification and treatment under the Plan. Your *[claim] [equity interest]* has been placed in class [ ] under the Plan. If you hold claims or equity interests in more than one class, you will receive a ballot for each class in which you are entitled to vote.

If your ballot is not received by [*name and address of proponent's attorney or other appropriate address]* on or before *[date]*, and such deadline is not extended, your vote will not count as either an acceptance or rejection of the Plan. If the Plan is confirmed by the Bankruptcy Court it will be binding on you whether or not you vote.

ACCEPTANCE OR REJECTION OF THE PLAN

[At this point the ballot should provide for voting by the particular class of creditors or equity holders receiving the ballot using one of the following alternatives;]

[If the voter is the holder of a secured, priority or unsecured nonpriority claim:]

The undersigned, the holder of a Class [ ] claim against the Debtor in the unpaid amount of Dollars ($)

[or, if the voter is the holder of a bond, debenture or other debt security:]

The undersigned, the holder of a Class [ ] claim against the Debtor, consisting of Dollars ($) principal amount of *[describe bond, debenture or other debt security]* of the Debtor (For purposes of this Ballot, it is not necessary and you should not adjust the principal amount for any accrued or unmatured interest.)

[or, if the voter is the holder of an equity interest:]

The undersigned, the holder of Class *[ ]* equity interest in the Debtor, consisting of _____ shares or other interests of *[describe equity interest]* in the Debtor

[In each case, the following language should be included:]

(Check one box only)

[ ] ACCEPTS THE PLAN [ ] REJECTS THE PLAN

Dated: _____

Print or type name: _____

Signature: _____

Title (if corporation or partnership) _____

Address: _____

_____

RETURN THIS BALLOT TO:

[Name and address of proponent's attorney or other appropriate address]

Form 14

COMMITTEE NOTE

The form has been substantially amended to simplify its format and make it easier to complete correctly.

Directions or blanks for proponent to complete the text of the ballot are in italics and enclosed within brackets. A ballot should include only the applicable language from the alternatives shown on this form and should be adapted to the particular requirements of the case.

If the plan provides for creditors in a class to have the right to reduce their claims so as to qualify for treatment given to creditors whose claims do not exceed a specified amount, the ballot should make provisions for the exercise of that right. See section 1122(b) of the Code.

If debt or equity securities are held in the name of a broker/dealer or nominee, the ballot should require the furnishing of sufficient information to assure that duplicate ballots are not submitted and counted and that ballots submitted by a broker/dealer or nominee reflect the votes of the beneficial holders of such securities. See Rule 3017(e).

In the event that more than one plan of reorganization is to be voted upon, the form of ballot will need to be adapted to permit holders of claims or equity interests (a) to accept or reject each plan being proposed, and (b) to indicate preferences among the competing plans. See section 1129(c) of the Code.

FORM 17. NOTICE OF APPEAL UNDER 28 U.S.C. § 158(a) or (b) FROM A JUDGMENT, ORDER, OR DECREE OF A BANKRUPTCY COURT

[Caption as in Form 16A, 16B, or 16D, as appropriate]

NOTICE OF APPEAL

_____, the plaintiff [*or* defendant *or* other party] appeals under 28 U.S.C. § 158(a) or (b) from the judgment, order, or decree of the bankruptcy court (describe) entered in this adversary proceeding [*or other proceeding, describe type*] on the _____ day of _____, (year).

The names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their respective attorneys are as follows:

Dated: _____

Signed: _____
Attorney for Appellant

Attorney Name: _____
(and Identification No., if required)

Address: _____

_____

Tel No: _____

If a Bankruptcy Appellate Panel Service is authorized to hear this appeal, each party has a right to have the appeal heard by the district court. The appellant may exercise this right only by filing a separate statement of election at the time of the filing of this notice of appeal.

Form 17

COMMITTEE NOTE

The form has been amended to conform to Rule 8001(a), which requires the notice to contain the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their respective attorneys. A party filing a notice of appeal pro se should provide equivalent information.

Form 18. DISCHARGE OF DEBTOR

IN A CHAPTER 7 CASE

[Caption as in Form 16A]

DISCHARGE OF DEBTOR

It appearing that the debtor is entitled to a discharge, **IT IS ORDERED:** The debtor is granted a discharge under section 727 of title 11, United States Code, (the Bankruptcy Code).

Dated: _____

BY THE COURT

_____

United States Bankruptcy Judge

SEE THE BACK OF THIS ORDER FOR IMPORTANT INFORMATION.

EXPLANATION OF BANKRUPTCY DISCHARGE IN A CHAPTER 7 CASE

This court order grants a discharge to the person named as the debtor. It is not a dismissal of the case and it does not determine how much money, if any, the trustee will pay to creditors.

Collection of Discharged Debts Prohibited

The discharge prohibits any attempt to collect from the debtor a debt that has been discharged. For example, a creditor is not permitted to contact a debtor by mail, phone, or otherwise, to file or continue a lawsuit, to attach wages or other property, or to take any other action to collect a discharged debt from the debtor. *[In a case involving community property:]* [There are also special rules that protect certain community property owned by the debtor's spouse, even if that spouse did not file a bankruptcy case.] A creditor who violates this order can be required to pay damages and attorney's fees to the debtor.

However, a creditor may have the right to enforce a valid lien, such as a mortgage or security interest, against the debtor's property after the bankruptcy, if that lien was not avoided or eliminated in the bankruptcy case. Also, a debtor may voluntarily pay any debt that has been discharged.

Debts that are Discharged

The chapter 7 discharge order eliminates a debtor's legal obligation to pay a debt that is discharged. Most, but not all, types of debts are discharged if the debt existed on the date the bankruptcy case was filed. (If this case was begun under a different chapter of the Bankruptcy Code and converted to chapter 7, the discharge applies to debts owed when the bankruptcy case was converted.) Some of the common types of debts which are not discharged in a chapter 7 bankruptcy case are:

a. Debts for most taxes;

b. Debts that are in the nature of alimony, maintenance, or support;

c. Debts for most student loans;

d. Debts that the bankruptcy court specifically decides, during the bankruptcy case, are not discharged;

e. Debts for most fines, penalties, forfeitures, or criminal restitution obligations;

f. Debts for personal injuries or death caused by the debtor's operation of a motor vehicle while intoxicated;

g. Some debts which were not properly listed by the debtor;

h. Debts for which the debtor has given up the discharge protections by signing a reaffirmation agreement in compliance with the Bankruptcy Code requirements for reaffirmation of debts.

This information is only a general summary of the bankruptcy discharge and there are exceptions to these general rules. The law is complicated, so you may want to consult an attorney to determine the exact effect of the discharge in your case.

Form 18

COMMITTEE NOTE

The discharge order has been simplified by deleting paragraphs which had detailed some, but not all, of the effects of the discharge. These paragraphs have been replaced with a plain English explanation of the discharge. This explanation is to be printed on the reverse of the order, to increase understanding of the bankruptcy discharge among creditors and debtors. The bracketed sentence in the second paragraph should be included when the case involves community property.

Form 20A

Form 20A. Notice of Motion or Objection

[Caption as in Form 16A.]

NOTICE OF [MOTION TO] [OBJECTION TO]

_____ has filed papers with the court to [relief sought in motion or objection]. Your rights may be affected. You should read these papers carefully and discuss them with your lawyer, if you have one in this bankruptcy case. (If you do not have a lawyer, you may wish to consult one.)

If you do not want the court to [relief sought in motion or objection], or if you want the court to consider your views on the [motion] [objection], then by (date), you or your lawyer must:

[File with the court a written request for a hearing {or, *if the court requires a written response*, an answer explaining your position}, and mail a copy to

{movant's attorney's name and address}

{names and addresses of others to be served}

If you mail your {request} {response} to the court for filing, you must mail it early enough so the court will receive it by the date stated above.]

[Attend the hearing scheduled to be held on (date), (year), at _____a.m./p.m. in Courtroom _____, United States Bankruptcy Court, {address}.]

[Other steps required to oppose a motion or objection under local rule or court order.]

If you or your lawyer do not take these steps, the court may decide that you do not oppose the relief sought in the motion or objection and may enter an order granting that relief.

Date:_____

Signature:_____
Name:
Business Address:

Form 20B. Notice of Objection to Claim

[Caption as in Form 16A.]

NOTICE OF OBJECTION TO CLAIM

_____ has filed an objection to your claim in this bankruptcy case. Your claim may be reduced, modified, or eliminated. You should read these papers carefully and discuss them with your lawyer, if you have one.

If you do not want the court to eliminate or change your claim, or __(date)__, you or your lawyer must:

{If required by local rule or court order.} [File with the court a written response to the objection, explaining your position, and mail a copy to

{objector's attorney's name and address}

{names and addresses of others to be served}

If you mail your response to the court for filing, you must mail it early enough so that the court will receive it by the date stated above.]

Attend the hearing on the objection, scheduled to be held on __(date)__, __(year)__, at _____a.m./p.m. in Courtroom _____, United States Bankruptcy Court, {address}.

If you or your attorney do not take these steps the court may decide that you do not oppose the objection to your claim.

Date:_____

Signature:_____
Name:
Business Address:

Forms 20A & 20B

COMMITTEE NOTE

These forms are new. They are intended to provide uniform, plain English explanations to parties regarding what they must do to respond in certain contested matters which occur frequently in bankruptcy cases. Such explanations have been given better in some courts than in others. The forms are intended to make bankruptcy proceedings more fair, equitable, and efficient, by aiding parties, who sometimes do not have counsel, in understanding the applicable rules. It is hoped that use of these forms also will decrease the number of inquiries to bankruptcy clerks' offices.

Form 20A should be used upon the filing of a motion to dismiss or convert a case, a motion to modify a chapter 12 or chapter 13 plan, a motion for relief from the automatic stay, an objection to exemptions, or an objection to confirmation of a chapter 12 or chapter 13 plan. Form 20B should be used when there is an objection to a claim.

These forms are not intended to dictate the specific procedures to be used by different bankruptcy courts. The forms contain optional language that can be used or adapted, depending on local procedures. Similarly, the signature line will be adapted to identify the actual sender of the notice in each circumstance. All adaptations of the form should carry out the intent to give notice of applicable procedures in easily understood language.

Exhibit "B"

Present Official Bankruptcy Forms 1, 3, 6 (Schedule F, only),

8, 9, 10, 14, 17, and 18

B1
(Rev. 12/94)

FORM 1. VOLUNTARY PETITION

United States Bankruptcy Court

_____ District of _____

VOLUNTARY PETITION

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

INFORMATION REGARDING DEBTOR (Check applicable boxes)

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

NATURE OF DEBT (Check one box)
- ☐ Non-Business/Consumer
- ☐ Business—Complete A & B below

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

B. BRIEFLY DESCRIBE NATURE OF BUSINESS

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

SMALL BUSINESS (Chapter 11 only)
- ☐ Debtor is a small business as defined in 11 U.S.C. § 101.
- ☐ Debtor is and elects to be considered a small business under 11 U.S.C. § 1121(e). (Optional)

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

NAME AND ADDRESS OF LAW FIRM OR ATTORNEY

Telephone No.

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

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

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

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

THIS SPACE FOR COURT USE ONLY

ESTIMATED NUMBER OF CREDITORS

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

ESTIMATED ASSETS (in thousands of dollars)

Under 50	50-99	100-499	500-999	1000-9999	10,000-99,000	100,000-over
☐	☐	☐	☐	☐	☐	☐

ESTIMATED LIABILITIES (in thousands of dollars)

Under 50	50-99	100-499	500-999	1000-9999	10,000-99,000	100,000-over
☐	☐	☐	☐	☐	☐	☐

EST. NO. OF EMPLOYEES—CH 11 & 12 ONLY

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

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

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

Name of Debtor _____

Case No. _____ (Court use only)

FILING OF PLAN

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

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

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

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

Location Where Filed	Case Number	Date Filed

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

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

REQUEST FOR RELIEF

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

SIGNATURES

ATTORNEY

X _____

Signature _____ Date _____

INDIVIDUAL/JOINT DEBTOR(S)

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

X _____

Signature of Debtor

_____

Date

X _____

Signature of Joint Debtor

_____

Date

CORPORATE OR PARTNERSHIP DEBTOR

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

X _____

Signature of Authorized Individual

_____

Print or Type Name of Authorized Individual

_____

Title of Individual Authorized by Debtor to File this Petition

_____

Date

If debtor is a corporation filing under chapter 11, Exhibit "A" is attached and made part of this petition.

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

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

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

X _____ _____

Signature of Debtor Date

X _____ _____

Signature of Joint Debtor Date

EXHIBIT "B"

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

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

X _____ _____

Signature of Attorney Date

CERTIFICATION AND SIGNATURE OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

I certify that I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document.

_____

Printed or Typed Name of Bankruptcy Petition Preparer

_____

Social Security Number

_____

_____

Address Tel. No.

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document:

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate Official Form for each person.

X _____

Signature of Bankruptcy Petition Preparer

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

Form B1XA
6/90

Exhibit "A"

[If debtor is a corporation filing under chapter 11 of the Code, this Exhibit "A" shall be completed and attached to the petition.]

[Caption as in Form 16B]

Exhibit "A" to Voluntary Petition

1. Debtor's employer identification number is _____.

2. If any of debtor's securities are registered under section 12 of the Securities and Exchange Act of 1934, the SEC file number is _____.

3. The following financial data is the latest available information and refers to debtor's condition on _____.

a. Total assets $ _____

b. Total liabilities $ _____

		Approximate number of holders
Fixed, liquidated secured debt	$ _____	_____
Contingent secured debt	$ _____	_____
Disputed secured claims	$ _____	_____
Unliquidated secured debt	$ _____	_____

		Approximate number of holders
Fixed, liquidated unsecured debt	$ _____	_____
Contingent unsecured debt	$ _____	_____
Disputed unsecured claims	$ _____	_____
Unliquidated unsecured debt	$ _____	_____
Number of shares of preferred stock	_____	_____
Number of shares of common stock	_____	_____

Exhibit "A" continued

Comments, if any: _____

4. Brief description of debtor's business: _____

5. List the name of any person who directly or indirectly owns, controls, or holds, with power to vote, 20% or more of the voting securities of debtor: _____

6. List the names of all corporations 20% or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held, with power to vote, by debtor: _____

Form 3. APPLICATION AND ORDER TO PAY FILING FEE IN INSTALLMENTS

[Caption as in Form 16B]

APPLICATION TO PAY FILING FEES IN INSTALLMENTS

In accordance with Fed. R. Bankr. P. 1006, application is made for permission to pay the filing fee on the following terms:

$ _____ with the filing of the petition, and the balance of

$ _____ in _____ installments, as follows:

$ _____ on or before _____

$ _____ on or before _____

$ _____ on or before _____

$ _____ on or before _____

I certify that I am unable to pay the filing fee except in installments. I further certify that I have not paid any money or transferred any property to an attorney or any other person for services in connection with this case or in connection with any other pending bankruptcy case and that I will not make any payment or transfer any property for services in connection with the case until the filing fee is paid in full.

Date: _____

_____
Applicant

_____
Attorney for Applicant

CERTIFICATION AND SIGNATURE OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

I certify that I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document.

_____
Printed or Typed Name of Bankruptcy Petition Preparer

_____
Social Security No.

_____

_____
Address

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document:

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate Official Form for each person.

X _____
Signature of Bankruptcy Petition Preparer

_____
Date

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

ORDER

IT IS ORDERED that the debtor pay the filing fee in installments on the terms set forth in the foregoing application.

IT IS FURTHER ORDERED that until the filing fee is paid in full the debtor shall not pay, and no person shall accept, any money for services in connection with this case, and the debtor shall not relinquish, and no person shall accept, any property as payment for services in connection with this case.

BY THE COURT

Date: _____

_____
United States Bankruptcy Judge

FORM B6F
(10/89)

In re _____, Debtor

Case No. _____ (If known)

SCHEDULE F—CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS

State the name, mailing address, including zip code, and account number, if any, of all entities holding unsecured claims without priority against th debtor or the property of the debtor, as of the date of filing of the petition. Do not include claims listed in Schedules D and E. If all creditors will not fit o this page, use the continuation sheet provided.

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

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

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

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

CREDITOR'S NAME AND MAILING ADDRESS INCLUDING ZIP CODE	CODEBTOR	HUSBAND, WIFE, OR JOINT	DATE CLAIM WAS INCURRED AND CONSIDERATION FOR CLAIM. IF CLAIM IS SUBJECT TO SETOFF, SO STATE.	CONTINGENT	UNLIQUIDATED	DISPUTED	AMOUNT OF CLAIM
ACCOUNT NO.							
ACCOUNT NO.							
ACCOUNT NO.							
ACCOUNT NO.							

_____ continuation sheets attached

Subtotal ▶ $

Total ▶ $

(Report total also on Summary of Schedules)

Form B8
11/94

Form 8. INDIVIDUAL DEBTOR'S STATEMENT OF INTENTION

[Caption as in Form 16B]

CHAPTER 7 INDIVIDUAL DEBTOR'S STATEMENT OF INTENTION

1. I, the debtor, have filed a schedule of assets and liabilities which includes consumer debts secured by property of the estate.

2. My intention with respect to the property of the estate which secures those consumer debts is as follows:

a. *Property to Be Surrendered.*

	Description of Property	Creditor's name
1.	_____	_____
2.	_____	_____
3.	_____	_____

b. *Property to Be Retained. [Check applicable statement of debtor's intention concerning reaffirmation, redemption, or lien avoidance.]*

	Description of property	Creditor's name	Debt will be reaffirmed pursuant to § 524(c)	Property is claimed as exempt and will be redeemed pursuant to § 722	Lien will be avoided pursuant to § 522(f) and property will be claimed as exempt
1.	_____	_____	_____	_____	_____
2.	_____	_____	_____	_____	_____
3.	_____	_____	_____	_____	_____
4.	_____	_____	_____	_____	_____
5.	_____	_____	_____	_____	_____

3. I understand that § 521(2)(B) of the Bankruptcy Code requires that I perform the above stated intention within 45 days of the filing of this statement with the court, or within such additional time as the court, for cause, within such 45-day period fixes.

Date: _____

_____
Signature of Debtor

CERTIFICATION OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

I certify that I am a bankruptcy petitioner preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document.

_____ _____
Printed or Typed Name of Bankruptcy Petition Preparer Social Security No.

_____

_____
Address

Names and Social Security Numbers of all other individuals who prepared or assisted in preparing this document.

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate Official Form for each person.

X_____ _____
Signature of Bankruptcy Petition Preparer Date

A bankruptcy petition preparer's failure to comply with the provision of title 11 and the Federal Rules of Bankruptcy Procedures may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

Form B9
6/92

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

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

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

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

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

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

9E (Alt.)..Chapter 11, Individual/Joint Case

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

9F (Alt.)..Chapter 11, Corporation/Partnership Case

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

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

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

FORM B9A
(Rev. 12/94)

United States Bankruptcy Court

Case Number

_____ District of _____

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 7 OF THE BANKRUPTCY CODE.
MEETING OF CREDITORS, AND FIXING DATES
(Individual or Joint Debtor No Asset Case)

In re (Name of Debtor)	Address of Debtor	Soc. Sec./Tax Id. Nos.
	Date Case Filed (or Converted)	

Name and Address of Attorney for Debtor	Telephone Number	Name and Address of Trustee	Telephone Number

☐ This is a converted case originally filed under chapter _____ on _____ (date).

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

DISCHARGE OF DEBTS

Deadline to File a Complaint Objecting to Discharge of the Debtor or toDetermine Dischargeability of Certain Types of Debts:

AT THIS TIME THERE APPEAR TO BE NO ASSETS AVAILABLE FROM WHICH PAYMENT MAY BE MADE TO UNSECURED CREDITORS. DO NOT FILE A PROOF OF CLAIM UNTIL YOU RECEIVE NOTICE TO DO SO.

COMMENCEMENT OF CASE. A petition for liquidation under chapter 7 of the Bankruptcy Code has been filed in this court by or against the person or persons named above as the debtor, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property, debts, and property claimed as exempt are available for inspection at the office of the clerk of the bankruptcy court.

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

MEETING OF CREDITORS. The debtor (both husband and wife in a joint case) is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may elect a trustee other than the one named above, elect a committee of creditors, examine the debtor, and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to creditors.

LIQUIDATION OF THE DEBTOR'S PROPERTY. The trustee will collect the debtor's property and turn any that is not exempt into money. At this time, however, it appears from the schedules of the debtor that there are no assets from which any distribution can be paid to creditors. If at a later date it appears that there are assets from which a distribution may be paid, the creditors will be notified and given an opportunity to file claims.

EXEMPT PROPERTY. Under state and federal law, the debtor is permitted to keep certain money or property as exempt. If a creditor believes that an exemption of money or property is not authorized by law, the creditor may file an objection. An objection must be filed not later than 30 days after the conclusion of the meeting of creditors.

DISCHARGE OF DEBTS. The debtor is seeking discharge of debts. A discharge means that certain debts are made unenforceable against the debtor personally. Creditors whose claims against the debtor are discharged may never take action against the debtor to collect the discharged debts. If a creditor believes that the debtor should not receive any discharge of debts under § 727 of the Bankruptcy Code or that a debt owed to the creditor is not dischargeable under § 523(a) (2), (4), (6), or (15) of the Bankruptcy Code, timely action must be taken in the bankruptcy court by the deadline set forth above in the box labeled "Discharge of Debts." Creditors considering taking such action may wish to seek legal advice.

DO NOT FILE A PROOF OF CLAIM UNLESS YOU RECEIVE A COURT NOTICE TO DO SO

Address of the Clerk of the Bankruptcy Court	For the Court:
	Clerk of the Bankruptcy Court
	Date

FORM B9B
6/92

United States Bankruptcy Court

Case Number

_____ District of _____

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 7 OF THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES
(Corporation/Partnership No Asset Case)

In re (Name of Debtor)	Address of Debtor	Soc. Sec./Tax Id. Nos.
	Date Case Filed (or Converted)	

☐ Corporation ☐ Partnership

Name and Address of Attorney for Debtor	Telephone Number	Name and Address of Trustee	Telephone Number

☐ This is a converted case originally filed under chapter _____ on _____ (date)

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

AT THIS TIME THERE APPEAR TO BE NO ASSETS AVAILABLE FROM WHICH PAYMENT MAY BE MADE TO UNSECURED CREDITORS. DO NOT FILE A PROOF OF CLAIM UNTIL YOU RECEIVE NOTICE TO DO SO.

COMMENCEMENT OF CASE. A petition for liquidation under chapter 7 of the Bankruptcy Code has been filed in this court by or against the debtor named above, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts, are available for inspection at the office of the clerk of the bankruptcy court.

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

MEETING OF CREDITORS. The debtor's representative, as specified in Bankruptcy Rule 9001(5), is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may elect a trustee other than the one named above, elect a committee of creditors, examine the debtor, and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to the creditors.

LIQUIDATION OF THE DEBTOR'S PROPERTY. The trustee will collect the debtor's property, if any, and turn it into money. At this time, however, it appears from the schedules of the debtor that there are no assets from which any distribution can be paid to the creditors. If at a later date it appears that there are assets from which a distribution may be paid, the creditors will be notified and given an opportunity to file claims.

DO NOT FILE A PROOF OF CLAIM UNLESS YOU RECEIVE A COURT NOTICE TO DO SO

Address of the Clerk of the Bankruptcy Court	For the Court:
	Clerk of the Bankruptcy Court
	Date

FORM B9C
(Rev. 12/94)

United States Bankruptcy Court

Case Number

_____ District of _____

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 7 OF THE BANKRUPTCY CODE.
MEETING OF CREDITORS, AND FIXING DATES
(Individual or Joint Asset Case)

In re (Name of Debtor)	Address of Debtor	Soc. Sec./Tax Id. Nos.
	Date Case Filed (or Converted)	

Name and Address of Attorney for Debtor	Telephone Number	Name and Address of Trustee	Telephone Number

☐ This is a converted case originally filed under chapter _____ on _____ (date).

DEADLINE TO FILE A PROOF OF CLAIM

For creditors other than governmental units: For governmental units:

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

DISCHARGE OF DEBTS

Deadline to File a Complaint Objecting to Discharge of the Debtor or to Determine Dischargeability of Certain Types of Debts:

COMMENCEMENT OF CASE: A petition for liquidation under chapter 7 of the Bankruptcy Code has been filed in this court by or against the person or persons named above as the debtor, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property, debts, and property claimed as exempt are available for inspection at the office of the clerk of the bankruptcy court.

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MEETING OF CREDITORS. The debtor (both husband and wife in a joint case) is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may elect a trustee other than the one named above, elected a committee of creditors, examine the debtor, and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to creditors.

LIQUIDATION OF THE DEBTOR'S PROPERTY. The trustee will collect the debtor's property and turn any that is not exempt into money. If the trustee can collect enough money and property from the debtor, creditors may be paid some or all of the debts owed to them.

EXEMPT PROPERTY. Under state and federal law, the debtor is permitted to keep certain money or property as exempt. If a creditor believes that an exemption of money or property is not authorized by law, the creditor may file an objection. An objection must be filed not later than 30 days after the conclusion of the meeting of creditors.

DISCHARGE OF DEBTS. The debtor is seeking a discharge of debts. A discharge means that certain debts are made unenforceable against the debtor personally. Creditors whose claims against the debtor are discharged may never take action against the debtor to collect the discharged debts. If a creditor believes that the debtor should not receive any discharge of debts under § 727 of the Bankruptcy Code or that a debt owed to the creditor is not dischargeable under § 523(a)(2), (4), (6), or (15) of the Bankruptcy Code, timely action must be taken in the bankruptcy court by the deadline set forth above in the box labeled "Discharge of Debts." Creditors considering taking such action may wish to seek legal advice.

PROOF OF CLAIM. Except as otherwise provided by law, in order to share in any payment from the estate, a creditor must file a proof of claim by the date set forth above in the box labeled "Deadline to File a Proof of Claim." The place to file the proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

Address of the Clerk of the Bankruptcy Court	For the Court:
	Clerk of the Bankruptcy Court
	Date

FORM B9D
(Rev. 12/94)

United States Bankruptcy Court

Case Number

_____ District of _____

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 7 OF THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES
(Corporation/Partnership Asset Case)

In re (Name of Debtor)	Address of Debtor	Soc. Sec./Tax Id. Nos.
	Date Case Filed (or Converted)	

☐ Corporation ☐ Partnership

Name and Address of Attorney for Debtor	Telephone Number	Name and Address of Trustee	Telephone Number

☐ This is a converted case originally filed under chapter _____ on _____ (date)

DEADLINE TO FILE A PROOF OF CLAIM

For creditors other than governmental units: For governmental units

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

COMMENCEMENT OF CASE. A petition for liquidation under chapter 7 of the Bankruptcy Code has been filed in this court by or against the debtor named above, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts, are available for inspection at the office of the clerk of the bankruptcy court.

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

MEETING OF CREDITORS. The debtor's representative, as specified in Bankruptcy Rule 9001(5), is required to appear at the meeting of the creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may elect a trustee other than the one named above, elect a committee of creditors, examine the debtor, and transact such as other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to the creditors.

LIQUIDATION OF THE DEBTOR'S PROPERTY. The trustee will collect the debtor's property, if any, and turn it into money. If the trustee can collect enough money and property from the debtor, creditors may be paid some or all of the debts owed to them.

PROOF OF CLAIM. Except as otherwise provided by law, in order to share in any payment from the estate, a creditor must file a proof of claim by the date set forth above in the box labeled "Deadline to File a Proof of Claim." The place to file the proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

Address of the Clerk of the Bankruptcy Court	For the Court:
	Clerk of the Bankruptcy Court
	Date

FORM B9E
(Rev. 12/94)

United States Bankruptcy Court

Case Number

_____ District of _____

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

In re (Name of Debtor)	Address of Debtor	Soc. Sec./Tax Id. Nos.
	Date Case Filed (or Converted)	

Name and Address of Attorney for Debtor	Telephone Number	Name and Address of Trustee	Telephone Number

☐ This is a converted case originally filed under chapter _____ on _____ (date).

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

DISCHARGE OF DEBTS

Deadline to File a Complaint to Determine Dischargeability of Certain Types of Debts:

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

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

MEETING OF CREDITORS. The debtor (both husband and wife in a joint case) is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may examine the debtor and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to creditors.

EXEMPT PROPERTY. Under state and federal law, the debtor is permitted to keep certain money or property as exempt. If a creditor believes that an exemption of money or property is not authorized by law, the creditor may file an objection. An objection must be filed not later than 30 days after the conclusion of the meeting of creditors.

DISCHARGE OF DEBTS. The debtor may seek a discharge of debts. A discharge means that certain debts are made unenforceable against the debtor personally. Creditors whose claims against the debtor are discharged may never take action against the debtor to collect the discharged debts. If a creditor believes that the debtor should not receive a discharge under § 1141(d)(3)(C) of the Bankruptcy Code, timely action must be taken in the bankruptcy court in accordance with Bankruptcy Rule 4004(a). If a creditor believes that a debt owed to the creditor is not dischargeable under § 523(a)(2), (4), (6), or (15) of the Bankruptcy Code, timely action must be taken in the bankruptcy court by the deadline set forth above in the box labeled "Discharge of Debts." Creditors considering taking such action may wish to seek legal advice.

PROOF OF CLAIM. Schedules of creditors have been or will be filed pursuant to Bankruptcy Rule 1007. Any creditor holding a scheduled claim which is not listed as disputed, contingent, or unliquidated as to amount may, but it is not required to, file a proof of claim in this case. Creditors whose claims are not scheduled or whose claims are listed as disputed, contingent, or unliquidated as to amount and who desire to participate in the case or share in any distribution must file their proofs of claim. A creditor who desires to rely on the schedules of creditors has the responsibility for determining that the claim is listed accurately. If the court sets a deadline for filing a proof of claim, you will be notified. The place to file a proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

PURPOSE OF CHAPTER 11 FILING. Chapter 11 of the Bankruptcy Code enables a debtor to reorganize pursuant to a plan. A plan is not effective unless approved by the court at a confirmation hearing. Creditors will be given notice concerning any plan, or in the event the case is dismissed or converted to another chapter of the Bankruptcy Code. The debtor will remain in possession of its property and will continue to operate any business unless a trustee is appointed.

Address of the Clerk of the Bankruptcy Court	For the Court:
	Clerk of the Bankruptcy Court
	Date

FORM B9E (Alt)
(Rev 12/94)

United States Bankruptcy Court

Case Number

_____ District of _____

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

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

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

DEADLINE TO FILE A PROOF OF CLAIM

For creditors other than governmental units: For governmental units:

[or "If the court sets a deadline, creditors will be notified."]

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

DISCHARGE OF DEBTS

_____ is the Deadline to File a Complaint to Determine Dischargeability of Certain Types of Debts.

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

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

MEETING OF CREDITORS. The debtor (both husband and wife in a joint case) is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may examine the debtor and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to creditors.

EXEMPT PROPERTY. Under state and federal law, the debtor is permitted to keep certain money or property as exempt. If a creditor believes that an exemption of money or property is not authorized by law, the creditor may file an objection. An objection must be filed not later than 30 days after the conclusion of the meeting of creditors.

DISCHARGE OF DEBTS. The debtor may seek a discharge of debts. A discharge means that certain debts are made unenforceable against the debtor personally. Creditors whose claims against the debtor are discharged may never take action against the debtor to collect the discharged debts. If a creditor believes that the debtor should not receive a discharge under § 1141(d)(3)(C) of the Bankruptcy Code, timely action must be taken in the bankruptcy court in accordance with Bankruptcy Rule 4004(a). If a creditor believes that a debt owed to the creditor is not dischargeable under § 523(a)(2), (4), (6), or (15) of the Bankruptcy Code, timely action must be taken in the bankruptcy court by the deadline set forth above in the box labeled "Discharge of Debts." Creditors considering taking such action may wish to seek legal advice.

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PURPOSE OF CHAPTER 11 filing. Chapter 11 of the Bankruptcy Code enables a debtor to reorganize pursuant to a plan. A plan is not effective unless approved by the court at a confirmation hearing. Creditors will be given notice concerning any plan, or in the event the case is dismissed or converted to another chapter of the Bankruptcy Code. The debtor will remain in possession of its property and will continue to operate any business unless a trustee is appointed.

For the Court: _____ _____

Clerk of the Bankruptcy Court — Date

FORM B9F
6/92

United States Bankruptcy Court

Case Number

_____ District of _____

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 11 OF THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES
(Corporation/Partnership Case)

In re (Name of Debtor)	Address of Debtor	Soc. Sec./Tax Id. Nos.
	Date Case Filed (or Converted)	

☐ Corporation ☐ Partnership

Name and Address of Attorney for Debtor	Telephone Number	Name and Address of Trustee	Telephone Number

☐ This is a converted case originally filed under chapter _____ on _____ (date)

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

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

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

MEETING OF CREDITORS. The debtor's representative, as specified in Bankruptcy Rule 9001(5) is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may examine the debtor and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to the creditors.

PROOF OF CLAIM. Schedules of creditors have been or will be filed pursuant to Bankruptcy Rule 1007. Any creditor holding a scheduled claim which is not listed as disputed, contingent, or unliquidated as to amount may, but is not required to, file a proof of claim in this case. Creditors whose claims are not scheduled or whose claims are listed as disputed, contingent, or unliquidated as to amount and who desire to participate in the case or share in any distribution must file their proofs of claim. A creditor who desires to rely on the schedule of creditors has the responsibility for determining that the claim is listed accurately. If the court sets a deadline for filing a proof of claim, you will be notified. The place to file a proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

PURPOSE OF CHAPTER 11 FILING. Chapter 11 of the Bankruptcy Code enables a debtor to reorganize pursuant to a plan. A plan is not effective unless approved by the court at a confirmation hearing. Creditors will be given notice concerning any plan, or in the event the case is dismissed or converted to another chapter of the Bankruptcy Code. The debtor will remain in possession of its property and will continue to operate any business unless a trustee is appointed.

Address of the Clerk of the Bankruptcy Court	For the Court:
	Clerk of the Bankruptcy Court
	Date

FORM B9F (Alt.)
(Rev. 12/94)

United States Bankruptcy Court

Case Number

_____ District of _____

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 11 OF THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES
(Corporation/Partnership Case)

In re (Name of Debtor)	Address of Debtor Date Filed (or Converted)	Soc. Sec./Tax Id. Nos.
Addressee:	Address of the Clerk of the Bankruptcy Court	

☐ Corporation ☐ Partnership

Name and Address of Attorney for Debtor Telephone Number	Name and Address of Trustee Telephone Number

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

DEADLINE TO FILE A PROOF OF CLAIM

For creditors other than governmental units:

For governmental units.
[or "If the court sets a deadline, creditors will be notified."]

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

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

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

MEETING OF CREDITORS. The debtor's representative, as specified in Bankruptcy Rule 9001(5) is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may examine the debtor and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to creditors.

PROOF OF CLAIM. Schedules of creditors have been or will be filed pursuant to Bankruptcy Rule 1007. Any creditor holding a scheduled claim which is not listed as disputed, contingent, or unliquidated as to amount may, but is not required to, file a proof of claim in this case. Creditors whose claims are not scheduled or whose claims are listed as disputed, contingent, or unliquidated as to amount and who desire to participate in the case or share in any distribution must file their proof of claim. A creditor who desires to rely on the schedule of creditors has the responsibility for determining that the claim is listed accurately. The place to file a proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

PURPOSE OF CHAPTER 11 FILING. Chapter 11 of the Bankruptcy Code enables a debtor to reorganize pursuant to a plan. A plan is not effective unless approved by the court at a confirmation hearing. Creditors will be given notice concerning any plan, or in the event the case is dismissed or converted to another chapter of the Bankruptcy Code. The debtor will remain in possession of its property and will continue to operate any business unless a trustee is appointed.

For the Court: _____
Clerk of the Bankruptcy Court

_____
Date

FORM B9G
(Rev. 12/94)

United States Bankruptcy Court

Case Number

_____ District of _____

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 12 OF THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES
(Individual or Joint Debtor Family Farmer)

In re (Name of Debtor)	Address of Debtor	Soc. Sec./Tax Id. Nos.
	Date Case Filed (or Converted)	

Name and Address of Attorney for Debtor	Telephone Number	Name and Address of Trustee	Telephone Number

☐ This is a converted case originally filed under chapter _____ on _____ (date).

DEADLINE TO FILE A PROOF OF CLAIM

For creditors other than governmental units: For governmental units:

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

FILING OF PLAN AND DATE, TIME, AND LOCATION OF HEARING ON CONFIRMATION OF PLAN

☐ The debtor has filed a plan. The plan or a summary of the plan is enclosed. Hearing on confirmation will be held:
_____ (Date) _____ (Time) _____ (Location)

☐ The debtor has filed a plan. The plan or a summary of the plan and notice of the confirmation hearing will be sent separately.

☐ A plan has not been filed as of this date. Creditors will be given separate notice of the hearing on confirmation of the plan.

DISCHARGE OF DEBTS

Deadline to File a Complaint to Determine Dischargeability of Certain Types of Debts:

COMMENCEMENT OF CASE. A family farmer's debt adjustment case under chapter 12 of the Bankruptcy Code has been filed in this court by the family farmer named above as the debtor, and an order for relief has been entered. You will not receive notice of all documents filed in this case: All documents filed with the court, including lists of the debtor's property and debts are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions, repossessions, or wage deductions. Some protection is also given to certain codebtors of consumer debts. If unauthorized actions are taken by a creditor against a debtor, or a protected codebtor, the court may punish that creditor. A creditor who is considering taking action against the debtor or the property of the debtor, or any codebtor, should review §§ 362 and 1201 of the Bankruptcy Code and may wish to seek legal advice. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor (both husband and wife in a joint case) is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may examine the debtor and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to creditors.

EXEMPT PROPERTY. Under state and federal law, the debtor is permitted to keep certain money or property as exempt. If a creditor believes that an exemption of money or property is not authorized by law, the creditor may file an objection. An objection must be filed not later than 30 days after the conclusion of the meeting of creditors.

DISCHARGE OF DEBTS. The debtor may seek a discharge of debts. A discharge means that certain debts are made unenforceable against the debtor personally. Creditors whose claims against the debtor are discharged may never take action against the debtor to collect the discharged debts. If a creditor believes a specific debt owed to the creditor is not dischargeable under § 523(a)(2), (4), (6), or (15) of the Bankruptcy Code, timely action must be taken in the bankruptcy court by the deadline set forth above in the box labeled "Discharge of Debts." Creditors considering taking such action may wish to seek legal advice.

PROOF OF CLAIM. Except as otherwise provided by law, in order to share in any payment from the estate, a creditor must file a proof of claim by the date set forth above in the box labeled "Deadline to File a Proof of Claim." The place to file the proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

PURPOSE OF A CHAPTER 12 FILING. Chapter 12 of the Bankruptcy Code enables family farmers to reorganize pursuant to a plan. A plan is not effective unless approved by the bankruptcy court at a confirmation hearing. Creditors will be given notice in the event the case is dismissed or converted to another chapter of the Bankruptcy Code.

Address of the Clerk of the Bankruptcy Court	For the Court:
	Clerk of the Bankruptcy Court
	Date

FORM B9H
(Rev 12/94)

United States Bankruptcy Court

_____ District of _____

Case Number

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 12 OF THE BANKRUPTCY CODE. MEETING OF CREDITORS, AND FIXING OF DATES (Corporation/Partnership Family Farmer)

In re (Name of Debtor)	Address of Debtor	Soc Sec./Tax Id. Nos
	Date Case Filed (or Converted)	

☐ Corporation ☐ Partnership

Name and Address of Attorney for Debtor	Telephone Number	Name and Address of Trustee	Telephone Number

☐ This is a converted case originally filed under chapter _____ on _____ (date).

DEADLINE TO FILE A PROOF OF CLAIM

For creditors other than governmental units: For governmental units.

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

FILING OF PLAN AND DATE, TIME, AND LOCATION OF HEARING ON CONFIRMATION OF PLAN

☐ The debtor has filed a plan. The plan or a summary of the plan is enclosed. Hearing on confirmation will be held:

_____ (Date) _____ (Time) _____ (Location)

☐ The debtor has filed a plan. The plan or a summary of the plan and notice of the confirmation hearing will be sent separately.

☐ A plan has not been filed as of this date. Creditors will be given separate notice of the hearing on confirmation of the plan.

DISCHARGE OF DEBTS

Deadline to file a Complaint to Determine Dischargeability of Certain Types of Debts:

COMMENCEMENT OF CASE: A family farmer's debt adjustment case under chapter 12 of the Bankruptcy Code has been filed in this court by the family farmer named above as the debtor, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts, are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions or repossessions. Some protection is also given to certain codebtors of consumer debts. If unauthorized actions are taken by a creditor against a debtor or a protected codebtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor, the property of the debtor, or a codebtor, should review §§ 362 and 1201 of the Bankruptcy Code and may wish to seek legal advice. If the debtor is a partnership, remedies otherwise available against general partners are not necessarily affected by the commencement of this partnership case. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor's representative, as specified in Bankruptcy Rule 9001(5), is required to appear at the meeting of creditors on the date and at the place set forth above in the box labeled "Date, Time, and Location of Meeting of Creditors" for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may examine the debtor and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to the creditors.

DISCHARGE OF DEBTS. The debtor may seek a discharge of debts. A discharge means that certain debts are made unenforceable against the debtor. Creditors whose claims against the debtor are discharged may never take action against the debtor to collect the discharged debts. If a creditor believes a specific debt owed to the creditor is not dischargeable under § 523(a) (2), (4), (6), or (15) of the Bankruptcy Code, timely action must be taken in the bankruptcy court by the deadline set forth above in the box labeled "Discharge of Debts." Creditors considering taking such action may wish to seek legal advice.

PROOF OF CLAIM. Except as otherwise provided by law, in order to share in any payment from the estate, a creditor must file a proof of claim by the date set forth above in the box labeled "Deadline to File a Proof of Claim." The place to file the proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of Claim forms are available in the clerk's office of any bankruptcy court.

PURPOSE OF A CHAPTER 12 FILING. Chapter 12 of the Bankruptcy Code enables family farmers to reorganize pursuant to a plan. A plan is not effective unless approved by the bankruptcy court at a confirmation hearing. Creditors will be given notice in the event the case is dismissed or converted to another chapter of the Bankruptcy Code.

Address of the Clerk of the Bankruptcy Court	For the Court:
	Clerk of the Bankruptcy Court
	Date

FORM B9I
(Rev. 12/94)

United States Bankruptcy Court

Case Number

_____ District of _____

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 13 OF THE BANKRUPTCY CODE. MEETING OF CREDITORS, AND FIXING OF DATES

In re (Name of Debtor)	Address of Debtor	Soc. Sec./Tax Id. Nos.
	Date Case Filed (or Converted)	

Name and Address of Attorney for Debtor	Telephone Number	Name and Address of Trustee	Telephone Number

☐ This is a converted case originally filed under chapter _____ on _____ (date).

DEADLINE TO FILE A PROOF OF CLAIM

For creditors other than governmental units: For governmental units:

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

FILING OF PLAN AND DATE, TIME, AND LOCATION OF HEARING ON CONFIRMATION OF PLAN

☐ The debtor has filed a plan. The plan or a summary of the plan is enclosed. Hearing on confirmation will be held:
_____ (Date) _____ (Time) _____ (Location)

☐ The debtor has filed a plan. The plan or a summary of the plan and notice of the confirmation hearing will be sent separately.

☐ A plan has not been filed as of this date. Creditors will be given separate notice of the hearing on confirmation of the plan.

COMMENCEMENT OF CASE. An individual's debt adjustment case under chapter 13 of the Bankruptcy Code has been filed in this court by the debtor or debtors named above, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts, are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions, repossessions, or wage reductions. Some protection is also given to certain codebtors of consumer debts. If unauthorized actions are taken by a creditor against a debtor, or a protected codebtor, the court may punish that creditor. A creditor who is considering taking action against the debtor or the property of the debtor, or any codebtor, should review §§ 362 and 1301 of the Bankruptcy Code and may wish to seek legal advice. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor (both husband and wife in a joint case) is required to appear at the meeting of creditors on the date and at the place set forth above in the box labeled "Date, Time, and Location of Meeting of Creditors" for the purpose of being examined under oath. Attendance by creditors at the meeting is welcome, but not required. At the meeting, the creditors may examine the debtor and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time by notice at the meeting, without further written notice to creditors.

PROOF OF CLAIM. Except as otherwise provided by law, in order to share in any payment from the estate, a creditor must file a proof of claim by the date set forth above in the box labeled "Deadline to File a Proof of Claim." The place to file the proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

PURPOSE OF A CHAPTER 13 FILING. Chapter 13 of the Bankruptcy Code is designed to enable a debtor to pay debts in full or in part over a period of time pursuant to a plan. A plan is not effective unless approved by the bankruptcy court at a confirmation hearing. Creditors will be given notice in the event the case is dismissed or converted to another chapter of the Bankruptcy Code.

Address of the Clerk of the Bankruptcy Court	For the Court:
	Clerk of the Bankruptcy Court
	Date

B10 (Official Form 10)
(Rev. 7/95)

United States Bankruptcy Court
_____ District of _____

PROOF OF CLAIM

In re (Name of Debtor)

Case Number

NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.

Name of Creditor
(The person or other entity to whom the debtor owes money or property)

Name and Address Where Notices Should be Sent

Telephone No.

☐ Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.

☐ Check box if you have never received any notices from the bankruptcy court in this case.

☐ Check box if the address differs from the address on the envelope sent to you by the court.

THIS SPACE IS FOR COURT USE ONLY

ACCOUNT OR OTHER NUMBER BY WHICH CREDITOR IDENTIFIES DEBTOR:

Check here if this claim ☐ replaces ☐ amends a previously filed claim, dated:_____

1. BASIS FOR CLAIM

☐ Goods sold
☐ Services perfomed
☐ Money loaned
☐ Personal injury/wrongful death
☐ Taxes
☐ Other (Describe briefly)

☐ Retiree benefits as defined in 11 U.S.C. § 1114(a)
☐ Wages, salaries, and compensation (Fill out below)
Your social security number_____
Unpaid compensation for services performed
from_____ to _____
(date) (date)

2. DATE DEBT WAS INCURRED

3. IF COURT JUDGMENT, DATE OBTAINED:

4. CLASSIFICATION OF CLAIM. Under the Bankruptcy Code all claims are classified as one or more of the following: (1) Unsecured nonpriority, (2) Unsecured Priority, (3) Secured. It is possible for part of a claim to be in one category and part in another.
CHECK THE APPROPRIATE BOX OR BOXES that best describe your claim and STATE THE AMOUNT OF THE CLAIM AT TIME CASE FILED.

☐ SECURED CLAIM $ _____
Attach evidence of perfection of security interest
Brief Description of Collateral:
☐ Real Estate ☐ Motor Vehicle ☐ Other (Describe briefly)

Amount of arrearage and other charges at time case filed included in secured claim above, if any $ _____

☐ UNSECURED NONPRIORITY CLAIM $ _____
A claim is unsecured if there is no collateral or lien on property of the debtor securing the claim or to the extent that the value of such property is less than the amount of the claim.

☐ UNSECURED PRIORITY CLAIM $ _____
Specify the priority of the claim.

☐ Wages, salaries, or commissions (up to $4000),* earned not more than 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier—11 U.S.C. § 507(a)(3)

☐ Contributions to an employee benefit plan—11 U.S.C. § 507(a)(4)

☐ Up to $1,800* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use—11 U.S.C. § 507(a)(6)

☐ Alimony, maintenance, or support owed to a spouse, former spouse, or child—11 U.S.C. § 507(a)(7)

☐ Taxes or penalties of governmental units—11 U.S.C. § 507(a)(8)

☐ Other—Specify applicable paragraph of 11 U.S.C. § 507(a)_____
*Amounts are subject to adjustment on 4/11/98 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.

5. TOTAL AMOUNT OF CLAIM AT THE TIME CASE FILED: $_____ (Unsecured) $_____ (Secured) $_____ (Priority) $_____ (Total)

☐ Check this box if claim includes charges in addition to the principal amount of the claim. Attach itemized statement of all additional charges.

6. CREDITS AND SETOFFS: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim. In filing this claim, claimant has deducted all amounts that claimant owes to debtor.

7. SUPPORTING DOCUMENTS: *Attach copies of supporting documents*, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, or evidence of security interests. If the documents are not available, explain. If the documents are voluminous, attach a summary.

8. TIME-STAMPED COPY: To receive an acknowledgement of the filing of your claim, enclose a stamped, self-addressed enveloped and copy of this proof of claim.

THIS SPACE IS FOR COURT USE ONLY

Date

Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any)

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

Form B14
6/90

Form 14. BALLOT FOR ACCEPTING OR REJECTING PLAN

[Caption as in Form 16A]

BALLOT FOR ACCEPTING OR REJECTING PLAN

Filed By _____
on *[date]* _____ .

The plan referred to in this ballot can be confirmed by the court and thereby made binding on you if it is accepted by the holders of two-thirds in amount and more than one-half in number of claims in each class and the holders of two-thirds in amount of equity security interests in each class voting on the plan. In the event the requisite acceptances are not obtained, the court may nevertheless confirm the plan if the court finds that the plan accords fair and equitable treatment to the class or classes rejecting it and otherwise satisfies the requirements of § 1129(b) of the Code. To have your vote count you must complete and return this ballot.

[If holder of general claim] The undersigned, a creditor of the above-named debtor in the unpaid principal amount of $ _____ ,

[If bondholder, debenture holder, or other debt security holder] The undersigned, the holder of *[state unpaid principal amount]* $ _____ of *[describe security]* _____
of the above-named debtor, with a stated maturity date of _____,
[if applicable] registered in the name of _____,
[if applicable] bearing serial number(s) _____],

[If equity security holder] The undersigned, the holder of *[state number]* _____ shares
of *[describe type]* _____ stock of the above named debtor,
represented by Certificate(s) No. _____, [*or* held in my/our brokerage
Account No. _____ at *[name of broker-dealer]* _____,

[Check One Box]

[ ] Accepts

[ ] Rejects

the plan for the reorganization of the above-named debtor proposed by
[name of proponent] _____,

and *[if more than one plan is to be voted on]*

[ ] Accepts

[ ] Rejects

the plan for the reorganization of the above-named debtor proposed by
[name of proponent] _____.

[If more than one plan is accepted, the following may but need not be completed.] The undersigned prefers the plans accepted in the following order.

[Identify plans]

1. _____ .

2. _____ .

Dated: _____

Print or type name: _____

Signed: _____

[If appropriate] By: _____

as: _____

Address: _____

Return this ballot on or before _____ (date) to: _____ (name)

Address: _____

_____

COMMITTEE NOTE

This form is derived from former Official Form No. 30. The form has been amended to facilitate the voting of a debtor's shares held in "street name." The form may be adapted to designate the class in which each ballot is to be tabulated. It is intended that a separate ballot will be provided for each class in which a holder may vote.

Form 17
12/94

FORM 17. NOTICE OF APPEAL UNDER 28 U.S.C. § 158(a) or (b) FROM A JUDGMENT, ORDER, OR DECREE OF A BANKRUPTCY COURT

In re _____,
Debtor

Case No. _____

Chapter _____

NOTICE OF APPEAL

_____, the plaintiff [*or* defendant *or* other party] appeals under 28 U.S.C. § 158(a) or (b) from the judgment, order, or decree of the bankruptcy court (describe) entered in this adversary proceeding [*or other proceeding, describe type*] on the _____ day of _____, 19__.

The parties to the order appealed from and the names of their respective attorneys are as follows:

_____

_____

Dated: _____

Signed: _____
Attorney for Appellant

Address: _____

_____

If a Bankruptcy Appellate Panel is authorized to hear this appeal, each party has a right to have the appeal heard by the district court. The appellant may exercise this right only by filing a separate statement of election at the time of the filing of this notice of appeal.

B18 (Official Form 18)
(12/94)

Form 18. DISCHARGE OF DEBTOR

[Caption as in 16A]

DISCHARGE OF DEBTOR

It appears that a petition commencing a case under title 11, United States Code, was filed by or against the person named above on _____ (date), and that an order for relief was entered under chapter 7, and that no complaint objecting to the discharge of the debtor was filed within the time fixed by the court [*or* that a complaint objecting to discharge of the debtor was filed and, after due notice and hearing, was not sustained].

IT IS ORDERED THAT:

1. The above-named debtor is released from all dischargeable debts.

2. Any judgment heretofore or hereafter obtained in any court other than this court is null and void as a determination of the personal liability of the debtor with respect to any of the following:

   (a) debts dischargeable under 11 U.S.C. § 523;

   (b) unless heretofore or hereafter determined by order of this court to be nondischargeable, debts alleged to be excepted from discharge under clauses (2), (4), (6), and (15) of 11 U.S.C. § 523(a);

   (c) debts determined by this court to be discharged.

3. All creditors whose debts are discharged by this order and all creditors whose judgments are declared null and void by paragraph 2 above are enjoined from instituting or continuing any action or employing any process or engaging in any act to collect such debts as personal liabilities of the above-named debtor.

BY THE COURT

Dated: _____

_____
United States Bankruptcy Judge

Item 8C

Draft Minutes

Advisory Committee on Bankruptcy Rules

Meeting of March 21 - 22, 1996

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of March 21 - 22, 1996

Memphis, Tennessee

DRAFT

Minutes

The Advisory Committee met in a courtroom of the United States Bankruptcy Court for the Western District of Tennessee. The following members were present:

Bankruptcy Judge Paul Mannes, Chairman
District Judge Adrian G. Duplantier
District Judge Eduardo C. Robreno
Honorable Jane A. Restani, United States Court of International Trade
Bankruptcy Judge Donald E. Cordova
Bankruptcy Judge Robert J. Kressel
Bankruptcy Judge A. Jay Cristol
Professor Charles J. Tabb
R. Neal Batson, Esquire
Kenneth N. Klee, Esquire
J. Christopher Kohn, Esquire, United States Department of Justice
Leonard M. Rosen, Esquire
Gerald K. Smith, Esquire
Henry J. Sommer, Esquire
Professor Alan N. Resnick, Reporter

Circuit Judge Alice M. Batchelder was unable to attend. District Judge Thomas S. Ellis, III, liaison to the Committee from the Committee on Rules of Practice and Procedure, and Richard G. Heltzel, clerk-adviser to the Committee, also were unable to attend.

The following additional persons attended all or part of the meeting: Bankruptcy Judge James W. Meyers, former member of the Committee; Professor Daniel R. Coquillette, Reporter for the Committee on Rules of Practice and Procedure ("Standing Committee"); Peter G. McCabe, Assistant Director of the Administrative Office of the United States Courts ("Administrative Office") and Secretary to the Standing Committee; Joseph G. Patchan, Director, Executive Office for United States Trustees; Patricia S. Channon, Bankruptcy Judges Division, Administrative Office; Mark D. Shapiro, Rules Committee Support Office, Administrative Office; and Elizabeth C. Wiggins, Federal Judicial Center.

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 Committee on Rules of Practice and Procedure.

Votes and other action taken by the Advisory Committee and assignments by the Chairman appear in **bold.**

Introductory Items

The Chairman presented a citation from the Judicial Conference to Bankruptcy Judge James W. Meyers. The citation recognizes, and expresses the appreciation of the Judicial Conference for, Judge Meyers' contribution to the administration of justice and commitment to the judiciary while serving on the Committee from October 1989 to October 1995.

The Committee **approved the minutes of the September 1995 meeting** subject to correction of several typographical errors. The Committee also requested that a note be added at the end stating that a decision had been made after the September 1995 meeting to move the March 1996 meeting from Charleston, SC, (the originally announced location), to Memphis, TN.

The Chairman and the Reporter briefed the Committee on actions taken at the January 1996 meeting of the Standing Committee. Professor Resnick reported that the Standing Committee had approved the Committee's recommendation concerning the procedure for amending the official forms when certain dollar amounts stated in the Bankruptcy Code are adjusted under a formula prescribed by Congress in the Bankruptcy Reform Act of 1994. The procedure will permit automatic amendment of those dollar amounts that appear on the official forms without further action by the Standing Committee or the Judicial Conference. [The Judicial Conference approved the procedure at its meeting of March 12, 1996.]

Professor Resnick said the Standing Committee's self-study report generated substantial controversy. Although the Standing Committee received the report on a motion that also mentioned publication, no schedule for publication was discussed and Judge Stotler indicated that further comment could be submitted. The long range planning subcommittee, which drafted the report, was also disbanded at the request of its sole remaining member. Judge Stotler, Chair of the Standing Committee, transferred the long range planning function

to the Standing Committee's Reporter, Professor Coquillette. The comments on committee appointments made by the Advisory Committee in response to the draft reviewed at the September 1995 meeting, although not incorporated into the study report, were summarized orally for the Standing Committee by Judge Stotler. Professor Coquillette added that the Advisory Committee's views on appointments also had been communicated directly to the Chief Justice. He said he thought it was very clear that the self study report did not reflect the views of the Standing Committee.

Professor Resnick stated that the Standing Committee had approved a recommendation to the Judicial Conference for a uniform local rule numbering system, but that the recommendation required only that a district number its local rules to correspond to the relevant federal rules of procedure. There would be no other required elements. Professor Resnick added that the Judicial Conference had adopted the recommendation, as transmitted by the Standing Committee, on March 12, 1996, and had set April 15, 1997, as the deadline for conversion to the new numbering. The Committee's work product, approved at the September 1995 meeting, will be distributed to the courts as a suggested, or model, numbering system. The Chairman said he had been disappointed by the Standing Committee's action in switching from the concept of detailed, mandatory numbering systems to a general directive. The Committee thanked Ms. Channon for her work in drafting a numbering system for local bankruptcy rules.

The Reporter also stated that the Standing Committee's subcommittee on style now has completely new membership, due to turnover of membership on the Standing Committee. Professor Coquillette informed the Committee that he and Judge Stotler had met with the Chief Justice to discuss the rules re-styling initiative. He said the Chief Justice had approved the idea of publishing for comment the re-styled draft of the appellate rules. The Chief Justice had opposed any re-styling of the evidence rules, because of their substantive nature, and had requested that the re-styling of the other bodies of rules be suspended until the results of the work on the appellate rules could be evaluated.

One member commented that perhaps the bankruptcy rules should not be put off until last, because doing so would increase the pressure on the Committee to conform. The Reporter, however, said he did not think timing would make a difference. He said that uniform conventions likely would come out of the re-styling of the appellate rules and that the Committee would have an opportunity to comment on the appellate draft. Professor Coquillette added that the process appears to have slowed. He said that work on the civil rules has stopped at about the halfway point and that substantive questions raised by the re-styling process have proved very controversial within the civil advisory committee. Professor Coquillette estimated that work on the bankruptcy rules is probably about "a decade" in the future. The sense of the Committee was not to push for re-styling but to continue to wait and monitor the process as it develops with the other bodies of rules.

A Committee member inquired whether the "'shall' vs. 'must'" issue has been resolved. The Reporter responded that the latest draft guidelines from the Standing Committee's style consultant, Bryan Garner, say that "shall" is an acceptable alternative, but that usage should be consistent within the rules.

Professor Coquillette reported on the meeting of the special study group on rules governing attorney conduct that was held on the day preceding the January 1996 meeting of the Standing Committee. Due in part to a blizzard that prevented attendance by some study group members, there will be a further meeting June 18 -19, 1996, in conjunction with the June meeting of the Standing Committee. Professor Coquillette said that the three options under consideration are: 1) a uniform (national) rule that says "always look to the state rule," 2) a small number (five or six) of federal rules covering certain "core" areas such as conflicts, with all other issues remaining subject to state rules, or 3) a model rule for local adoption. He noted that if the concept of "core" rules is chosen, the supersession clause of the Rules Enabling Act would apply [except for bankruptcy rules].

Mr. Smith attended the meeting of the special study group on behalf of the Committee and praised the presentations and the written materials. He said there seems to be little doubt

that a clearer rule is needed and that preliminary research on local bankruptcy rules indicates that few districts address the subject at all. He said it probably will be easier to achieve a rule for civil and criminal practice than in bankruptcy, because traditional litigation rules that work in bilateral situations, such as rules governing conflicts, do not work well in the multi-party setting of a bankruptcy case. Rules on this subject generally say that a lawyer cannot represent a party in a matter "directly adverse" to another client (even in an unrelated matter), he said, yet the automatic stay is directly adverse to every creditor in a bankruptcy case. Another member stated that a bankruptcy case is not a lawsuit but an in rem proceeding within which adversary litigation may occur. Accordingly, he said, the bilateral rule should apply to the litigation, but not the case in chief. Mr. Smith closed by saying that whatever approach is taken toward establishing rules, whether by rule or by statutory amendment, the proposals will be controversial.

The Chairman asked Mr. McCabe to renew the Committee's request to the House Judiciary Committee that it undertake to print an official pamphlet of the Federal Rules of Bankruptcy Procedure as the Judiciary Committee does with the other bodies of federal procedural rules.

Action Items

Comments Received on the Preliminary Draft Amendments

Rule 1020. The Federal Bar Association proposed that the amendments state that a debtor has to qualify as a small business in order to make the election to be so treated and to require that any motion to extend the time to file an election be made and ruled on within the original 60-day period. The Reporter recommended against both suggestions. He said he does not believe there is any ambiguity that a debtor must meet the statutory definition of a small business in order to make a valid election and noted that the rule as drafted tracks the language of § 1121(e) of the Code. With respect to the time for making the election, the Reporter stated that most of the litigation to which the Federal Bar Association referred

involved different formulations than the one used in the draft. He said that Rule 9006 establishes a workable procedure, *i.e.,* a party must either request extension within the original time or (if the time has expired) must show excusable neglect. The Committee took no action on this suggestion.

The Executive Office for United States Trustees offered a "minor suggestion" that the deadline for making the election should be the date of the § 341 meeting. Professor Resnick said he recommended that this change not be made, because the debtor might learn of the availability of the election for the first time during the § 341 meeting. He reminded the Committee also that it had originally considered 100 days "or another date" as the appropriate period. Committee members expressed concern about effectively giving the debtor "permanent exclusivity" and the merits of giving the court discretion to either extend or require a debtor to make a prompt decision. **A motion to amend the published draft by putting a period after the word "relief" on line 6, (cutting off explicit mention of an extension), carried by a vote of 8 - 2.**

Rule 2007.1. The Federal Bar Association had proposed that the United States trustee, after filing a report of a disputed election of a chapter 11 trustee, also be required to file a motion to resolve the dispute. The Reporter disagreed with the suggestion and said he had discussed it with the general counsel of the Executive Office for United States Trustees, who opposed it on the ground that such action properly should be reserved to a party with an economic stake in the case. **The Committee took no action on this suggestion.**

The Executive Office for United States Trustees ("Executive Office") objected to the provision in the draft requiring the United States trustee to appoint the person elected. During the original drafting of the rule, this issue had been debated. The Committee had retained the appointment language in view of the various statutory provisions, such as the termination of the debtor's period of exclusivity, that are tied to the "appointment" of a trustee. The Executive Office proposed that the rule instead continue to require the United States trustee to file a report of the election together with an application for court approval and that the report

itself serve as the appointment of the person elected. That is, rather than the United States trustee making the appointment, the report would constitute the appointment. The Reporter had redrafted the rule to implement the proposals of the Executive Office. He had submitted the new draft to the Executive Office, and obtained a response stating that the new draft satisfied the concerns of the Executive Office.

The Committee discussed when the appointment-by-report would be effective for purposes such as trustee liability and cutting off exclusivity -- when the report is filed or when the court signs the order approving the appointment? One member said that effectiveness should be as of the date the order approving the appointment is entered. Mr. Patchan agreed, noting that trustees are sensitive to the liability aspect and generally will not act prior to obtaining court approval of their appointment. **A motion to approve the redrafted rule with the addition at lines 12 and 42 of the words "as of the date of entry of the order approving the appointment" carried, with one opposed. The Committee also approved style changes to simplify the description of disputed and undisputed elections and amendments to the committee note proposed by the Reporter on the recommendation of the Executive Office to clarify who is eligible to solicit proxies.**

Rule 3014. The Federal Bar Association suggested amending the rule to require that any request for an extension of time to file an election under § 1111(b)(2) of the Code be made before the conclusion of the hearing on the disclosure statement. The proposed amendments that were published for comment concern only the procedure for making a § 1111(b) election when approval of the disclosure statement is combined with the confirmation hearing in a small business case, and the comment, accordingly, was not germane to the proposed amendments. The Reporter asked whether the Committee would want to consider the suggestion as a long term matter. The consensus was that the suggestion should be retained and considered in the future along with a method for permitting a party to change an election if the plan is modified materially or the original election would be impacted by a subsequent decision on valuation.

Rule 3017.1. This rule is proposed to implement § 1125(f) of the Bankruptcy Code, which was among the new provisions added in 1994 to permit expedited handling of small business cases filed under chapter 11. This proposed new rule sets out the procedure in a small business case for obtaining conditional approval of a disclosure statement and combining final approval with the confirmation hearing. Bankruptcy Judge Geraldine Mund had noted that § 105 of the Code, as amended in 1994, also permits a court to order a similar procedure in a chapter 11 case without that authority being restricted to a small business case. Judge Mund had suggested that proposed new rule 3017.1 be broadened to apply to any chapter 11 case. The Reporter said the legislative history of the 1994 amendments made it clear that Congress intended to provide a streamlined procedure for small businesses, but that the commentary provided for the amendments to § 105 fails to indicate any intent to apply the streamlined procedure in a large case. He noted further that there have been no published decisions approving such measures in a large case, and said it seemed to him premature to broaden the rule in the absence of either congressional or judicial direction to do so. **The Committee accepted the Reporter's recommendation to leave the proposed rule unchanged.**

Rules 3017(d), 3018(a), and 3021. James Gadsden, Esq., commented on these amendments that allow the court "for cause" to fix a record date for voting on a plan and permit the record date for distributions to be set in the plan or confirmation order. Mr. Gadsden questioned the amendments as unnecessary. The current rules provide that these record dates are the date the order is entered by the clerk. When the amendments first were proposed, the Reporter said, the primary reason offered was the frequent delays in entering orders on the docket. Ms. Channon, who had researched the typical interval between signing of orders by a judge and their entry on the docket, said that while docketing delays formerly occurred, especially in the Central District of California, the clerk's office there and in other districts she contacted said delays now are rare and almost all orders are entered within 48 hours of being signed. Mr. Klee said that he had experienced docketing delays in several districts not reported on at the meeting and that such delays are not the only problem the amendments would address. He said that disbursing agents also must complete several steps before the names and addresses of the "record holders" can be established. He distributed copies of a letter describing these

from the Fleet National Bank and added that this letter also should allay the concerns expressed by Mr. Gadsden concerning the potential for a chilling effect on trading after a record date is set. **A motion to leave the proposed amendments unchanged carried with several abstentions, but no opposing votes.**

Rule 8001. The Federal Bar Association commented that providing for an election to have an appeal heard by a district court seemed "premature" when only one bankruptcy appellate panel service is operating. The Reporter said there is a need for a rule under a statute that provides for all circuits to establish such panels even if only one circuit has done so. Judge Robreno said the proposed subdivision (e) of the rule is not self-contained and is confusing. He suggested changing the heading to "election to have appeal heard by district court and not the bankruptcy appellate panel" and that the text should say "provided there is a bankruptcy appellate panel service." **A motion to adopt these changes failed by a vote of 7 - 3. A second motion to change the heading to "Election to Have Appeal Heard by District Court in Lieu of a Bankruptcy Appellate Panel" carried, with one opposed, subject to review by the style subcommittee.**

There was no objection to the suggestion that the committee note be expanded to include the material that was voted down for inclusion in the text and to point out that subdivision (e) has nothing to do with appeal to the court of appeals. At the March 22 session, the Reporter offered alternative draft additions to the Committee Note. **The Committee approved alternative "A," as amended during discussion, by a 6 - 2 vote.** Accordingly, the following two sentences will be added:

> Subdivision (e) is amended to provide the procedure for electing under 28 U.S.C. § 158(c)(1) to have an appeal heard by the district court instead of the bankruptcy appellate panel service. This subdivision is applicable only if a bankruptcy appellate panel service is authorized under 28 U.S.C. § 158(b) to hear the appeal.

Rule 8002. The Reporter stated that in July 1995, when the Standing Committee considered the Committee's request to publish the preliminary draft, two members of the Standing Committee had made comments concerning the amendments to this rule. One member suggested that the Advisory Committee consider whether the Committee Note should warn the parties that failure to file a notice of appeal prior to the time prescribed in the rule could result in a loss of the right to appeal if the court denies the party's request for an extension of time to file. Another member questioned the Committee's choice to model the amendments after Rule 4(a)(5) of the Federal Rules of Appellate Procedure (which applies in civil cases) rather than after the more definite provisions of Fed. R. App. P. 4(b) (which applies in criminal cases). The Reporter stated he had responded that the Committee believed strongly that a party should not lose a right because of delay by a judge in ruling on a timely filed motion. **The Committee took no action on either comment.**

Rule 9011. Judge Mund commented on a provision in this rule that prohibits a court from ordering sanctions on its own initiative unless the court does so before a voluntary dismissal or settlement of the claims. The Reporter said the provision duplicates a provision in Rule 11 of the Federal Rules of Civil Procedure as that rule was amended in 1993; its purpose is to permit parties to settle without any threat that the court might later impose monetary sanctions. **The Committee made no change to the draft as a result of this comment.**

Bankruptcy Judge James E. Yacos commented that the rule should make it clear that the striking of an unsigned pleading should occur only when a clerk has "inadvertently and through mistake" accepted the document for filing. The Reporter noted that under both Fed. R. Civ. P. 5 and Fed. R. Bankr. P. 5005 a clerk does not have authority to reject a document tendered for filing based on improper form. Rules 11 and 9011 reflect a clear and deliberate policy of the Standing Committee that unsigned papers should be accepted by the clerk, but may be stricken by the court if not signed after the defect is brought to the attorney's attention. **The Committee made no change to the draft.**

The Reporter stated that in reviewing the preliminary draft he had identified a potential problem arising from a provision in subdivision (b) that was introduced in the process of conforming to Rule 11 of the Federal Rules of Civil Procedure as amended in 1993. Subdivision (a) contains, as it always has, a clause carving out from the requirement of signature by an attorney any list, schedule, or statement; these documents are signed only by the debtor. Subdivision (b) now contains, for the first time, language providing that by presenting a document to the court (by signing, filing, submitting, or later advocating), the attorney is representing that "reasonable" inquiry has been made that the document does not contain improper material. Subdivision (b), however, does not contain language carving out from the attorney's responsibility in the presenting function a list, schedule, or statement that, under subdivision (a), only the debtor is required to sign. The Reporter said he hoped the rule would be interpreted to hold an attorney responsible only for those documents the attorney signed, but he was concerned about the issue. [Reporter's Memorandum dated February 20, 1996.]

The consensus was that sanctioning of an attorney for the contents of a debtor's schedules or statement of financial affairs was unlikely, and the Committee took no action. Some members, however, said the initial sentence of Rule 9011(a) is confusing and could be interpreted to mean that an unrepresented debtor does not have to sign the lists, schedules, and statements. After the March 21 session, a member submitted to the Reporter a proposed revision to clear up any ambiguity about a pro se debtor's obligation to sign all documents. At the March 22 session, the Reporter offered a revised draft which ended the first sentence after the word "name" on line 9 and added, immediately thereafter on lines 9 through 11 an additional sentence as follows: "A party who is not represented by an attorney shall sign all papers." **The Committee accepted this revision, and a motion to approve the amendments to Rule 9011, as redrafted, carried.**

Rule 9015. The Federal Bar Association commented that the phrase "specially designated" does not seem to "comport" with the statute and that a party should be required to consent by using specific language. The Reporter observed that the phrase in question is actually used in

the statute and that he saw no need to require special language for consenting to the conducting of the jury trial by the bankruptcy judge. **The Committee made no change to the draft.**

In January 1995, when the Standing Committee considered the draft interim rule on which the current draft was based, a member of the Standing Committee had commented that the Committee might consider adding explicit provisions requiring notice concerning consent to conduct of the jury trial by a bankruptcy judge to any parties who join the action after consents have been given by the original parties. The Committee declined in 1995 to make such additions. In November 1995, Judge Restani, the Committee's liaison to the Advisory Committee on Civil Rules, reported that this suggestion had resulted in a memorandum by Professor Edward H. Cooper, Reporter to the Civil Committee, that suggested these issues could be addressed in Rule 73(b), which governs consent to have a magistrate judge exercise civil trial jurisdiction. The Reporter said he did not think the additions were necessary. [See Reporter's Memorandum dated February 21, 1996.] **The Committee took no action on the suggestion.**

Proposals for Further Amendments

Rules 1017 and 2002(a). At the September 1995 meeting, the Committee approved in principle amending the rules to limit to the debtor and the trustee notice of a motion to dismiss for failure to file schedules and statements. The Reporter had drafted amendments accordingly and also had reorganized Rule 1017. Mr. Sommer said the rule should require "notice and a hearing," not simply notice prior to any dismissal. Mr. Klee said the provision should apply only to a voluntary case and expressed concern about the interaction between a dismissal after limited notice and § 349 of the Code, which revests property in the prepetition owner, unless the court orders otherwise. Judge Kressel said the trustee would receive notice under the proposed amendments and could alert the judge if any property of the estate had been sold, enabling the judge to tailor the dismissal order accordingly. **A motion was made to approve the draft subject to the Reporter incorporating changes to address the issues**

raised during discussion, but failed for want of a second. The Committee requested the Reporter to rework the draft overnight. At the March 22 session, the Committee considered a revised draft. Mr. Klee inquired whether the proposed amendments should apply to dismissal of a chapter 13 case under § 1307(c)(9) and, if so, whether this should be indicated in the heading. **The consensus was that the amendments should include chapter 13 cases and that the provisions governing dismissal for failure to pay the filing fee also should include a reference to chapter 13 cases.**

Rule 2004. At the September 1995 meeting, the Committee approved amendments to Rule 2004(c) to clarify that a bankruptcy court can order an examination outside the district in which the case is pending and that an attorney admitted in the district where the case is pending can sign the subpoena regardless of the place of the examination. The Committee also discussed whether the motion under Rule 2004 should be on notice or whether it can be ex parte. The language of the rule seems to require notice at least to the trustee or debtor in possession, but the original (1983) committee note states that the motion may be heard either ex parte or on notice. The discussion indicated that practice under this rule varies widely, and it also was suggested that examination should be available without the need for any motion or court order. The Committee asked the Reporter to draft alternative proposals for the next meeting. The Reporter presented five alternatives, which are set forth in his memorandum dated February 19, 1996. Initial straw votes indicated substantial support for two approaches: 1) stating in the rule that a notice or an ex parte procedure is authorized, in the court's discretion, or 2) requiring notice in every instance (Proposals 2 and 3).

Judge Robreno expressed concern, however, about where a potential examinee can object. Mr. Smith stated that it can be difficult to persuade a judge to quash a subpoena for an examination that the judge ordered. Judge Cristol said that the judges in his district do not consider their ex parte orders as conferring approval of an examination, and they readily de-authorize or limit an examination when appropriate. Judge Meyers said that with a 60-day deadline for filing complaints, parties need a way to examine and that, if the debtor were carved out, he thought a procedure requiring only a subpoena (without a prior order) would

be acceptable. The Chairman stated there is a sixth option of repealing Rule 2004. Others suggested adapting the procedures prescribed in Rules 27 and 30 of the Federal Rules of Civil Procedure. **A motion to adopt Proposal 5 (examination by subpoena only) failed, but this alternative was added to those under continued consideration. A motion to table the issue until the next meeting carried by a vote of 9 - 4.** The objective is to draft a rule that states clearly the procedural mechanism for obtaining an examination and also states in which court a potential examinee can seek a protective order. The Reporter was instructed to continue to consider Proposals 1, 2, 3, and 5 from the February 19 memorandum, as well as the procedural mechanisms provided in Rules 27 and 30 of the Federal Rules of Civil Procedure. There also was a request for assistance from the Federal Judicial Center in determining the actual practices currently used in the courts.

Rule 9009. Bankruptcy Judge Alan H. W. Shiff proposed amending Rule 9009 to limit alteration of official forms. **The Committee determined not to act on this suggestion.**

Proposal for Amendments to Implement § 110 of the Code. The Chairman stated that Bankruptcy Judge Geraldine Mund, of the Central District of California, had requested the Committee to draft rules for disciplinary proceedings involving bankruptcy petition preparers under § 110 of the Code. He said he had suggested to Judge Mund that the Central District of California take the lead in developing procedures, which might later be prescribed nationally. Shortly before the meeting, Judge Mund forwarded a copy of a general order detailing procedures for actions involving bankruptcy petition preparers that recently had been issued by the district court. The Reporter noted that some parts of § 110 relate to a specific case and some, such as improper advertising, do not. He raised the question of what the procedure should be when the conduct at issue is not linked to a specific case. Under subsection (i) of § 110, for example, if a case is dismissed on account of action or inaction by a bankruptcy petition preparer or if general conduct is at issue, the bankruptcy court must "certify that fact" to the district court, where someone must make a motion. There is no guidance concerning exactly what should be certified or how, he said, and the matter may be a non-core proceeding, raising jurisdictional issues. Mr. Klee said that 28 U.S.C. § 157

states that "[c]ore proceedings include, but are not limited to" those listed. He said he thought improper advertising by a bankruptcy petition preparer could be deemed to be core as a proceeding "arising under title 11" (28 U.S.C. § 157(a)). The Reporter said it might be prudent simply to monitor action by the courts on this issue for the time being. He also said he could study the issue further and prepare material for the Committee to consider, if the Committee so desired. He also suggested that the Federal Judicial Center could ascertain how courts are handling these proceedings now. **A motion to defer action passed unanimously.**

Forwarding of Approved Amendments to Be Delayed. The Committee agreed that the amendments approved for publication at the meeting and at the September 1995 meeting should be held for the time being. The Committee will submit to the Standing Committee at the June 1996 meeting only the final drafts of amendments to the rules published in 1995 and preliminary draft amendments to the official forms [See below.] with a request for publication. Rather than burden the Standing Committee with a few proposed rules amendments, followed by additional proposed amendments in 1997, the consensus was that the Committee should assemble a substantial package of amendments before transmitting. The Reporter said the amendments to Rule 2003 previously approved and awaiting transmittal may need some changes in light of the revisions made at the meeting to Rule 2007.1. If so, a new draft will be considered at the September 1996 meeting.

Official Bankruptcy Forms. The Chairman of the Subcommittee on Forms, Mr. Sommer, presented the proposed amendments to the forms, with descriptions of those written comments from Committee members which the subcommittee had accepted. Concerning Form 1, the Voluntary Petition, and Exhibit "A" to the petition, a member asked whether the filing of Exhibit "A" could be restricted to a publicly held corporation. Ms. Channon said she would ask the Securities and Exchange Commission whether it would agree. A member requested that Form 9 include in the new information provided about the necessity to file a proof of claim some qualifying statement about jeopardy to a creditor's right to a jury trial after filing a proof of claim. **A motion to add such a statement failed by a vote of 6 - 4.** Some members reiterated their concern about this issue, noted the potential legal consequences under

the Langenkamp and Granfinanciera decisions,[1] and reminded the Committee that it is easier to delete material after publication than to add it. The Chairman said he shared the concern and **gave assurance that the Committee would come back to the matter after publication. The Committee approved for publication the proposed amendments and two new forms, including the changes that had been accepted by the subcommittee.** Mr. Sommer also reported that Forms 1, 9, and 10, which are the forms most heavily used by the public, will be reformatted by a graphics design expert to make them more readily understandable. He said the forms package will be recirculated to the members after the reformatting and prior to the June 1996 meeting of the Standing Committee.

Uniform Local Rule Numbering. The Committee discussed a revised draft cover memorandum proposed for transmitting to the courts the Committee's recommended uniform numbering system for local rules. [In January 1996 the Standing Committee approved, and on March 12, 1996, the Judicial Conference adopted, a uniform numbering system that directs only that courts number their local rules to correspond to the relevant federal rules of procedure. See "Introductory Items," above.] Several members expressed dissatisfaction with the recommendation submitted to the Judicial Conference and said they also were unsure about its meaning. Some members wanted the memorandum to be more assertive in discouraging deviations from what the Committee had approved. Mr. McCabe said the letter should avoid being at odds with the Standing Committee's intent. The Committee requested that the memorandum be redrafted to comport with the limited directive of the Standing Committee and the Judicial Conference but also to state more clearly that the Committee's numbering system is the recommended one. At the March 22 session, the Committee considered a redraft prepared by Mr. McCabe with suggestions from Judge Restani. The Committee changed the word "Model" to "Uniform" in the title of the memorandum, deleted the word "model" from the second and third paragraphs, and made stylistic changes in the

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[1] Langenkamp v. Culp, 498 U.S. 42, 111 S. Ct. 330, 112 L. Ed. 2d 343 (1990); Granfinanciera, S.A., et al. v. Nordberg, 492 U.S. 33, 109 S. Ct. 2782, 106 L. Ed. 2d 26 (1989).

final paragraph. **The Committee approved the revised memorandum as edited at the meeting.**

Subcommittee and Liaison Reports

Rule 2014 Subcommittee. The chairman of the subcommittee, Mr. Smith, reviewed the history of the subcommittee's mission to revise Rule 2014. The current rule's ex parte procedure and nebulous concept of "connections" to parties in the case has been troublesome for many years, he said. The American Bar Association ("ABA") had drafted a list of relationships identified as conflicting with potential representation and suggested that a "safe harbor" should be provided for those who had disclosed all relationships included in the list. The Committee in 1992 had declined to adopt the ABA's suggestion, because the "safe harbor" would conflict with the authority of the court under § 328(c) of the Code to disallow compensation if a conflict later appears. Mr. Smith said his draft amendments try to clarify what must be disclosed by providing both a list of specifics and an assertion by the applicant for employment that there is "no substantial risk" that the applicants' relationships with others will materially and adversely affect the representation to be undertaken in the case. This approach was based on that used in the *Restatement of the Law Governing Lawyers*, he said. Mr. Smith noted that the draft also provides for immediate or delayed employment and for notice and opportunity to object. Although the draft that was printed in the Committee agenda book did not include a notice provision, he said, he had completed an initial draft. He reported that the subcommittee had met over lunch on March 21 and would continue to exchange comments and complete a draft rule and commentary for the September 1996 meeting. He summarized the subcommittee's goals as being to provide: 1) a clear procedure, 2) notice early on to those who need it, and 3) adequate disclosure. He said a long range project would be to provide Professor Coquillette with draft rules on conflicts, particularly as they arise in bankruptcy cases.

Litigation Subcommittee. The chairman of the subcommittee, Mr. Klee, reported that the subcommittee had met by conference call on January 8, at the Administrative Office of the

United States Court in Washington, D.C., on February 9, and would meet immediately following the conclusion of the Committee meeting. He said he expected the subcommittee would need one further meeting in order to have complete drafts ready for the Committee's consideration at the September meeting. He said the subcommittee had considered the letter sent by Bankruptcy Judge Samuel L. Bufford, recommending that bankruptcy motion practice should follow state court practice, but had rejected his view. The subcommittee is concentrating on motion practice and Rules 9013 and 9014, he said. The subcommittee thinks adversary proceedings are proceeding smoothly under the present rules; the subcommittee may consider adjusting the scope of Rule 7001, but will take that issue up later.

Rule 7062 Subcommittee. The chairman of the subcommittee, Judge Kressel, said first that the subcommittee is misnamed, because at the last meeting the Committee decided to remove from Rule 7062 the exceptions listed, because they pertain to the bankruptcy case rather than to adversary proceedings. The first issue, he said, is whether all orders should be stayed except those listed or whether none should be stayed except those listed -- in other words, which should be the "default" position. The second issue is which orders should be stayed and which not stayed, and the third matter to be addressed is the mechanics of staying an order or its enforcement. Judge Kressel said the subcommittee seems to be developing consensus on all of these and should have a draft to submit for the September 1996 meeting.

Alternative Dispute Resolution (ADR) Subcommittee. Professor Tabb, subcommittee chair, said that the current posture of continuing to monitor local ADR efforts while taking no action to propose any national rule remains appropriate.

Liaison with the Civil Rules Committee. Judge Restani noted that the recently enacted Public Law No. 104-67, which deals with litigation under the Securities Act, contains provisions for sanctions that resemble the former Rule 11 of the Federal Rules of Civil Procedure. She also said that the civil rules committee plans to present amendments to Rule 23 for publication and comment at the June 1996 meeting of the Standing Committee. So far, she said, there seems to be agreement only that an interlocutory appeal of a class certification decision should be

permitted and that the standard for certifying should be raised to some degree. She said that comment is heavy on the protective order amendments to Rule 26, but the amendments probably will not go forward. She said comments are about evenly divided on 12-person juries, and that judges are uniformly against the amendments that would permit attorney voir dire, while attorneys favor it.

Next Meeting

The next meeting of the Committee will be September 26 - 27, 1996, in San Francisco, California.

Respectfully submitted,

Patricia S. Channon

Item 9A

To: Honorable Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice and Procedure

From: Ralph K. Winter, Jr., Chair
Advisory Committee on Federal Rules of Evidence

Date: May 15, 1996

Re: Report of the Advisory Committee on Evidence Rules

Introduction

The Advisory Committee on Evidence Rules met on April 22, 1996, in Washington, D.C. The Committee considered public comments regarding the proposed amendments to the Evidence Rules that were published in September 1995. After deferring action on a proposed amendment to Rule 103(e) and making several changes to other proposed amendments, the Committee approved the amendments discussed below for presentation to the Standing Committee for final approval.

Rule 103(e). Although a majority of the Committee agreed that a uniform default rule ought to be codified as to whether a pretrial objection to, or a proffer of, evidence must be renewed at trial, neither the rule that was published for comment nor the alternative formulation commanded a majority. Comments received in connection with the proposed amendment were unanimously in favor of a rule, but split on the proper formulation. Nine comments supported the published rule while eleven supported the reverse formulation.

I. Action Items

A. Proposed Amendments to Evidence Rules 407, 801(d)(2), 803(24), 804(b)(5), 804(b)(6), 806, and 807 Submitted for Approval by the Standing Committee and Transmittal to the Judicial Conference.

These proposed amendments were published for comment by the bench and bar in September 1995. Letters were received from thirty-nine commentators. (Two of the comments are identical but were submitted by different members of the Federal Magistrate Judges Association.). The following letters contain only general statements regarding published rules submitted for Standing Committee approval:

(1) Leon Karelitz, Esq. of Raton, N.M., in a letter dated November 7, 1995, "supported the Advisory Committee's proposed amendments" and also "commend[ed] that Committee's reasoning and decision not to amend the rules listed on pp. 160-161."

(2) Senior Judge Prentice H. Marshall of the Northern District of Illinois, approves of the proposed amendments and the Advisory Committee's tentative decision not to propose amendments to the listed rules.

(3) J. Houston Gordon, Esq., Covington, Tenn., supports the changes in Rules 407 and 801(d)(2).

(4) Magistrate Judge Virginia M. Morgan, on behalf of the Federal Magistrate Judges Association, in a letter dated January 23, 1996, supports the proposed changes.

(5) Carolyn B. Witherspoon, Esq., on behalf of the Arkansas Bar Association, in a letter dated January 31, 1996, wrote that the Committee had no objection to the proposed changes to Rules 801, 803, 804, new Rule 807, and Rule 804(b)(6) and 806, and pointed out that the proposed change to Rule 407 would change the law in the Eighth Circuit.

(6) James A. Strain, Esq., on behalf of The Seventh Circuit Bar Association, characterized the proposed amendments as "appropriate."

(7) Harriet L. Turney, Esq., on behalf of the State Bar of Arizona, in a letter dated February 27, 1996, writes that the State Bar "supports the proposed amendments to Rules 801, 803, 804, 806, and 807."

(8) Kent S. Hofmeister, Esq., on behalf of the Federal Bar Association, in a letter dated February 29, 1996, endorses the proposed amendments.

(9) Donald R. Dunner, Esq., on behalf of the American Bar Association Section of Intellectual Property Law, in a letter dated March 1, 1990, writes that "this committee has no substantive comment" on the amendments proposed for Rules 407, 801(d)(2) or 804(b)(6). With regard to amendments to the latter two rules, the letter further states that the committee "finds the amendments to be reasonable."

(10) Nanci L. Clarence, Esq., on behalf of the Executive Committee of the Litigation Section of the State Bar of California, in a letter dated February 28, 1996, writes that the Section takes "no position" on the proposed amendments.

Judge Ralph K. Winter, Chair, presided over a public hearing in New York on January 18, 1996, which was also

attended by the Hon. Jerry E. Smith and Gregory P. Joseph, members of the Evidence Committee and Professor Margaret A. Berger, the Reporter. At the hearing, the Committee heard from Professor Richard D. Friedman of the Michigan Law School and Thais L. Richardson, a student at the American University Law School.

Bryan Garner, consultant on style, suggested certain stylistic improvements that were incorporated into the rules that were published for comment. The Advisory Committee voted, however, at its April, 1996 meeting to defer all restylization efforts. Consequently, any changes that had been made in the rules solely for stylistic reasons have been eliminated.

1. Synopsis of Proposed Amendments

(a) Rule 407 is amended to extend the exclusionary principle of the rule to product liability actions, and to clarify that the rule applies only to measures taken after an injury or harm caused by an event.

(b) Rule 801(d)(2) is amended to provide that a court shall consider the contents of the statement seeking admission when determining whether the proponent has established the preliminary facts that make a statement admissible as an authorized or vicarious admission or a coconspirator's statement. With regard to a coconspirator's statement this amendment codifies the holding in Bourjaily v. United States, 483 U.S. 171 (1987). The amendment also resolves an issue on which the Supreme Court had reserved decision by providing that the contents of the statement do not alone suffice to establish the preliminary facts.

(c) Rule 804(b)(6) is added 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 therein. This rule codifies a principle that has been recognized by every circuit that has addressed the issue, although the tests for finding waiver and the applicable standard of proof have not been uniform. The proposed rule adheres to the usual Rule 104(a) preponderance of the evidence standard for preliminary questions. The rule would apply in civil as well as criminal cases and would apply to wrongdoing by the government.

(d) The contents of Rules 803(24) and 804(b)(5) have been combined and transferred to a new Rule 807. Consequently, there will now be only one residual hearsay exception instead of two. This change was made to facilitate future additions to Rules 803 and 804. No change in meaning is intended.

(e) Rule 806 is amended to eliminate a comma that mistakenly appears in the current rule.

2. Text of Proposed Amendments, GAP Report, and Summary of Comments Relating to Particular Rules.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

Rule 407. Subsequent Remedial Measures

When, after an injury or harm allegedly caused by an event, measures are taken ~~which~~ that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, ~~or~~ culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction ~~in connection with the event~~.

* * * * *

COMMITTEE NOTE

The amendment to Rule 407 makes two changes in the rule. First, the words "an injury or harm allegedly caused by" were added to clarify that the rule applies only to changes made after the occurrence that produced the damages giving rise to the action. Evidence of measures taken by the defendant prior to the "event" causing "injury or harm" do not fall within the exclusionary scope of Rule 407 even if they occurred after the manufacture or design of the product. See Chase v. General Motors Corp., 856 F.2d 17, 21-22 (4th Cir. 1988).

Second, Rule 407 has been amended to provide that evidence of subsequent

remedial measures may not be used to prove "a defect in a product or its design, or that a warning or instruction should have accompanied a product." This amendment adopts the view of a majority of the circuits that have interpreted Rule 407 to apply to products liability actions. See Raymond v. Raymond Corp., 958 F.2d 1518, 1522 (1st Cir. 1991); In re Joint Eastern District and Southern District Asbestos Litigation v. Armstrong World Industries, Inc., 995 F.2d 343 (2d Cir. 1993); Cann v. Ford Motor Co., 658 F.2d 54, 60 (2d Cir. 1981), cert. denied, 456 U.S. 960 (1982); Kelley v. Crown Equipment Co., 970 F.2d 1273, 1275 (3d Cir. 1992); Werner v. Upjohn, Inc., 628 F.2d 848 (4th Cir. 1980), cert. denied, 449 U.S. 1080 (1981); Grenada Steel Industries, Inc. v. Alabama Oxygen Co., Inc., 695 F.2d 883 (5th Cir. 1983); Bauman v. Volkswagenwerk Aktiengesellschaft, 621 F.2d 230, 232 (6th Cir. 1980); Flaminio v. Honda Motor Company, Ltd., 733 F.2d 463, 469 (7th Cir. 1984); Gauthier v. AMF, Inc., 788 F.2d 634, 636-37 (9th Cir. 1986).

Although this amendment adopts a uniform federal rule, it should be noted that evidence of subsequent remedial measures may be admissible pursuant to the second sentence of Rule 407. Evidence of subsequent measures that is not barred by Rule 407 may still be subject to exclusion on Rule 403 grounds when the dangers of prejudice or confusion substantially outweigh the probative value of the evidence.

Public Comments on Rule 407.

(1) Judge Martin L.C. Feldman of the Eastern District of Louisiana, in his letter of November 6, 1995, expressed concern that the impeachment exception to Rule 407 might be applied too broadly.

(2) Frank E. Tolbert of Miller, Tolbert, Muehlhausen, Muehlhausen & Groff, P.C., Logansport, Ind., in a

letter dated November 1, 1995, agreed that Rule 407 should be extended to product liability actions as to changes made after the occurrence that produced the injury.

(3) Richard C. Watters, Esq., of Miles, Sears & Eanni, Fresno, CA, in a letter dated November 9, 1995, supported the proposed amendment.

(4) Joseph D. Jamil, Esq., of Jamil & Kolius, Houston, Tex., in a letter dated November 6, 1995, wrote that "the rule should, if anything, be amended to ***permit*** proof of subsequent remedial measures in products liability cases."

(5) Professor Michael H. Hoffheimer, University of Mississippi Law Center, in a letter dated December 1, 1995, objected to a stylistic change that substituted a "that" for a "which."

(6) Brent W. Coon, Esq., of Provost, Umphrey, Beaumont, Tex., in a letter dated November 27, 1995, recommended amending the rule "to specifically exclude claims grounded in products liability as opposed to expressly including such claims. The public would be much better served."

(7) John A.K. Grunert, Esq., of Campbell & Associates, Boston, MA., in a letter dated January 4, 1996, urges reconsideration of some of the proposed changes. He suggests that "the rule should apply only to remedial measures taken after the alleged tortfeasor knew or should have known of the 'injury or harm.'" As drafted, he fears the rule will produce "the same uncertainty and factual difficulty that the so-called 'discovery rule' and 'successive harms' rule have created with respect to statute of limitations defenses." He proposes eliminating the words relating to "injury or harm" entirely as not needed due to judicial decisions, or if there is a need for clarification substituting instead: "When, after the first occurrence of

injury or harm for which damages or other forms of relief are sought in the litigation," etc. He also suggests adding "a breach of warranty" in order to fully accomplish the Committee's purpose and deleting "a defect in a product's design" as "a redundant source of possible confusion." Finally, he see no need to change the second sentence of the rule.

(8) Judge Edward R. Becker of the Third Circuit, in a letter dated January 17, 1996, "commend[s] the Committee for this proposal."

(9) Robert F. Wise, Jr., Esq., on behalf of the Federal Procedure Committee of the New York State Bar Association, in a letter dated February 28, 1996, writes that "the proposed amendments appear to codify the existing case law, and we support their adoption."

(10) Hugh F. Young, Jr., on behalf of the Product Liability Advisory Council (PLAC), in a letter dated February 29, 1996, comments extensively on the proposed amendments. He writes that PLAC "is a non-profit association whose corporate members include more than 110 major product manufacturers along with more than 300 attorneys in private practice who represent those manufacturers at trial and on appeal in cases involving products liability." PLAC supports the change extending Rule 407 to all product liability actions, but urges the Committee to revise the rule "to make clear that, in product liability cases, it applies not only to changes made in a product line after an accident occurs but also to any product line changes made after the sale of the product involved in the case." PLAC argues that the change is needed in order to encourage manufacturers to make changes that will avoid additional accidents.

(11) Thais L. Richardson, a student at American University Law School, submitted a Comment that will be published in volume 45 of The American

University Law Review. The Comment approves of extending the rule to products liability actions but objects that limiting the rule to measures taken after the event giving rise to the lawsuit is "inconsistent with both public policy and substantive products liability law." Ms. Richardson testified to the same effect at the public hearing on January 18, 1996.

(12) William B. Poff, Esq., on behalf of the National Association of Railroad Trial Counsel, in a letter dated March 1, 1996, approves the changes.

(13) Professor David P. Leonard of Loyola Law School, Los Angeles, CA, in a letter dated March 1, 1996, finds that the Committee's clarification of the meaning of "after an event" is "ill-advised." "[T]he goal of promoting safety would be thwarted by admitting evidence of subsequent remedial measure taken before the accident in question had occurred." Accordingly he recommends applying "the exclusionary principle to all cases in which admission might materially affect the decision whether to repair, regardless of whether the measure was taken before or after the accident in question. While a rule requiring the judge to make such a factual finding would not be perfect, it would reach results more in accordance with the rule's purpose in a greater number of cases than would the current proposal."

(14) Pamela Anagnos Liapakis, on behalf of the Association of Trial Lawyers of America (ATLA), in a letter dated March 1, 1996, opposed the revision principally on the grounds that disagreements among circuits ought to be resolved by the Supreme Court, and that excluding evidence of subsequent measures is a bad rule for products liability cases as no empirical evidence exists that anybody has ever made a safety-related change because of the rule. She states that subsequent repair evidence is often the only evidence available to a

plaintiff to prove feasibility since other evidence resides in defendants' file cabinets. She also states that the amended rule is outcome-determinative because it would make plaintiffs susceptible to summary judgment motions long before a litigation would reach the stage where feasibility might be controverted so that the exception in the second sentence of Rule 407 would apply.

GAP Report on Rule 407. The words "injury or harm" were substituted for the word "event" in line 4. The stylization changes in the second sentence of the rule were eliminated. The words "causing 'injury or harm'" were added to the Committee Note.

Rule 801. Definitions

* * * * *

(d) Statements which are not hearsay.

* * * * *

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make

a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

COMMITTEE NOTE

Rule 801(d)(2) has been amended in order to respond to three issues raised by Bourjaily v. United States, 483 U.S. 171 (1987). First, the amendment codifies the holding in Bourjaily by stating expressly that a court shall consider the contents of a coconspirator's statement in determining "the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered." According to Bourjaily, Rule 104(a) requires these preliminary questions to be established by a preponderance of the evidence.

Second, the amendment resolves an issue on which the Court had reserved decision. It provides that the contents of the declarant's statement do not alone suffice to establish a conspiracy in which the declarant and the defendant participated. The court must consider in addition the circumstances surrounding the statement, such as the identity of the speaker, the context in which the statement was made, or evidence corroborating the contents of the statement in making its determination as to each preliminary question. This amendment is in accordance with existing practice. Every court of appeals that has resolved this issue requires some evidence in addition to the contents of the statement. See, e.g., United States v. Beckham, 968 F.2d 47, 51 (D.C.Cir. 1992); United States v. Sepulveda, 15 F.3d 1161, 1181-82 (1st Cir. 1993), cert. denied, 114 S.Ct. 2714 (1994); United States v. Daly, 842 F.2d 1380, 1386 (2d Cir.), cert. denied, 488 U.S. 821 (1988); United States v. Clark, 18 F.3d 1337, 1341-42 (6th Cir.), cert. denied, 115 S.Ct. 152 (1994); United States v. Zambrana, 841 F.2d 1320, 1344-45 (7th Cir. 1988); United States v. Silverman, 861 F.2d 571, 577 (9th Cir. 1988); United States v. Gordon, 844 F.2d 1397, 1402 (9th Cir. 1988); United States v. Hernandez, 829 F.2d 988, 993 (10th Cir. 1987), cert. denied, 485 U.S. 1013 (1988); United States v. Byrom, 910 F.2d 725, 736 (11th Cir. 1990).

Third, the amendment extends the reasoning of Bourjaily to statements offered under subdivisions (C) and (D) of Rule 801(d)(2). In Bourjaily, the Court rejected treating foundational facts pursuant to the law of agency in favor of an evidentiary approach governed by Rule 104(a). The Advisory Committee believes it appropriate to treat analogously preliminary questions relating to the declarant's authority under subdivision (C), and the agency or employment relationship and scope thereof under subdivision (D).

Public Comments on Rule 801.

(1) Judge Edward R. Becker of the Third Circuit, in a letter dated January 17, 1996, finds the proposed rule an improvement over the current state of the law, but urges the Committee to restore the old evidence aliunde principle that predated the Bourjaily opinion. Judge Becker notes that Bourjaily was an exercise in the jurisprudence of "plain meaning" rather than a "jurisprudential declaration" about the law of evidence by the Supreme Court; that he knows of no evidence that the drafters of the rules intended to abolish the independent evidence requirement; and that coconspirators' statements are suspect in terms of trustworthiness so that bootstrapping is "particularly dangerous." Abandonment of the independent evidence requirement eliminates one of the few safeguards of reliability.

(2) Daniel E. Monnat, on behalf of the Kansas Association of Criminal Defense Lawyers, in a letter dated January 22, 1996, opposes allowing the contents of a hearsay statement to be used in determining the admissibility of a hearsay statement, but "absolutely support[s] that part of the amendment which clarifies that the contents of the hearsay statement are not alone sufficient to establish the existence of a conspiracy."

(3) Paul W. Mollica, on behalf of the Chicago Council of Layers, in a letter dated February 7, 1996, urges additional study before the rule is extended to civil cases. He argues that the per se rule established by the proposal requiring corroboration before a statement is admitted into evidence "could unreasonably deprive a party of important evidence, especially where the party opposing admission of the statement proffers no evidence to rebut it."

(4) Robert F. Wise, Jr., on behalf of the Commercial and Federal Litigation Section of the New York State Bar Association, in a letter dated February 28, 1996, characterizes the proposed amendment as "a net gain for those resisting admission of co-conspirator statements," although he notes that some, particularly criminal defense lawyers will question whether "some independent evidence" is sufficient protection. He also observes that the "quality of the independent evidence required has not been defined." Treating authorized and vicarious admissions consistently with coconspirators' statements makes sense as all rest on an agency theory. On balance he terms the proposed amendment an improvement that helps to clarify the law.

(5) Professor James J. Duane of Regent University Law School, in a letter dated February 29, 1996, submitted lengthy comments that he hopes to have published. He objects to the proposed amendment as codifying pure dictum, predicts that the amendment will have no impact on any cases, and "if adopted, will instantly become the most frivolous and trivial of the all the Federal Rules of Evidence." He suggests that something should have been done about the quantity or quality of the additional independent evidence, the source of the independent evidence, and the need for each of the three required findings to be supported by independent evidence. He also proposed substituting "conspirator" for

"coconspirator," and rewriting the rule to substitute "conspirator of the party" for "conspirator of a party" because the provision's plain-meaning is that a statement may be offered against any defendant in a multi-party criminal case (even one who was not a member of the conspiracy), if it was made by someone who was in a conspiracy with at least one of the other defendants.

(6) William J. Genego and Peter Goldberger as Co-Chairs of the National Association of Criminal Defense Lawyers' Committee on Rules of Procedure (NACDL), in a letter dated February 29, 1996, write that NACDL would prefer to reject Bourjaily and does not support the extension of that holding to other agents' statements, particularly in criminal cases. But if these suggestions are rejected, NACDL states that "we certainly support the creation of a specific rule of insufficiency for bootstrapped offers of co-conspirator statements." NACDL points out that concerns about the reliability of coconspirator statements have been exacerbated by the Sentencing Guidelines' harsh penalties and incentives for cooperation. NACDL also states that the extension of the bootstrapping rule to other forms of admissions makes matters worse in "white collar crime" cases arising in a business setting.

(7) Professor Myrna S. Raeder of Southwestern Law School, in a letter dated March 1, 1996, objects to the proposed amendment as "fall[ing] short of any meaningful assurance of reliability. . . Some type of additional reliability check is warranted, whether by independent evidence or . . . by additional foundational requirements." She enclosed a 1990 report prepared by the American Bar Association Criminal Justice Section's Committee on Rules of Criminal Procedure and Evidence.

(8) Professor Richard D. Friedman of the University of Michigan Law School

testified at the public hearing held on Janurary 18, 1996. He does not think the amendment should be adopted because it is not needed and will increase confusion. "When we talk about some evidence, I think it is very, very hard to put your fingers on what that means and I don't even think -- I don't really think it is possible." In his view there almost always is other evidence, and in cases in which there really was no conspiracy one should trust the district trial courts to make the appropriate judgment.

GAP Report on Rule 801. The word "shall" was substituted for the word "may" in line 26. The second sentence of the committee note was changed accordingly.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

* * * * *

(24) [Transferred to Rule 807] ~~Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C)~~

~~the general purposes of these rule and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.~~

COMMITTEE NOTE

The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.

Public Comments on Rule 803.

(1) Professor Bruce Comely French of Ohio Northern University Law School, in a letter dated January 16, 1996, noted his opposition to the residual provisions on principle. He also opposed combining the exceptions, if they are to be retained, into the proposed Rule 807. He believes that a designation system such as (24a) or (5a) would aid historical research.

(2) All other comments approved combining the two residual exceptions into a new Rule 807.

(3) Comments addressed to the substance of the residual exception are discussed in connection with Rule 807.

GAP Report on Rule 803. The words "Transferred to Rule 807" were substituted for "Abrogated."

Rule 804. Hearsay Exceptions; Declarant Unavailable

* * * * *

(b) Hearsay exceptions

* * * * *

(5) [Transferred to Rule 807] ~~Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (C) the general purposes of these rule and the interests of justice will~~

~~best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.~~

(6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

COMMITTEE NOTE

Subdivision (b)(5). The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intented.

Subdivision (b)(6). Rule 804(b)(6) has been added to provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant's

prior statement when the party's deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness. This recognizes the need for a prophylactic rule to deal with abhorrent behavior "which strikes at the heart of the system of justice itself." United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982), cert. denied, 467 U.S. 1204 (1984). The wrongdoing need not consist of a criminal act. The rule applies to all parties, including the government.

Every circuit that has resolved the question has recognized the principle of forfeiture by misconduct, although the tests for determining whether there is a forfeiture have varied. See, e.g., United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992); United States v. Potamitis, 739 F.2d 784, 789 (2d Cir.), cert. denied, 469 U.S. 918 (1984); Steele v. Taylor, 684 F.2d 1193, 1199 (6th Cir. 1982), cert. denied, 460 U.S. 1053 (1983); United States v. Balano, 618 F.2d 624, 629 (10th Cir. 1979), cert. denied, 449 U.S. 840 (1980); United States v. Carlson, 547 F.2d 1346, 1358-59 (8th Cir.), cert. denied, 431 U.S. 914 (1977). The foregoing cases apply a preponderance of the evidence standard. Contra United States v. Thevis, 665 F.2d 616, 631 (5th Cir.) (clear and convincing standard), cert. denied, 459 U.S. 825 (1982). The usual Rule 104(a) preponderance of the evidence standard has been adopted in light of the behavior the new Rule 804(b)(6) seeks to discourage.

Public Comments on Rule 804(b)(5). See Public Comments on Rule 803.

Public Comments on Rule 804(b)(6).

(1) Robert F. Wise, Jr., Esq. on behalf of the Commercial and Federal Litigation Section of the New York State Bar Association, in a letter dated February 28, 1996, states that the proposed amendment raises "two potential

concerns." First, a higher clear and convincing standard would be more appropriate than the preponderance of the evidence standard because a penalty or punishment is at stake and because the consequences of admission may be severe. He also believes that a higher standard may cut down on time consuming satellite litigation. Second, he finds that the words "'wrongdoing' and 'acquiesced' are somewhat nebulous and are likely to engender dispute." He asks whether the rule would apply to a corporation in civil litigation that refused to produce its employees in a foreign jurisdiction? Finally, he finds no presing need for a rule since the courts have been able to deal with these situation, and fears that more litigation and a more mechanical approach may ensue if the amendment is adopted.

(2) William B. Poff, Esq. on behalf of the National Association of Railroad Trial Counsel, in a letter dated March 1, 1996, comments that the word "acquiesce" is too vague and suggests substituting "who has engaged, directly or indirectly, in wrongdoing."

(3) Professor Myrna S. Raeder of Southwestern University School of Law, on behalf of ten professors of evidence and individuals interested in evidentiary policy, in a letter dated March 1, 1996, made a number of suggestions. "Forfeiture" should be substituted for "waiver" because the concept of knowing waiver in this context is a fiction. The rule should be rewritten so that it would apply only when the defendant is aware that the victim is likely to be a witness in a proceeding. If the defendant is accused of murdering an individual, and there is no connection to witness tampering, a traditional hearsay exception should be required so as to ensure trustworthy evidence and to discourage persons from manufacturing inculpatory statements from victims in murder cases. Therefore the words "obstruct justice" should be added at

line 34 after the words "intended to" and the phrase "in a pending proceeding should be added after the word "witness" at line 36. The phrase "acquiesced in wrongdoing" is too broad a standard; mere knowledge by the party should not suffice. She suggests substituting "engaged in or directed wrongdoing" at lines 33-34, and amending the committee note to indicate that the exception will not apply "unless a plausible possibility existed that had the accused opposed the conduct it would not have occurred." She also endorses substituting the more stringent "clear and convincing" standard and adding an advance notice provision because the proposed rule resembles the residual rules and Rule 404(b) in dealing with evidence whose presentation is not necessarily self-evident.

(4) William J. Genego and Peter Goldberger, Co-Chairs of the National Association of Criminal Defense Lawyers' Committee on Procedure, in a letter dated February 29, 1996, write that "NACDL strongly opposes the addition of proposed subparagraph (b)(6)." "A rule necessarily allowing the admissibility of untrustworthy, immaterial, inferior quality, and unjust evidence as a sanction for supposed misconduct is strong medicine, which should be more carefully formulated." It objects specifically that the terminology ("wrongdoing) is too vague; the preponderance standard of proof too low; that a notice requirement is needed; and that "forfeiture" should be substituted for "waiver.". NADCL further objects to "a party who" instead of "a party that" which would more clearly be potentially applicable to the government. NADCL suggests that a more appropriate remedy is to admit evidence of the wrongdoing as tending to show "consciousness of guilt" by the defendant or consciousness of doubt" by the government, accompanied by an "adverse inference" charge to the jury.

(5) Professor Richard D. Friedman of the University of Michigan Law School, at the public hearing on January 18, 1996, and in his submitted statement voiced a number of concerns. He prefers "forfeiture" to "waiver" and a "clear and convincing" standard. He approves of the rationale behind "acquiescence" but wishes the committee note to state that "knowledge of the conduct, and even satisfication concerning it, does not suffice unless there was at least a plausible possibility that if the accused had opposed the conduct the person engaged in it would not have done so." He suggested that absence ought not to equal unavailability unless "the prosecution has been unable by reasonable means to secure the attendance or testimony of the declarant." Professor Friedman would apply the rule even when the conduct that rendered a potential witness unable to testify is the same conduct with which the defendant is charged, as in a child abuse case if the defendant's conduct prevented the victim from testifying fully. He would also extend the rule to admit statements by declarants who were intimidated by the defendant before the particular crime with which defendant is now charged.

GAP Report on Rule 804(b)(5). The words "Transferred to Rule 807" were substituted for "Abrogated."

GAP Report on Rule 804(b)(6). The title of the rule was changed to "Forfeiture by wrongdoing." The word "who" in line 33 was changed to "that" to indicate that the rule is potentially applicable against the government. Two sentences were added to the first paragraph of the committee note to clarify that the wrongdoing need not be criminal in nature, and to indicate the rule's potential applicability to the government. The word "forfeiture" was substituted for "waiver" in the note.

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in Rule 801(d)(2)~~,~~ (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

COMMITTEE NOTE

The amendment is technical. No substantive change is intended.

Public Comments on Rule 806. No specific comments were received.

GAP Report. Restylization changes in the rule were eliminated.

Rule 807. ~~Other Exceptions~~ Residual Exception

A statement not specifically covered by ~~any of the foregoing exceptions~~ Rule 803 or 804, but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

COMMITTEE NOTE

The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.

Public Comments on Rule 807.

(1) Judge Edward R. Becker of the Third Circuit, in a letter dated January 17, 1996, applauded the combining of the residual exceptions but thought the Committee should also redraft the notice requirement "to unify the circuits and promote more flexibility."

(2) Professor Myrna S. Raeder, on behalf of ten evidence professors and individuals interested in evidentiary policy, in a letter dated March 1, 1996, argues that the residuals are being overused by prosecutors. She urges a tightening of the rule in criminal cases. She notes two additional reasons for revisiting the rule: 1. there is confusion about different standards of trustworthiness for evidentiary and confrontation clause purposes, and whether the evidentiary standard should be the same in civil and criminal cases; 2. the proposed forfeiture exception in Rule 804(b)(6) provides prosecutors with new flexibility when unavailability was caused by the defendant's wrongdoing; consequently the Committee should consider tightening Rule 807 in typical criminal cases.

(3) William J. Genego and Peter Goldberger, Co-Chairs of the National Association of Criminal Defense Lawyers' Committee on Procedure, in a letter dated February 29, 1996, propose a full study of "the excessive invocation of these residual exceptions by the courts." They suggest that the wording should be narrowed to make it less easy to invoke the rule as a vehicle for admitting "near miss" hearsay evidence that does not satisfy traditional hearsay exceptions.

(4) Professor Richard D. Friedman of the University of Michigan Law School, in a

statement submitted in connection with his appearance at the January 18, 1996 public hearing, objected that "to speak of the statement having 'circumstantial guarantees of trustworthiness' that are 'equivalent' to those of the aggregate of exceptions of Rules 803 and 804 is a meaningless standard."

GAP Report on Rule 807. Restylization changes were eliminated.

Item 9B

DRAFT

ADVISORY COMMITTEE ON EVIDENCE RULES

Minutes of the Meeting of April 22, 1996

Washington, D.C.

The Advisory Committee on the Federal Rules of Evidence met on April 22, 1996 in the Thurgood Marshall Office Building in Washington, D.C.

The following members of the committee were present:

Circuit Judge Ralph K. Winter, Jr., Chairman

Circuit Judge Jerry E. Smith

District Judge Fern M. Smith

District Judge Milton I. Shadur

Federal Claims Judge James T. Turner

Dean James K. Robinson

Gregory P. Joseph, Esq.

John M. Kobayashi, Esq.

Frederic F. Kay, Esq.

Mary F. Harkenrider, Esq., and Roger Pauley, Esq., Department of Justice

Professor Margaret A. Berger, Reporter

Chief Judge Ann K. Covington and Professor Kenneth S. Broun were unable to attend.

Also present were:

District Judge David S. Doty, Liaison to the Civil Rules Committee

District Judge David D. Dowd, Jr., Liaison to the Criminal Rules Committee

District Judge Alicemarie H. Stotler, Chair, Standing Committee on Rules of Practice and Procedure

Professor Daniel R. Coquillette, Reporter, Standing Committee on Rules of Practice and Procedure

Circuit Judge C. Arlen Beam, Uniform Rules of Evidence

Joe Cecil, Esq., Federal Judicial Center

John Spaniol, Esq., John Rabiej, Esq., Paul Zingg, Esq., Administrative Office

Professor Stephen Saltzburg, ABA Litigation Section

Judge Winter called the meeting to order at 8:30 a.m.

Rules 413 - 415. Judge Winter reported to the committee that he had met with Senator Jon Kyl in order to discuss possible amendments to Rules 413-415. Congresswoman Molinari had also been invited but did not attend. At the meeting, Judge Winter suggested making the notice provisions in the new rules consistent with other evidence rules. Senator Kyl stated that there was no chance that Congress would back away from the policy

of the rules, and that he hoped that the states would adopt similar rules. Senator Kyl also stated that the Committee's draft went beyond congressional policy, especially by including balancing factors. Judge Winter said the balancing factors could be abandoned and offered the services of the Committee to work out a compromise. Judge Winter has not, however, heard from Senator Kyl since the meeting. Judge Stotler commented that she saw nothing further for the Committee to do.

Rule 103. Judge Winter began the discussion by stating that he had lost confidence in the proposed amendment. Neither the commentators who favored it nor those who opposed it seemed to share his understanding that the proposal distinguished between in limine evidentiary rulings that might be affected by events at trial and those that could not. He also noted that virtually all commentators believed that in some circumstances an in limine ruling might not be final and might require renewal at trial. However, no new language clarifying the distinction was offered. As a result, he feared that the proposed alternative might lull some lawyers into thinking renewal was unnecessary. He stated that he believed that we should do nothing at the present time so as to allow caselaw to develop and revisit the issue sometime in the future.

The Reporter summarized the comments received: although the commentators uniformly were in favor of a rule, there was considerable controversy over which version of the rule to adopt, with the majority favoring the alternative to the proposed amendment.

The Committee debated the proposal at length. Members pointed out the increased use of in limine motions as a means of structuring a trial; questioned how the rule would operate when pretrial proceedings are handled by a magistrate judge and the interrelationship with Fed.R.Civ. P. 46; observed that judges differ tremendously in how much attention they give matters pretrial; debated the interaction of the rule with the Supreme Court's opinion in Luce v. United States that requires a defendant to take the stand in order to preserve an objection to an in limine motion; discussed whether civil and criminal cases ought to be governed by the same rule; and considered a variety of proposed formulations.

A straw vote revealed that 3 members of the committee were in favor of the proposed amendment that had gone out for public comment; 3 members were in favor of the alternative version, and 4 members preferred no rule. Although more members of the committee preferred having a rule to not having a rule, no clear

majority emerged as to what should be done even after further discussion. Ultimately the Committee voted to defer acting on the rule by a vote of 7 to 2.

It was suggested that the Civil and Criminal Rules Committees might have some suggestions, or might be able to treat the subject matter of the proposal in their rules thereby eliminating some of the problems that had been raised, such as the interrelationship with the Luce decision and rulings by magistrate judges. Judge Doty, the liaison to the Civil Rules Committee doubted that the Civil Rules Committee would have time to consider this issue at its next meeting. Judge Dowd, the liaison to the Criminal Rules Committee, said he would be happy to review the issue with his Committee.

Rule 407. The Reporter summarized the comments that had been received. The great majority favored extending the rule to products liability actions. Some commentators, however, proposed extending the rule in products liability actions so that the rule would operate to bar evidence of remedial measures taken after the sale of the product even if the changes occurred before the event causing injury or harm. Two commentators objected to the restyling of the second sentence, primarily on the ground that there was no need for the proposed change.

Mr. Joseph suggested that the words "injury or harm" should be substituted for the word "event" in line 3 in light of the proposed change in line 1 adding the words "injury or harm allegedly caused by an" before the word "event." This change would clarify that the rule does not apply to changes that are made before an injury or harm occurs. Members of the committee commented that such a rule was desirable even in products liability cases because the fear of punitive damages and the substantive law on failure to warn provide sufficient incentives to make changes before an injury or harm occurs even in the absence of an exclusionary rule. Dean Robinson had no objection to the proposed rule but commented that the consequence is that subsequent plaintiffs will not be able to introduce the same evidence as initial plaintiffs who will be free to show a change made after sale before any injury or harm occurred. The Committee voted to approve Mr. Joseph's suggested change and to send the rule on to the Standing Committee.

The Committee also discussed the desirability of retaining the proposed changes in the second sentence of Rule 407 which had been made solely to restylize the rule. In light of the present freeze on a comprehensive restylization of the rules of evidence, the Committee voted 6 to 3 to return to the present wording of

the second sentence. In connection with the discussion of restyling, Judge Stotler asked the members of the Committee for comments on the comprehensive restylization of the appellate rules. She asked the Committee members to examine the proposed new appellate rules and to consider whether the restylization effort was worth it, if the rules were better and if not, why?

Rule 801. The Reporter summarized the received comments. The proposed changes were generally supported, although a number of commentators continued to press for the overturning of the Supreme Court's decision in Bourjaily v. United States that had held that the federal rules do not require independent evidence to establish foundational facts. A number of commentators had also suggested that the proposed change was unnecessary because it will have no impact. Finally, a few comments objected to extending the Bourjaily rule to other agency admissions, although there was disagreement about whether this extension would change present law undesirably, or was unnecessary because Bourjaily applies a fortiori.

The Committee again discussed whether it was worthwhile to make the proposed change in the rule. Professor Saltzburg pointed out that it was not correct to say that the contents of the statement "may" be considered, but rather that the contents of

the statement "must" be considered. The Committee ultimately voted with one vote opposed to change the "may" to "shall." It made no other changes in the proposed language of the amendment.

Rule 804(b)(6). The Reporter related that the comments that were received generally approved of the proposed amendment in principle. A number of objections were voiced about the text of the proposal: 1. that "forfeiture" rather than "waiver" more appropriately captures the rationale underlying the rule; 2. that the word "acquiesce" is too vague; 3. that the rule should be rewritten so that it will apply only when the defendant's intent is to tamper with a witness; 4. that a higher "clear and convincing" standard should be substituted; 5. that the profferer must give advance notice of an intention to offer evidence pursuant to this provision; 6. that the rule should be rewritten to indicate that it is usable against the prosecution as well.

The Committee agreed that "forfeiture" is a more appropriate term than "waiver" and voted to make that change in the rule and the accompanying note. The Committee also discussed at length alternative formulations for the concept of acquiescence such as "aiding and abetting" and "acceptance of benefits" but ultimately decided to retain "acquiesce."

The Committee thought it unnecessary to rewrite the rule to refer specifically to witness tampering because the proposed text states that the rule applies only in instances in which the party's objective was to "procure the unavailability of the declarant as a witness." The Committee agreed to change the word "who" in line 22 to "that" so as to indicate that forfeiture could be applied against the prosecution as well as an accused. The Reporter was directed to amend the proposed Committee Note accordingly.

The Committee discussed whether to retain the word "wrongdoing" or whether "misconduct" was a more appropriate terms since the absence of a declarant as a witness could be obtained by conduct that was not criminal. The Committee voted in favor of substituting the word "misconduct." (After the meeting, however, Judge Winter reminded the Committee that the term "wrongdoing" already appears in Rule 804 in connection with the definition of unavailability, and that it would be preferable not to introduce another concept into the rule. The Committee acquiesced in his suggestion. A member of the Committee requested that the Committee Note convey that "wrongdoing" does not necessarily involve criminal behavior.)

After considerable discussion, the Committee decided not to insert a notice provision into the proposed rule. The Committee also decided not to insert a reference to new subdivision (6) into Rule 804(a)(5). Such an amendment would have the effect of requiring the proponent to demonstrate that the declarant's testimony could not be obtained through other means, such as taking a deposition. Such a requirement has never been imposed in cases that have found a forfeiture when a party procures a declarant's absence.

Rules 807 and 806. In accordance with its previous decision to eliminate the proposed restylization of Rule 407, the Committee decided to eliminate those changes in Rule 807 that had been made solely as a matter of style. The Committee made three changes in punctuation suggested by Judge Shadur: to eliminate commas in lines 3 and 4, and to add a comma in line 13. The Committee also agreed to restore the text of Rule 806 to its current state with the exception of correcting a mistakenly placed comma in line 2 between "801(d)(2)" and "(C)."

Rules 803(24) and 804(b)(5). Instead of saying "[Abrogated]" after the subdivision number, it was agreed that "[Transferred to Rule 807]" was more appropriate.

Other Comments. The Committee then turned to additional suggestions, unrelated to the Committee's proposals, for amending the rules that had been submitted for public comment. Judge Edward Becker had recommended a study by the Committee of the standard for harmless error in the various circuits. Members of the Committee, however, were not inclined to undertake such a study. The Committee also did not wish to revisit the holding of Luce v. United States, 469 U.S. 38 (1984), or to further revise the wording of Rules 407 or 801(d)(E).

Rule 807. Judge Becker had also suggested redrafting the notice requirement for the residual exception because there is a circuit split on how rigidly the notice requirement is applied. Roger Pauley suggested looking at the caselaw to determine whether the circuits actually reach different results on the same facts or whether they simply differ in their verbalization of the rule. The Committee agreed that the Reporter should report back on this issue.

The Committee also agreed that the Reporter should look into the expanded use of the residual exception. Judge Shadur suggested that to get a true picture of how the residual exception is operating one would need to look at unreported

cases. The Reporter will consult with the Federal Judicial Center about obtaining this information.

Finally, the Committee turned to suggestions it had received for amending rules not presently under consideration.

Rules 803(8)(C), 801(d)(1)(A) and 804(b)(1). John A. K. Grunert, Esq. of Boston, Mass. had suggesting amending Rule 803(8)(C) because practical obstacles make it impossible for an opponent to meet the burden of showing that a proffered official report is untrustworthy. He had suggested either shifting to the proponent the burden of proving trustworthiness, or providing that the report is not admissible upon a showing either that it is untrustworthy (as the present rule provides) or that the opponent "could not with due diligence obtain information reasonably necessary to evaluate its trustworthiness."

The Committee discussed this proposal in light of police accident reports and administrative reports from agencies such as the National Transportation Board and directed the Reporter to advise the Committee about the functioning of the trustworthiness requirement. A related question arose during the discussion as to how the courts are treating testimony given before administrative hearings pursuant to Rules 801(d)(1)(A) and 804(b)(1) and the Reporter was directed to report on this as well.

New Rule 804 Exception. The Committee had received a proposal for a new exception that would encompass "a statement made by the declarant which implicates the defendant in criminal behavior harmful to the declarant or in which the declarant apprehends such behavior by the defendant." The Reporter stated that a number of similar proposals would be made in forthcoming law review articles in the wake of the O.J. Simpson case. The Committee directed the Reporter to report on these developments.

The Applicability of Evidence Rules in Forfeiture Proceedings. The Committee discussed the present inapplicability of evidence rules to probable cause determinations in civil forfeiture hearings and ancillary hearings in criminal cases and whether the absence of any restrictions on the use of hearsay evidence was appropriate. The Reporter was asked to report back on fact patterns and judicial decisions in this area. The Committee does not, however, wish to consider the lack of evidence rules in bail hearings.

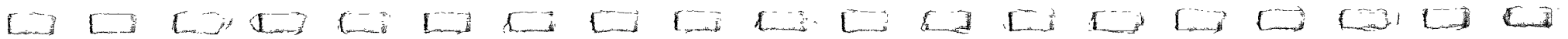
Foreign Business Records. Roger Pauley advised the Committee that the Department is putting together an omnibus bill that would cover the admissibility of foreign public records. A statute, 18 U.S.C. §3505, already covers foreign business records. Mr. Pauley suggested that it might be appropriate to

incorporate provisions dealing with private and public foreign records into the Federal Rules of Evidence.

Before adjourning the meeting, Judge Winter advised the Committee that developments at the Standing Committee meeting or in Congress might necessitate a conference call, but that he saw no urgency to set a date for the next meeting of the Committee.

Respectfully submitted,

Margaret A. Berger
Professor of Law
Reporter



ADVISORY COMMITTEE ON EVIDENCE RULES

Minutes of the Meeting of May 4 and 5, 1995

New York, New York

The Advisory Committee on the Federal Rules of Evidence met on May 4 and 5, 1995 at the federal courthouse in Foley Square in the Southern District of New York.

The following members of the Committee were present:
Circuit Judge Ralph K. Winter, Jr., Chair
Circuit Judge Jerry E. Smith
District Judge Fern M. Smith
Federal Claims Judge James T. Turner
Dean James K. Robinson
Professor Kenneth S. Broun
Gregory P. Joseph, Esq.
Fredric F. Kay, Esq.
John M. Kobayashi, Esq.
Mary F. Harkenrider, Esq., and Roger Pauley, Esq., Department of Justice
Professor Margaret A. Berger, Reporter

Chief Judge Covington and Judge Shadur were unable to attend.

Also present were:
Honorable Alicemarie H. Stotler, Chair, Committee on Rules of Practice and Procedure
Professor Daniel R. Coquillette, Reporter, Committee on Rules of Practice and Procedure
District Judge David S. Doty, Liaison to the Civil Rules Committee
Circuit Judge C. Arlen Beam
Peter G. McCabe, Esq., Secretary, Committee on Rules of Practice and Procedure
John K. Rabiej, Esq., Administrative Office
Paul Zingg, Esq., Administrative Office

Judge Winter called the meeting to order at 8:30 a.m. He reported to the Committee on a number of developments.

The Standing Committee. Judge Winter informed the Committee that the Standing Committee had voted to send out the amendments to Rules 103 and 407 for public comment. He also reported that some members of the Standing Committee feared that the amendment to Rule 103 might prove a trap for lawyers, and had expressed a preference for a default rule that would relieve the losing attorney from having to renew the motion at trial. A motion to revise the amendment accordingly was defeated, but it was agreed

that the Committee Note to Rule 103 would indicate that such an alternate version had been considered and rejected.

Congress. Judge Winter reported that he met with a number of persons on the Hill with regard to Rules 413-415. Staff counsel to Senator Biden indicated that the Democrats would have no objection to the Evidence Committee redraft. Judge Winter also met with four Republican staffers and suggested to them that admissibility should be limited to conduct resulting in a conviction. He reported that the House side had been surprisingly receptive. The Senate staffers acknowledged that the Evidence Committee draft might well be an improvement on the congressional version but that a revision of Rules 413-415 could not be accomplished through the Crime Bill. If at all, the Committee's draft would have to be presented as a technical amendment at the request of Congress; it might possibly pass "on consent." The House might perhaps hold hearings. Although Judge Winter was somewhat encouraged by the meetings, he thought that at this time there was less than a 50% chance that Congress would take any action to modify Rules 413-415.

At these meetings, Judge Winter also discussed the congressional initiative to amend Rule 702. He reported that he had advised the participants that the Committee viewed Daubert as a good decision with great potential and that an attempt to codify the opinion at this point would create problems. The Committee agreed that it would be unwise to react to each congressional proposal to amend a rule of evidence by submitting its own preferred redraft. The Committee decided to take no action on Rule 702 at this time.

The Committee then returned to its consideration of the hearsay rule.

Rule 803(4). The Committee agreed to recommend not amending Rule 803(4).

Rule 801(d)(2). At the previous meeting, the Committee had directed the Reporter to prepare a draft of Rule 801(d)(2)(E) that would deal with issues raised by the Supreme Court's decision in Bourjaily v. United States, and to also consider the effect of Bourjaily on Rules 801(d)(2)(C) and (D). The Reporter presented a number of alternate proposals for either amending each of the subdivisions separately or for language that would apply to all three.

The Committee then engaged in an extensive discussion. Professor Saltzburg, who had not been at the previous meeting, urged the Committee to codify pre-Bourjaily practice as the better rule. Professor Broun also expressed reservations about codifying any part of Bourjaily and extending its doctrine to civil cases. Dean Robinson suggested a corroboration requirement,

such as appears in Rule 804(b)(3) instead of an independent evidence requirement. Mr. Kobayashi was in favor of a requirement that would explicitly require the trial judge to examine the evidence offered pursuant to Rule 104(a) to establish the requisite preliminary facts and to make a finding as to whether the conditions for the exception are satisfied.

The Committee voted on three alternative approaches to Rule 801(d)(2)(E):

1. To not amend the rule - 3 votes
2. To add an independent evidence requirement - 7 votes
3. To codify the common law rule requiring that the statement must be set aside in making the preliminary determination - 2 votes.

The Committee decided not to draft the amendment in terms of corroboration but rather to specifically state that the statement could be considered but would not suffice in the absence of some independent evidence. The Committee then voted to extend this approach to subdivisions (C) and (D). It also agreed that it would review and vote on the text of the proposed amendment as well as the accompanying Committee Note at the next day's meeting.

The Committee also discussed whether a personal knowledge requirement should be added to either Rule 801(d)(2)(C) or Rule 801(d)(2)(D). The Committee declined to do so. Members of the Committee suggested that it was not unfair to shift to the opponent the burden of explaining to jurors how probative value was affected by the absence of personal knowledge, and that in some cases in which the declarant clearly lacked personal knowledge Rule 403 might be used to exclude the evidence.

Rule 803(3). The Committee had asked the Reporter to prepare a memorandum on the Hillmon doctrine, directed to the question of whether the Rule ought to be amended to prohibit evidence of declarant's intent to commit a future act when the act could not be performed without the participation of the party against whom the evidence is offered. The prime example that has disturbed some commentators is the homicide victim's statement that he or she is intending to meet the defendant. After discussion, the Committee decided not to amend the rule.

Rule 803(8). The Committee first discussed whether to amend the rule to state explicitly that evidence which would be barred by subdivisions (B) and (C) when offered against an accused may be admissible pursuant to another hearsay exception, or whether to adopt the reasoning of a Second Circuit opinion, United States v. Oates, 560 F.2d 45 (2d Cir. 1977), that barred such evidence absolutely. The Committee discussed the Reporter's memorandum about how the Circuits are handling this issue. It appears that

routine evidence of governmental activity, such as recording license plate numbers, that falls literally within the prohibitions of subdivisions (B) and (C) is admitted by most circuits pursuant to Rule 803(5). Furthermore, the circuits also admit some evidence barred by Rule 803(8) pursuant to Rule 803(6) when the declarant is available to testify. These cases do not suggest that the courts are permitting the government to put in crucial aspects of its case through hearsay testimony. The Committee concluded that there was no need to amend the rule.

The Committee then discussed whether Rule 803(8)(B) should be amended to permit a criminal defendant to offer against the government evidence which falls within the scope of the exception. Rule 803(8)(C) specifically provides that the evidence made admissible by that provision is admissible "against the Government in criminal cases." The omission in Rule 803(8)(B) may have occurred as a drafting error when Congress revised the rule. The few cases that have considered the issue have allowed the defendant to introduce evidence that otherwise satisfies subdivision (B). Consequently, the Committee saw no need to amend the provision.

Waiver by misconduct. The Committee next considered whether it should codify the generally recognized principle, that hearsay statements become admissible on a waiver by misconduct notion when the defendant deliberately causes the declarant's unavailability. The Committee debated a number of issues: the degree to which defendant must have participated in procuring the declarant's unavailability; the burden of proof that the government must meet in proving the defendant's misconduct; the consequences of a waiver finding; and the appropriate rule of evidence in which to place such a provision. The Committee agreed that codifying the waiver doctrine was desirable as a matter of policy in light of the large number of witnesses who are intimidated or incapacitated so that they do not testify. Consequently, the Committee chose a version of the rule that would not require having to show that the defendant actively participated in procuring the declarant's unavailability. Acquiescence will suffice. In addition, the Committee rejected imposing a "clear and convincing" burden of proof on the prosecution, as is required in the Fifth Circuit, in favor of the usual preponderance of the evidence standard used in connection with preliminary questions under Rule 104(a) even when a constitutional rule is at issue. The federal circuits other than the Fifth, currently use a preponderance standard with regard to finding waiver by misconduct.

The Committee agreed that the consequence of a finding of waiver is that the declarant's hearsay statement becomes admissible to the extent that it would have been admissible had the declarant testified at trial. For example, hearsay contained in the hearsay statement is not admissible unless it satisfies

some other hearsay exception, the declarant must have had personal knowledge, and the evidence may be subject to exclusion under Rule 403.

The Committee debated at length where to place this new exception. Some members of the Committee argued in favor of Rule 801 because subdivision (d) of that rule contains a number of provisions that are distinct from the traditional class exceptions dealt with in Rules 803 and 804. Furthermore, statements admissible on a waiver theory resemble admissions in being admissible only against the defendant and not against the world. On the other hand, other members were concerned that placement in the rule containing admissions would suggest that a personal knowledge requirement does not apply. In addition, the unavailable declarant is the subject of Rule 804.

In the course of discussing appropriate placement of the waiver principle, some members also expressed concern that adding the provision to Rule 804 would upset that rule's numbering scheme. The new provision clearly would have to appear before the residual exception in subdivision (b)(5) which is entitled, "Other exceptions." On the other hand, numbering the new provision "(b)(5)" would require renumbering the residual exception as "(b)(6)." This possibility disturbed some members of the Committee who felt that this would cause problems with computerized searches. Furthermore, the Committee realized that this renumbering problem would arise whenever a new exception was added to either Rule 803 or 804. Judge Winter suggested that the two residual exceptions should be combined and moved into a new Rule 807. No change in meaning would be intended by this transfer; it would be done solely to leave room for new exceptions and to minimize the impact on computer research when a new exception is added. The Committee adopted this suggestion.

Mr. McCabe then informed the Committee that when a provision is moved out of a Federal Rule its number is not reassigned to new material that is added to the rule from which it was removed. The Committee agreed that (b)(5) should remain blank in Rule 804 and that the waiver provision would be numbered Rule 804(b)(6).

Rule 804(b)(1). The Reporter had been asked to advise the Committee about judicial interpretations of the "predecessor in interest" provision. The Reporter informed the Committee of a number of cases, particularly in the Sixth Circuit, that hold that the provision is satisfied when the party against whom the evidence was offered at the first proceeding had a similar motive and opportunity to cross-examine as the party against whom the evidence is now being offered. Such an interpretation essentially renders superfluous the "predecessor in interest" provision. This approach has, however, been utilized almost exclusively in asbestos cases to admit deposition testimony given by the medical director of one manufacturer against a different manufacturer. It

appears likely that the evidence could have been admitted instead pursuant to the residual hearsay exception.

A second possible issue that arises with regard to the "predecessor in interest" requirement is whether it applies in a criminal case. Dictum in one circuit suggests that under specialized circumstances such evidence might be admitted against a criminal defendant, and there is some uncertainty expressed in the cases as to whether evidence may be offered against the government as a "predecessor in interest." There is no indication, however, that these cases are causing problems for the courts or litigants.

The Committee agreed not to amend Rule 804(b)(1).

Rule 804(b)(3). The Reporter had been asked to look at cases construing the corroboration requirement for exculpatory declarations against interest. The Committee was particularly interested in determining if the requirement was being interpreted too rigidly, and if a similar provision ought to be added for inculpatory statements. The Reporter distributed a number of recent cases to the Committee, and the Committee concluded that the corroboration requirement did not seem to be causing difficulties. Furthermore, in light of the Supreme Court's recent opinion in Williamson v. United States, 114 S.Ct. 2431 (1994), which restricted the use of inculpatory declarations against interest, the Committee saw no need to extend the corroboration requirement to inculpatory declarations at this time.

Articles 9 and 10. The Committee had asked the Reporter to consider a number of issues with regard to these two articles. The Committee agreed that the definition of "writings and recordings" that appears in Rule 1001(1) does not have to be added to Article 9. Rule 901(b) which specifically states that it is illustrating and not limiting methods of authentication is sufficiently flexible to deal with all of the items covered by the Rule 1001 definition.

The Committee also agreed that the certification requirement provided for foreign business records in 18 U.S.C. §3502(a) ought not to be extended to domestic records. In the case of domestic records, litigants will invariably handle authentication issues by stipulation except in instances in which a problem exists. When there is a problem and the witnesses are available in the United States they ought to be produced; allowing authentication by certification would be inappropriate.

Two issues were presented with regard to Rule 1006. 1) whether the rule should be clarified to state that summaries satisfying the rule will ordinarily be sent to the jury room, and 2) whether the text should be amended to explain that Rule 1006

does not apply to summaries that recapitulate evidence that has otherwise been admitted. The Committee decided not to propose an amendment to Rule 1006.

Rule 104. The Committee had determined not to consider possible amendments to Rule 104 until it was finished with its survey of the articles of the Federal Rules of Evidence other than Article 5. Now that the Committee had completed that agenda, it agreed that no amendment to Rule 104 was required.

Rape counselor privilege. The Crime Bill required the Judicial Conference to report to the Attorney General on the advisability of enacting a rape counselor privilege for the federal courts. The Committee agreed, however, to await the Attorney General's study as suggested by Ms. Harkenrider at the October 1994 meeting. A subcommittee consisting of Judge Fern Smith, Professor Broun, Ms. Harkenrider, Mr. Joseph and the Reporter analyzed rape counselor provisions that are presently in effect in twenty-four states. After a conference call among members of the subcommittee, Mr. Joseph drafted a qualified privilege that contained those features that the subcommittee considered least objectionable.[1] No one on the subcommittee,

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[1] It provided:

(a) Sexual assault counselors may not be compelled to testify about any opinion or information received from or about the victim without the consent of the victim. However, a counselor may be compelled to identify or disclose information if the court determines that the public interest and the need for the information substantially outweigh any adverse effect on the victim, the treatment relationship, and the treatment services if disclosure occurs.

(b) "Sexual assault counselor" for the purpose of this rule means a licensed medical professional, a licensed psychotherapist, or a person who has undergone at least [20 - 40] hours of counseling training and works under the direction of a supervisor in an organization or institution, or a division of an organization or institution, whose primary purpose is to render advice, counseling, or assistance to victims of sexual assault.

An alternate version of subdivision (a) was also suggested:

A victim has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made to a sexual assault counselor unless the court determines that the public interest and the need for the information substantially outweigh any adverse effect on the victim, the treatment relationship, and the treatment services if disclosure occurs.

however, was in favor of recommending that a rape counselor privilege ought to be enacted for the federal courts. The Committee agreed with the subcommittee. In particular, members thought it would be inappropriate to have a rape counselor privilege as the only specifically codified privilege. especially in light of the case load of the federal courts which rarely includes rape cases. Consequently, no recommendation to enact a rape counselor privilege will be made.

Review of proposed amendments and notes. Before the Committee adjourned, the amendments and proposed Committee Note to Rule 801(d)(2) and 804(b)(6) were distributed. The Committee unanimously voted to send them to the Standing Committee. The Committee also approved combining and transferring the text of the residual exceptions in Rule 803(24) and 804(b)(5), and directed the Reporter to add a Committee Note stating that no change in meaning was intended.

Respectfully submitted,

Margaret A. Berger
Professor of Law
Reporter

Item 10A

To: **Honorable Alicemarie H. Stotler, Chair, Standing Committee on Rules of Practice and Procedure**

From: **Patrick E. Higginbotham, Chair, Advisory Committee on Civil Rules**

DATE: **May 17, 1996**

Re: **Report of the Advisory Committee on Civil Rules**

I Introduction

The Advisory Committee on Civil Rules met on April 18 and 19, 1996, at the Administrative Office of the United States Courts in Washington, D.C. The Committee considered public comments on four rules that had been published for comment in September, 1995: Civil Rules 9(h), 26(c), 47(a), and 48. In part II(A) of this Report, the Committee recommends that the amendments to Rules 9(h) and 48 be submitted unchanged to the Judicial Conference with a recommendation for adoption. For reasons discussed in this Introduction, the Committee concluded that Rule 26(c) should be held for further consideration as part of a new project to study the general scope of discovery authorized by Rule 26(b)(1) and the scope of document discovery under Rules 34 and 45. (This project is described further in Part III.) This Introduction also will describe the Committee conclusion that amendment of Rule 47(a) should be postponed in favor of efforts to encourage mutual education and communication between bench and bar on the values of lawyer participation in the voir dire examination of prospective jurors.

Part II(B) of this Report recommends that this Committee approve for publication and comment revisions of the class action rule, Civil Rule 23. These proposed revisions result from a course of Committee study that began when, in March, 1991, the Judicial Conference requested that this Committee "direct the Advisory Committee on Civil Rules to study whether Rule 23, F.R.C.P. be amended to accommodate the demands of mass tort litigation." The proposals address some of the issues that arise in contemporary mass tort litigation, and address as well some issues that arise in small-claims class litigation.

Part III provides information about the plan to study the scope of discovery.

At the end are summaries of public comments and testimony on published Rules 26(c) and 47(a), separated out because of length. There follow the Minutes of the November, 1995 meeting and Draft Minutes of the April, 1996 meeting. The draft April Minutes are included because they bear directly on the Rule 23 recommendation described in Part II(B).

I (A)(1): Rule 26(c)

The protective order provisions of Rule 26(c) have been before the Committee for some time. Following public comment on a proposal published in October, 1993, this Committee accepted the Advisory Committee's recommendation that proposed amendments be transmitted to the Judicial Conference for its approval. This proposal was changed in several ways from the proposal that had been published. The Judicial Conference voted to delete the explicit reference to stipulated protective orders and then remanded for further consideration. Because there had not been an opportunity for public comment on the amendments in the form transmitted to the Judicial Conference, this Committee approved publication of the amendments in that form. A new round of public comment and hearings followed. Detailed summaries of the comments and testimony are provided toward the end of this Report. Comments supporting the proposal generally observed that it would clarify and confirm the general and better current practice. Comments opposing the proposal expressed continuing concern about the recognition of stipulated-protective-order practice, expressed fear that consideration of reliance on a protective order in determining whether to dissolve or modify the order would defeat desirable access, and often concluded that it would be better to make no changes than to adopt the proposal. The Committee decided to defer further consideration of protective orders for two related sets of reasons.

The first set of reasons for holding Rule 26(c) for further action basically turns on the lack of any urgent need for revision. Consideration of Rule 26(c) began with efforts to cooperate with Congress, in conjunction with pending legislative proposals. Painstaking consideration of the topic through the Rules Enabling Act procedure has shown that while there are differences of view about the need for public access to discovery materials produced in private litigation, there is no clear problem that demands rapid action.

The second and more important set of reasons for holding Rule 26(c) for further action arises from the Committee's conclusion that it is time to reconsider once again the basic scope of civil discovery. Protective order practice is intimately bound up with the sweeping scope of discovery under Rule 26(b)(1). Discovery may force production of information that is not admissible in any judicial proceeding, and that indeed proves not even relevant to the dispute. Consideration of Rule 26(c) has constantly reminded the Committee of the need to maintain the integral role of protective orders in justifying discovery of this scope. If reconsideration of the scope of discovery leads to significant changes, parallel changes in Rule 26(c) may prove advisable. If no changes are made in the scope of discovery, on the other hand, there will be time enough to resume consideration of Rule 26(c).

The text of Rule 26(c) as published for comment, and the Advisory Committee Note, are set out below.

RULE 26(c)

(c) (1) **Protective Orders.** ~~Upon~~ On motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, ~~and for good cause shown,~~ the court ~~in which~~ where the action is pending ~~or~~ – and ~~alternatively~~, on matters relating to a deposition, also the court in the district where the deposition ~~is to~~ will be taken – may, for good cause shown or on stipulation of the parties, make any order ~~which~~ that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(~~1~~A) ~~that~~ precluding the disclosure or discovery ~~not be had~~;

(~~2~~B) ~~that~~ specifying conditions, including time and place, for the disclosure or discovery ~~may be had only on specified terms and conditions, including a designation of time or place~~;

(~~3~~C) ~~that the discovery may be had only by~~ prescribing a discovery method ~~of discovery~~ other than that selected by the party seeking discovery;

(~~4~~D) ~~that~~ excluding certain matters ~~not be inquired into~~, or ~~that~~ limiting the scope of ~~the~~ disclosure or discovery ~~be limited~~ to certain matters;

(~~5~~E) designating the persons who may be present while ~~that~~ the discovery is ~~be~~ conducted ~~with no one present except persons designated by~~

~~the court~~;

(~~6~~F) ~~that a deposition, after being sealed,~~ directing that a sealed deposition be opened only ~~by order of the~~ upon court order;

(~~7~~G) ordering that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; or

(~~8~~H) directing that the parties simultaneously file specified documents or information enclosed in sealed envelopes, to be opened as ~~directed by~~ the court directs.

(2) If ~~the~~ a motion for a protective order is wholly or partly denied ~~in whole or in part~~, the court may, on ~~such~~ just terms ~~and conditions as are just~~, order that any party or ~~other~~ person provide or permit discovery or disclosure. ~~The provisions of~~ Rule 37(a)(4) apply~~ies~~ to the award of expenses incurred in relation to the motion.

(3) (A) The court may modify or dissolve a protective order on motion made by a party, a person bound by the order, or a person who has been allowed to intervene to seek modification or dissolution.

(B) In ruling on a motion to dissolve or modify a protective order, the court must consider, among other matters, the following:

(i) the extent of reliance on the order;

(ii) the public and private interests affected by the order, including any risk to public health or safety;

(iii) the movant's consent to submit to the terms of the order;

(iv) the reasons for entering the order, and

any new information that bears on the order; and

(v) the burden that the order imposes on persons seeking information relevant to other litigation.

Advisory Committee Note

Subdivisions (1) and (2) are revised to conform to the style conventions adopted for simplifying the present rules. No change in meaning is intended by these style changes.

Subdivision (1) also is amended to confirm the common practice of entering a protective order on stipulation of the parties. Stipulated orders can provide a valuable means of facilitating discovery without frequent requests for action by the court, particularly in actions that involve intensive discovery. If a stipulated protective order thwarts important interests, relief may be sought by a motion to modify or dissolve the order under subdivision (3). Subdivision (1), as all of Rule 26(c), deals only with discovery protective orders. It does not address any other form of order that limits access to court proceedings or materials submitted to a court.

Subdivision (3) is added to the rule to dispel any doubt whether the power to enter a protective order includes power to modify or vacate the order. The power is made explicit, and includes orders entered by stipulation of the parties as well as orders entered after adversary contest. The power to modify or dissolve should be exercised after careful consideration of the conflicting policies that shape protective orders. Protective orders serve vitally important interests by ensuring that privacy is invaded by discovery only to the extent required by the needs of litigation. Protective orders entered by agreement of the parties also can serve the important need to facilitate discovery without requiring repeated court rulings. A blanket protective order may encourage the exchange of information that a court would not order produced, or would order produced only under a protective order. Parties who rely on protective orders in these circumstances should not risk automatic disclosure simply because the material was once produced in discovery and someone else might want it.

Modification of a protective order may be sought to increase the level of protection afforded as well as to reduce it. Among the grounds for increasing protection might be violation of the order, enhanced appreciation of the extent to which discovery threatens important interests in privacy, or the need of a nonparty to protect interests that the parties have not adequately protected.

Modification or dissolution of a protective order does not, without more, ensure access to the once-protected information. If discovery responses have been filed with the court, access follows from a change of the protective order that permits access. If discovery responses remain in the possession of the parties, however, the absence of a protective order does not without more require that any party share the information with others.

Despite the important interests served by protective orders, concern has been expressed that protective orders can thwart other interests that also are important. Two interests have drawn special attention. One is the interest in public access to information that involves matters of public concern. Information about the conduct of government officials is frequently used to illustrate an area of public concern. The most commonly offered example focuses on information about dangerous products or situations that have caused injury and may continue to cause injury until the information is widely disseminated. The other interest involves the efficient conduct of related litigation, protecting adversaries of a common party from the need to engage in costly duplication of discovery efforts.

The first sentence of subparagraph (A) recognizes that a motion to modify or dissolve a protective order may be made by a party, a person bound by the order, or a person allowed to intervene for this purpose. A motion to intervene for this purpose need not meet the technical requirements of Rule 24. It is enough to show that the applicant has a sufficient interest to justify consideration of the motion. These provisions are supported by the practice that has developed through a long line of decisions.

Subparagraph (B) lists some of the matters that must be considered on a motion to dissolve or modify a protective order. The list is not all-inclusive; the factors that may enter the decision are too varied even to be foreseen.

The most important form of reliance on a protective order is the production of information that the court would not have ordered produced without the protective order. Often this reliance will take the form of producing information under a blanket protective order without raising the objection that the information is not subject to disclosure or discovery. The information may be protected by privilege or work-product doctrine, the outer limits of Rule 26(b)(1), or other rules. Reliance also may take other forms, including the court's own reliance on a protective order less sweeping than an order that flatly prohibits discovery. If the court would not have ordered discovery over proper objection, it should not later defeat protection of information that need not have been produced at all. Reliance also deserves consideration in other settings, but a finding that information is properly discoverable directs attention to the question of the terms – if any – on which protection should continue.

The public and private interests affected by a protective order include all of the myriad interests that weigh both for and against discovery. The question whether to modify or dissolve a protective order is, apart from the question of reliance, much the same as the initial determination whether there is good cause to enter the order. An almost infinite variety of interests must be weighed. The public and private interests in defeating protection

may be great or small, as may be the interests in preserving protection. Special attention must be paid to a claim that protection creates a risk to public health or safety. If a protective order actually thwarts publication of information that might help protect against injury to person or property, only the most compelling reasons, if any, could justify protection. Claims of commercial disadvantage should be examined with particular care, and mere commercial embarrassment deserves little concern. On the other hand, it is proper to demand a realistic showing that there is a need for disclosure of protected information. Often there is full opportunity to publicize a risk without access to protected discovery information. Paradoxically, the cases that pose the most realistic public risk also may be the cases that involve the greatest interests in privacy, such as a yet-to-be-proved claim that a party is infected with a communicable disease.

Consent to submit to the terms of a protective order may provide strong reason to modify the order. Submission to the terms of the order should include submission to the jurisdiction of the court to enforce the order. This factor will often overlap the fifth enumerated factor that considers the interests of persons seeking information relevant to other litigation. Submission to the protective order, however, does not establish an automatic right to modification. It may be better to leave to the court entertaining related litigation the question whether information is discoverable at all, the balance between the needs for discovery and for privacy, and the terms of protection that may reconcile these competing needs. These issues often are highly case-specific, and the court that entered the protective order may not be in a good position to address them.

Submission to the protective order and the court's enforcement jurisdiction also may justify disclosure to a state or federal agency. A public agency that has regulatory or enforcement jurisdiction often can compel production of the protected information by other means. The test of modification, however, does not turn on a determination whether the agency could compel production. Rather than provoke satellite litigation of this question, protection is provided by requiring the agency to submit to the protective order and the court's enforcement jurisdiction. If there is substantial doubt whether the agency's submission is binding, the court may deny disclosure. One obvious source of doubt would be a freedom of information act that does not clearly exempt information uncovered by this process.

The role of the court in considering the reasons for entering the protective order is affected by the distinction between contested and stipulated orders. If the order was entered on stipulation of the parties, the motion to modify or dissolve requires the court to consider the reasons for protection for the first time. All of the information that bears on the order is new to the court and must be considered. If the order was entered

after argument, however, the court may justifiably focus attention on information that was not considered in entering the order initially.

A protective order does not of itself defeat discovery of the protected information by independent discovery demands made in independent litigation on the person who produced the information. The question of protection must be resolved independently in each action. At the same time, it may be more efficient to reap the fruits of discovery already under way or completed without undertaking duplicating discovery. The closer the factual relationships between separate actions or potential actions, the greater the reasons for modifying a protective order to allow disclosure by the most efficient means.

Assessment of the need for disclosure in support of related litigation may require joint action by two courts. The court that entered the protective order can determine most easily the circumstances that justified the order and the extent of justifiable reliance on the order. The court where related litigation is pending can determine most easily the importance of the information in that litigation, and often can determine most accurately the balance between the interest in disclosure and the interest in nondisclosure or further protection. The rule does not attempt to prescribe procedures for cooperative action.

Special questions arise from the prospect of multiple related actions brought at different times and in different courts. Great inefficiencies can be avoided by establishing means of sharing information. Informal means are frequently found by counsel, and occasional efforts are made at establishing more formal means even outside the framework of consolidated proceedings. There is not yet sufficient experience to support adoption of formal rules establishing — and regulating the terms of access to — litigation support libraries, document depositories, depositions taken once for many actions, or similar devices. To the extent that consolidation devices may not prove equal to the task, however, these questions will deserve attention in the future.

Rule 26(c)(3) applies only to the dissolution or modification of protective orders entered by the court under subdivision (c)(1). It does not address private agreements entered into by litigants that are not submitted to the court for its approval. Nor does Rule 26(c)(3) apply to motions seeking to vacate or modify final judgments that occasionally contain restrictions on the disclosure of specified information. Rules 59 and 60 govern such motions.

I (A)(2): Rule 47(a)

The Committee decided not to proceed with the preliminary draft of proposed amendments to Civil Rule 47 that would have entitled attorneys to participate in voir dire and orally examine prospective jurors under reasonable court-imposed limits. Comments from nearly 200 judges, lawyers, and legal organizations were submitted and three public hearings were held on the proposed amendments.

The amendments addressed a significant concern voiced by the bar that some judges are doing an inadequate or perfunctory job of questioning prospective jurors. Nearly 70% of trial judges currently allow attorneys to supplement the judge's questions to prospective jurors as contemplated under the proposed rule. But the judges' major objection to the proposals continued to be the fear that – despite provisions of the proposed rule granting authority to impose reasonable limits – the loss of absolute judicial control would lead to abuse. Other judges were concerned that the proposal would lead to more appeals.

Adequate voir dire remains an important concern for the bar. Twenty-five national and local bar and other legal associations commented in favor of the proposed amendments. Some argued that a trial lawyer is more knowledgeable of a particular case and in a better position to ask pertinent questions of venire members than is a trial judge. Contrary to the views of some judges, lawyers also believed – with support by some juror studies – that prospective jurors are more comfortable responding to lawyer questioning rather than questioning by a jduge whose stature and office may intimidate them.

The Committee was not persuaded that pursuing the proposed changes in the rules was the appropriate response to the range of expressed concerns. Instead, the Committee urges study of the jury selection process and exploration of voir dire methods at judicial workshops and orientations for newly appointed judges, including informed discussions with experienced trial lawyers and judges regarding voir dire.

The Advisory Committee is of the strong view that the rulemaking process operated as it was designed. The bench, bar, and public expressed their views, and the Committee carefully reviewed each comment before reaching a decision. The Advisory Committee is persuaded that training sponsored by the Federal Judicial Center offers a good first step in bridging the gap between the bench and bar on voir dire and in achieving methods of jury selection that – while drawing upon local practice – are both fair and efficient.

Rule 47. Selecting ~~Selection of~~ Jurors

(a) ~~Examination of~~Examining Jurors. The court ~~may~~ shall ~~permit the parties or their attorneys to~~ conduct the voir dire examination of prospective jurors ~~or may itself conduct the examination~~. But the court shall also permit the parties to orally examine the prospective jurors to supplement the court's examination within reasonable limits of time, manner, and subject matter, as the court determines in its discretion. The court may terminate examination by a person who violates those limits, or for other good cause. ~~In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.~~

ADVISORY COMMITTEE NOTE

Rule 47(a) in its original and present form permits the court to exclude the parties from direct examination of prospective jurors. Although a recent survey shows that a majority of district judges permit party participation, the power to exclude is often exercised. See *Shapard & Johnson, Survey Concerning Voir Dire* (Federal Judicial Center 1994). Courts that exclude the parties from direct examination express two concerns. One is that direct participation by the parties extends the time required to select a jury. The second is that counsel frequently seek to use voir dire not as a means of securing an impartial jury but as the first stage of adversary strategy, attempting to establish rapport with prospective jurors and influence their views of the case.

The concerns that led many courts to undertake all direct examination of prospective jurors have earned deference by long tradition and widespread adherence. At the same time, the number of federal judges that permit party participation has grown considerably in recent years. The Federal Judicial Center survey shows that the total time devoted to jury selection is virtually the same regardless of the choice made in allocating responsibility between court and counsel. It also shows that judges who permit party participation have found little difficulty in controlling potential misuses of voir dire. This experience demonstrates that the problems that have been perceived in some state-court systems of party participation can be avoided by making clear the discretionary power of the district court to control the behavior of the party or counsel. The ability to enable party participation at low cost is of itself strong reason to permit party participation. The parties are thoroughly familiar with the case by the start of trial. They are in the best position to know the juror information that bears on challenges for cause and peremptory challenges, and to elicit it by jury questioning. In addition, the opportunity to participate provides an appearance and reassurance of fairness that has value in itself.

The strong direct case for permitting party participation is

further supported by the emergence of constitutional limits that circumscribe the use of peremptory challenges in both civil and criminal cases. The controlling decisions begin with *Batson v. Kentucky*, 476 U.S. 79 (1986) and continue through *J.E.B. v. Alabama ex rel. T.B.*, 114 S.Ct. 1419 (1994). *See also Purkett v. Elem*, 115 S.Ct. 1769 (1995). Prospective jurors "have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination." *J.E.B.*, 114 S.Ct. at 1428. These limits enhance the importance of searching voir dire examination to preserve the value of peremptory challenges and buttress the role of challenges for cause. When a peremptory challenge against a member of a protected group is attacked, it can be difficult to distinguish between group stereotypes and intuitive reactions to individual members of the group as individuals. A stereotype-free explanation can be advanced with more force as the level of direct information provided by voir dire increases. As peremptory challenges become less peremptory, moreover, it is increasingly important to ensure that voir dire examination be as effective as possible in supporting challenges for cause.

Fair opportunities to exercise peremptory and for-cause challenges in this new setting require the assurance that the parties can supplement the court's examination of prospective jurors by direct questioning. The importance of party participation in voir dire has been stressed by trial lawyers for many years. They believe that just as discovery and other aspects of pretrial preparation and trial, voir dire is better accomplished through the adversary process. The lawyers know the case better than the judge can, and are better able to frame questions that will support challenges for cause or informed use of peremptory challenges. Many also believe that prospective jurors are intimidated by judges, and are more likely to admit potential bias or prejudgment under questioning by the parties.

Party examination need not mean prolonged voir dire, nor subtle or brazen efforts to argue the case before trial. The court can undertake the initial examination of prospective jurors, restricting the parties to supplemental questioning controlled by direct time limits. Effective control can be exercised by the court in setting reasonable limits on the manner and subject-matter of the examination. Lawyers will not be allowed to advance arguments in the guise of questions, to seek committed responses to hypothetical descriptions of the case, to assert propositions of law, to intimidate or ingratiate, or otherwise to turn the opportunity to seek information about prospective jurors into improper adversary strategies. The district court has ample power to control the time, manner, and subject matter of party examination. The process of determining the limits continues throughout the course of each party's examination, and includes the power to terminate further examination by a person that has misused or abused the right of examination. Among other grounds, termination may be warranted not only by conduct that may impair the trial jury's impartiality but also by questioning that is

repetitious, confusing, or prolonged, or that threatens inappropriate invasion of the prospective jurors' privacy. The determination to set limits or to terminate examination is confided to the broad discretion of the district court. Only a clear abuse of this discretion — usually in conjunction with a clearly inadequate examination by the court — could justify reversal of an otherwise proper jury verdict.

The voir dire process can be further enhanced by use of jury questionnaires to elicit routine information before voir dire begins. Questionnaires can save much time, and may improve in many ways the development of important information about prospective jurors. Potential jurors are protected against the embarrassment of public examination. A prospective juror may be more willing to reveal potentially embarrassing information in responding to a questionnaire than in answering a question in open court. Written answers to a questionnaire also may avoid the risk that answers given in the presence of other prospective jurors may contaminate a large group.

Questionnaires are not required by Rule 47(a), but should be seriously considered. At the same time, it is important to guard against the temptation to extend questionnaires beyond the limits needed to support challenges for cause and fair use of peremptory challenges. Just as voir dire examination, questionnaires can be used in an attempt to select a favorable jury, not an impartial one. Prospective jurors must be protected against unwarranted invasions of privacy; the duty of jury service does not support casual inquiry into such matters as religious preferences, political views, or reading, recreational, and television habits. Indeed the list of topics that might be of interest to a party bent on manipulating the selection of a favorable jury through the use of sophisticated social-science profiles and personality evaluations is virtually endless. Selection of an impartial jury requires suppression of such inquiries, not encouragement. The court's guide must be the needs of impartiality, not party advantage.

II. ACTION ITEMS

A. Rules Transmitted for Judicial Conference Approval
Rules 9(h), 48

1. Synopsis of proposed amendments

This brief synopsis will be followed by a separate introduction for each of Rules 9(h) and 48.

These proposed amendments of Rules 9(h) and 48 were published for comment in September, 1995. They are now submitted with a recommendation that they be transmitted to the Judicial Conference for approval in the form in which they were published.

The Rule 9(h) amendment resolves a possible ambiguity by including nonadmiralty claims in an admiralty action within the interlocutory appeal provisions of 28 U.S.C. § 1292(a)(3).

The Rule 48 amendment restores the 12-person civil jury, but without alternates and with the continuing right of the parties to stipulate to smaller juries down to a floor of six.

(a) Rule 9(h)

28 U.S.C. § 1292(a)(3) provides for interlocutory appeals in "admiralty cases." Rule 9(h) now provides that "admiralty cases" in this statute "shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h)." Because an admiralty case may include nonadmiralty claims, this language is not easily applied when a district court disposes of a nonadmiralty claim advanced in an admiralty case by an order that otherwise fits the requirements of § 1292(a)(3). The amendment resolves the question by allowing an appeal without regard to whether the order disposes of an admiralty claim or a nonadmiralty claim.

(b) Rule 48

The proposed amendment of Rule 48 would restore the 12-person jury, albeit without alternates. The Committee weighed the following benefits of the proposal. First, a 12-person jury would significantly increase the statistical probability of including a more diverse cross-section of the community than a smaller jury, and, in particular, would include greater minority representation. For example, a 12-person jury is one and one-half times as likely to include at least one member of a minority constituting 10% of the population than is a 6-person jury. An empirical study has shown minorities represented on 12-person juries 82% of the time and on 6-person juries only 32% of the time. Second, a 12-person jury has a greater capacity for recalling all facts and arguments presented at trial. Third, a larger jury would be less likely to be dominated by a single aggressive juror and less likely to reach

an aberrant decision. Fourth, recent studies have challenged the data relied on by the courts when they originally decided to reduce jury size in the early 1970s. Fifth, few magistrate judges lack access to 12-person jury courtrooms within reasonable proximity to their chambers. Sixth, although the added costs are not insignificant, the increase would be less than 13% of the funds allocated to pay for jurors' expenses, and only one-third of one percent of the judiciary's overall $3 billion budget.

Two objections to the proposal were elicited during the public comment period. First, the present flexibility in the rule, which allows, but does not require, a judge to seat a jury of fewer than 12 persons, has been working well, and the proposed change is unnecesssary. Second, incurring added costs to pay the expenses of additional venire members and courtrooms would be unwise, especially in these times of financial restraints.

After discussing the comments, the Committee voted to recommend that the proposed amendments to Rule 48 be submitted to the Standing Committee. The Committee found particularly helpful the article written by Chief Judge Richard S. Arnold, which reviews the long history and extols the virtues of a 12-person jury. 22 *Hofstra L. Rev.* 1 (1993). In the end, the Committee was persuaded that the jury function lies at the heart of the Article III courts; that it is vital that we regain the benefits of 12-person juries, restoring a tradition adhered to for hundreds of years.

(2) Text of Proposed Amendments, GAP Report, and Summary of Comments Relating to Particular Rules:

Rule 9. Pleading Special Matters

* * *

(h) Admiralty and Maritime Claims. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. ~~The reference in Title 28, U.S.C. § 1292(a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h)~~ A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. § 1292(a)(3).

ADVISORY COMMITTEE NOTE

Section 1292(a)(3) of the Judicial Code provides for appeal from "[i]nterlocutory decrees of * * * district courts * * * determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed."

Rule 9(h) was added in 1966 with the unification of civil and admiralty procedure. Civil Rule 73(h) was amended at the same time to provide that the § 1292(a)(3) reference "to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of Rule 9(h)." This provision was transferred to Rule 9(h) when the Appellate Rules were adopted.

A single case can include both admiralty or maritime claims and nonadmiralty claims or parties. This combination reveals an ambiguity in the statement in present Rule 9(h) that an admiralty "claim" is an admiralty "case." An order "determining the rights and liabilities of the parties" within the meaning of § 1292(a)(3) may resolve only a nonadmiralty claim, or may simultaneously resolve interdependent admiralty and nonadmiralty claims. Can appeal be taken as to the nonadmiralty matter, because it is part of a case that includes an admiralty claim, or is appeal limited to the admiralty claim?

The courts of appeals have not achieved full uniformity in applying the § 1292(a)(3) requirement that an order "determin[e] the rights and liabilities of the parties." It is common to assert that the statute should be construed narrowly, under the general policy that exceptions to the final judgment rule should be construed narrowly. This policy would suggest that the ambiguity should be resolved by limiting the interlocutory appeal right to orders that determine the rights and liabilities of the parties to an admiralty claim.

A broader view is chosen by this amendment for two reasons. The statute applies to admiralty "cases," and may itself provide for appeal from an order that disposes of a nonadmiralty claim that is joined in a single case with an admiralty claim. Although a rule of court may help to clarify and implement a statutory grant of jurisdiction, the line is not always clear between permissible implementation and impermissible withdrawal of jurisdiction. In addition, so long as an order truly disposes of the rights and liabilities of the parties within the meaning of § 1292(a)(3), it may prove important to permit appeal as to the nonadmiralty claim. Disposition of the nonadmiralty claim, for example, may make it unnecessary to consider the admiralty claim and have the same effect on the case and parties as disposition of the admiralty claim. Or the admiralty and nonadmiralty claims may be interdependent. An illustration is provided by *Roco Carriers, Ltd. v. M/V Nurnberg Express*, 899 F.2d 1292 (2d Cir. 1990). Claims for losses of ocean shipments were made against two defendants, one subject to admiralty jurisdiction and the other not. Summary judgment was granted in favor of the admiralty defendant and against the nonadmiralty defendant. The nonadmiralty defendant's appeal was accepted, with the explanation that the determination of its liability was "integrally linked with the determination of non-liability" of the admiralty defendant, and that "section 1292(a)(3) is not limited to admiralty *claims*; instead, it refers to admiralty *cases*." 899 F.2d at 1297. The advantages of permitting appeal by the nonadmiralty defendant would be particularly clear if the plaintiff had appealed the summary judgment in favor of the admiralty defendant.

It must be emphasized that this amendment does not rest on any particular assumptions as to the meaning of the § 1292(a)(3) provision that limits interlocutory appeal to orders that determine the rights and liabilities of the parties. It simply reflects the conclusion that so long as the case involves an admiralty claim and an order otherwise meets statutory requirements, the opportunity to appeal should not turn on the circumstance that the order does — or does not — dispose of an admiralty claim. No attempt is made to invoke the authority conferred by 28 U.S.C. § 1292(e) to provide by rule for appeal of an interlocutory decision that is not otherwise provided for by other subsections of § 1292.

GAP REPORT ON RULE 9(h)

No changes have been made in the published proposal.

Summary of Comments: Rule 9(h)

95-CV-156: Robert J. Zapf, Esq., for the Practice and Procedure Committee, U.S. Maritime Law Assn.: Fully supports the proposal. "[I]nterlocutory appeals in admiralty cases are very useful, even if rare." Nonmaritime claims, such as environmental claims, should be included.

95-CV-193: Carolyn B. Witherspoon, Esq., for the Federal Legislation and Procedures Committee, Arkansas Bar Assn.: The Committee had no objections.

95-CV-274: Kent S. Hofmeister, Esq., for Federal Bar Assn. by Mark D. Laponsky, Esq., Chair of Labor Section: Congress should study the desirability of § 1292(a)(3) and interlocutory appeals in general. But so long as § 1292(a)(3) persists, the right to appeal should extend to nonadmiralty matters included in an admiralty case. The proposal is endorsed.

Testimony on Rule 9(h)

George J. Koelzer, Esq. December 15: Tr at 107: "Proposed Rule 9(h) * * * is one I suppose everybody endorses."

Rule 48. Number of Jurors -- Participation in Verdict

The court shall seat a jury of ~~not fewer than six and not more than~~ twelve members. ~~and a~~All jurors shall participate in the verdict unless excused from service ~~by the court pursuant to~~ under Rule 47(c). Unless the parties ~~otherwise~~ stipulate otherwise, (1) the verdict shall be unanimous, and (2) no verdict ~~shall~~ may be taken from a jury ~~reduced in size to~~ of fewer than six members.

Advisory Committee Note

Rule 48 was amended in 1991 to reflect the conclusion that it had been "rendered obsolete by the adoption in many districts of local rules establishing six as the standard size for a civil jury." Six-person jury local rules were upheld by the Supreme Court in *Colgrove v. Battin,* 413 U.S. 149 (1973). The Court concluded that the Seventh Amendment permits six-person juries, and that the local rules were not inconsistent with Rule 48 as it then stood.

Rule 48 is now amended to restore the core of the twelve-member body that has constituted the definition of a civil jury for centuries. Local rules setting smaller jury sizes are invalid because inconsistent with Rule 48.

The rulings that the Seventh Amendment permits six-member juries, and that former Rule 48 permitted local rules establishing six-member juries, do not speak to the question whether six-member juries are desirable. Much has been learned since 1973 about the advantages of twelve-member juries. Twelve-member juries substantially increase the representative quality of most juries, greatly improving the probability that most juries will include members of minority groups. The sociological and psychological dynamics of jury deliberation also are strongly influenced by jury size. Members of a twelve-person jury are less easily dominated by an aggressive juror, better able to recall the evidence, more likely to rise above the biases and prejudices of individual members, and enriched by a broader base of community experience. The wisdom enshrined in the twelve-member tradition is increasingly demonstrated by contemporary social science.

Although the core of the twelve-member jury is restored, the other effects of the 1991 amendments remain unchanged. Alternate jurors are not provided. The jury includes twelve members at the beginning of trial, but may be reduced to fewer members if some are excused under Rule 47(c). A jury may be reduced to fewer than six members, however, only if the parties stipulate to a lower number before the verdict is returned.

Careful management of jury arrays can help reduce the incremental costs associated with the return to twelve-member juries.

Sylistic changes have been made.

GAP Report on Rule 48

No changes have been made in Rule 48 as published.

Rule 48
Prepublication Comments

(The prepublication comments are presented in the order of the set presented to the Committee on Rules of Practice and Procedure for the July, 1995 meeting.)

Hon. William T. Moore, Jr.: As practicing lawyer and newly appointed judge, has had no difficulties with Rule 48, and recommends that it not be changed.

Hon. John F. Nangle: In practice, 7- and 8-member juries are used due to the elimination of alternates. In 21 years on the bench has never had a hung jury. Are majority verdicts being considered? Why ask for trouble? Do not adopt the proposal.

Hon. Morey L. Sear: The Rule 47 proposal is very bad. "[T]he proposal to go back to 12 person juries is equally bad."

Hon. J. Clifford Wallace: The Judicial Council of the Ninth Circuit unanimously opposes the Rule 48 proposal. Experiences with smaller juries generally have been positive, and there are no compelling reasons to empanel larger juries for all cases.

Hon. Ann C. Williams: The Court Administration and Case Management Committee unanimously declined to endorse the proposal. The present rule provides flexibility, allowing 12-person juries when the complexity of the case warrants. Mandating 12-person juries for all cases would require citizens to spend more time in the judicial process in cases where that may not be necessary. Education of judges regarding jury size in particular cases is a better alternative. And some court facilities are not equipped for 12-person juries.

Hon. Joseph E. Stevens, Jr.: In complete accord with Judge Nangle. Would prefer to eliminate civil juries. Barring any such radical departure, 6- or 8-person juries are economical and expeditious. They should not be abandoned.

Hon. Claude M. Hilton: There are no problems with the 6-person civil jury, and no reason to consider any changes.

Hon. John A. MacKenzie: "In 28 years on this bench, I have never felt the jury size had produced a bad verdict." We now routinely seat 8 jurors.

Hon. James M. Rosenbaum: Writes as chair of the Court Design Guide Subcommittee of the Judicial Conference Committee on Security, Space and Facilities. Present Design Guide standards contemplate 6- to 8-person juries for magistrate judges. The square foot costs of court construction range from $150 to $250. There are 50 court facilities in various stages of design and construction; all would be affected by the proposed amendment. The Committee has and offers no opinion on the advisability of the rules change.

Hon. Richard L. Williams: The need for a rule governing the number of civil jurors is a mystery. "Please notify whatever group of the federal judiciary concerned about this issue to table it in perpetuity and move on to something that will be helpful."

Hon. Rebecca Beach Smith: Endorses her approval on Judge Williams' letter.

Anthony A. Alaimo: Concurs completely with the views expressed by Judge John Nangle, noted above.

Comments After Publication

95-CV-95: Hon. Stewart Dalzell: In E.D.Pa., the cost of adding four jurors at $50 to $52 a day would be $261,000 a year. Never has empaneled an 8-person jury without at least one black juror. If 8-person jurors were more unstable, we would expect longer deliberations; in fact, there seems to be no difference in deliberation time between 8- and 12-person juries. (The same remarks have been appended to Judge Dalzell's later letter, 95-CV-109.)

95-CV-98: John Wissing, Esq.: True community representation is not possible with 6 jurors. "[L]uck, chance or bias * * * play a role in the verdict because too few minds are at work." 12-person juries are better.

95-CV-99: Hon. Edwin F. Hunter: W.D.La. initiated the 6-person jury. This should be left to the discretion of the court.

95-CV-100: Hon. Andrew W. Bogue: The Committee Note is "absolute nonsense." "I do not appreciate broad, general comments such as you people made without any empirical studies whatsoever." 6- or 7-person juries are easier to manage and save money.

95-CV-101: Hon Stanwood R. Duval, Jr.: Most judges seat 8 or 9 jurors; Batson ensures minority representation; there is no unfairness; 12 increases the prospect of "one person who is recalcitrant, obdurate, biased * * *, thereby increasing the possibility of a mistrial." The number of peremptories would not be increased.

95-CV-102: Charles W. Daniels, Esq.: "It is hard to believe that you are getting a fair cross section of the community when you have only 6 people sitting in the jury box * * *."

95-CV-107: Hon Martin L.C. Feldman: 12-person juries add needless time to the selction process and cost more. E.D.La. has long used 6-person juries, which dispense quality justice and achieve diversity.

95-CV-108: Hon. Robert B. Propst: Disagrees with the proposal. if there is change, why not 8- or 9-person juries? And less than unanimous verdicts?

95-CV-109: Hon. Stewart Dalzell: E.D.Pa. is in the process of creating nine courtrooms with jury boxes that will hold only 8 people; the building cannot accommodate larger jury boxes and still fit nine courtrooms in the available space. In addition, there are existing courtrooms, in constant use for civil trials, that seat only 12; they would be unusable because of the need to seat alternates as well.

95-CV-110: Bertram W. Eisenberg, Esq.: The time and administrative savings supposed to follow reduction to 6-member juries "never really panned out." It is good to return to 12.

95-CV-111: Frank E. Tolbert, Esq.: It is good to return to the common law tradition of 12, even though 6-person juries are "more prompt."

95-CV-112: Hon. Jackson L. Kiser: 6-person juries have worked admirably. Do not increase costs. If there is a strong leader on the jury, "that is the luck of the draw"; 11 others can be led as easily as 5 others.

95-CV-113: Hon. Judith N. Keep, for the unanimous judges of the Southern District of California: Realistically, this will mean 11- and 12-person juries in short cases, and 6- or 7-person juries in long cases because of attrition in long cases. And there is no hope of a cross-section in long cases in any event, since financial and family hardships eliminate many groups of people. And "tradition" is not a compelling concern when various states have widely different practices.

95-CV-114: Hon. John W. Bissell: The "core" of the 12-person jury will not be restored, because fewer will be left at verdict time in protracted cases; 16 or 18 would be needed to have 12 to decide. Costs would go up. And New Jersey has 6-person juries; defendants would be encouraged to remove, expecting less risk of a substantial plaintiff's verdict from a 12-person jury ("did the defense insurance industry promote and/or endorse the proposed amendment"?).

95-CV-115 Hon. Richard L. Williams: Present juries generally have 8 members. A 50% increase would increase the burden on citizens called to serve. Sufficient representativeness is achieved by 8. Larger juries will protract deliberations, and increase the number of mistrials for failure to agree.

95-CV-118: Richard C. Watters, Esq.: "Rule 48 would be a positive step in civil jury trials."

95-CV-119: Richard A. Sayles, Esq.: "[J]uries of less than twelve, especially of six, produce extreme results, one way or the other, more often than juries of twelve."

95-CV-121: Hon. Michael A. Telesca: Increasing jury size will lead to greater costs, particularly with jury-box sizes now often set at eight. If the judge carefully selects the jury, 6 will not be susceptible to domination, can accurately recall the evidence, and can decide fairly.

95-CV-122: Allen L. Smith, Jr., Esq.: I participated in a Supreme Court case that questioned 6-person juries in 1972. I heartily approve a return to 12. 12 are needed to provide "a desirable experiential diversity needed in so much civil litigation."

95-CV-126: Daniel V. Flatten, Esq.: Favors the proposal.

95-CV-127: Daniel A. Ruley, Jr., Esq.: "My experience with six person juries is that they lend themselves to control by one or two dominant persons, something that seldom happened with twelve persons." (See also 95-CV-165.)

95-CV-128: Mike Milligan, Esq.: Favors the increase. It will make it more difficult to exercise peremptory challenges in a discriminatory manner.

95-CV-129: Hon. Charles P. Sifton: As chief judge of E.D.N.Y., currently constructing two new courthouses with 8-person jury boxes in magistrate judges' courtrooms, objects to a proposal that will require redesign and increased expense.

95-CV-132: Hon. Robert P. Propst: (See also 95-CV-108): The Committee should consider less-than-unanimous verdicts. This may be particularly desirable if a first trial has mistried for failure to reach unanimous agreement.

95-CV-134: Professor Michael H. Hoffheimer: It is good to return to

12-member juries, but bad to allow them to be reduced to as few as 6 at deliberation time. This will encourage court and attorneys to tolerate significant attrition.

95-CV-137: Hon. Philip M. Pro: 12-member juries can be used now where appropriate; juries of less and 8 or 9 are rare. And magistrate judges now conduct many civil jury trials; their courtrooms are not large enough for 12-person jury boxes.

95-CV-139: Hon. Joseph M. Hood: Questions whether the additional cost is warranted.

95-CV-140: Michael E. Oldham, Esq., and Heather Fox Vickles, Esq.: 12-person juries "increase the representative quality of most juries, enhancing the probability of minority participation, and improve the sociologic and psychological dynamics of jury deliberations."

95-CV-141: Brent W. Coon, Esq.: Supports the proposal.

95-CV-142: Hon. Alan A. McDonald: Smaller juries are more efficient and economical. What data show that larger juries are more representative? Nor is there factual support for the assertion that the sociological and psychological dynamics are affected. All that can be said is that it is easier to hang a 12-person jury.

95-CV-143: Hon. Fred Van Sickle: The amendment would increase costs, and ask more of prospective jurors. It will increase the risk of hung juries; parties rarely stipulate to nonunanimous verdicts. It will increase removal from state court to take advantage of the unanimous 12-member jury requirement. The Chief Judges of the Ninth Circuit have voted unanimous opposition.

95-CV-145: Hon. William O. Bertelsman: No strong opposition, but most civil juries now are 8 to 10. There is no need for change.

95-CV-147: Hon. Peter C. Dorsey: Agrees with Judge Telesca, 95-CV-121 above.

95-CV-149: Thomas D. Allen, Esq.: 12-member juries, with a unanimity requirement provide "a greater probability of correctness."

95-CV-152: Richard W. Nichols, Esq.: California permits 9-3 verdicts; if federal courts use 12-person unanimous juries, defendants will remove many more cases because this practice favors them. Diversity can be protected by effective use of the proposed Rule 47(a) power to participate in voir dire, and by astute observance of Batson. Jurors are more likely to be influenced by a lawyer on the jury than a loudmouth. Costs will be increased, particularly in a state such as California where some jurors live so far from court that they must be housed in hotels. It is better to leave this matter for local rules that can respond to local conditions.

95-CV-154: Ira B. Grudberg, Esq.: Supports for the reasons stated in the commentary.

95-CV-155: J. Houston Gordon, Esq.: 12-person juries are more representative and less likely to be dominated by one or two. The verdicts are more acceptable to the public.

95-CV-159: Hon. B. Avant Edenfield: Vigorously opposed. 12-person juries are used at times now, but it is more orderly to use 8. There is no information showing 12-person juries are better. (Judge

Edenfield renewed his comments in 95-CV-272.)

95-CV-160: Hon. Michael M. Mihm: 6-member juries work well. There are few complaints about lack of minority representation, and verdicts do not "fall along minority lines." The social tinkering represented by concern with the sociological and psychological dynamics of jury deliberation "has no place within the Federal Rules of Civil Procedure."

95-CV-162: J. Richard Caldwell, Jr., Esq.: 12-person juries represent a meaningful cross-section. There is less risk that one juror with a private agenda will dominate. There is no reason to expect that significantly more time will be required.

95-CV-163: Hon. Prentice H. Marshall: Wholeheartedly approves.

95-CV-164: Hon. Donald D. Alsop: The amendment at least should provide for quotient [sic for majority] verdicts if the jury is unable to agree unanimously after a stated number of hours. Minnesota state courts allow a 5/6 verdict after 6 hours of deliberation; the practice is successful.

95-CV-165: Daniel A. Ruley, Jr., Esq.: 6-person juries frequently are controlled by one or two dominant persons, leading to higher and lower verdicts and, at times, verdicts contrary to the evidence. These risks are reduced by 12-person juries. (See also 95-CV-127.)

95-CV-166: Hon. Lucius D. Bunton: A survey of all 10 active judges in W.D. Tex. shows 9 opposed to changing rule 48. None now use 12 jurors; most use 7 or 8. Minorities "are more than adequately represented." An experiment with 3-person shadow juries showed that in 80% of the cases the 3-person juries reached the same result as the 6-person juries. An increase in numbers is expensive.

95-CV-169: Hon. Gene E. Brooks: 12-person juries will bring additional costs. Minority participation in the *system* will be unchanged; only the numbers in particular trials will be affected. Differences between 6 and 12 in sociological and psychological dynamics should be statistically insignificant: "For the Committee to base its preference upon psychological intangibles is wrong."

95-CV-172: Hon. Jerry Buchmeyer: The change "is also unnecessary. I use 12-member juries in all my criminal and civil trials."

95-CV-173: Hon. Sam R. Cummings: Registers opposition.

95-CV-174: Hon. Virginia M. Morgan, for Federal Magistrate Judges Assn.: Opposes. Magistrate judges presided at 17.2% of federal civil jury trials in the year ending September 30, 1994. Jury sizes now generally range from 7 to 9; they perform well. There are no perceptible problems in including minority representatives. The fear of domination by an aggressive juror has not been demonstrated. Increased jury size will add to costs. And most magistrate judges have courtrooms designed for smaller juries. (The same statement has been given number 95-CV-202.)

95-CV-180: Hon. Stewart Dalzell: See also 95-CV-95, 109: Supplementing earlier comments, adds that the architects have now stated that jury boxes could be expanded in the E.D.Pa. space renovation project only by reducing the number of courtrooms, and that there is no money to draft a contingency plan.

95-CV-181: Hon. Thomas P. Griesa, for the unanimous judges of S.D.N.Y.: There is no significant benefit in returning to 12-person juries. The change would increase cost and lengthen the time needed to select a jury. 6-, 8-, and 9-member juries are as likely to be representative of the community, and are no more likely to be dominated by a single member. (The same statement was forwarded by Judge John F. Keenan and assigned number 95-CV-181.)
95-CV-183: Hon. Fred Biery: Experience with 6- and 12-member juries in state and federal courts has shown no observable difference. Jury funds are stretched already.
95-CV-184: Paul W. Mollica, Esq., for the Federal Courts Committee of the Chicago Council of Lawyers: Endorses 12-person juries for the reasons advanced by the Committee Note, adding that larger juries may reduce the incidence of Batson violations.
95-CV-185: Hon. Clarence A. Brimmer: I try cases to 7-person juries "to save funds." 12-person juries would be "a waste of money."
95-CV-186: Hon. Sam Sparks: 6-person jury verdicts parallel 12-person jury verdicts. The expense of jury trials is staggering; why double it?
95-CV-187: Hon. Edward C. Prado for the 5th Circuit District Judges Assn.: A poll of 94 district judges in the 5th Circuit produced 73 responses as of the date of writing. 63 oppose the proposal, while 10 favor it.
95-CV-189: Hon. Barefoot Sanders: Normally uses 8- or 9-person juries. Only speculation supports the proposal to revert to 12.
95-CV-190: Robert R. Sheldon, for the Connecticut Trial Lawyers Assn.: Because attorney voir dire takes time, expanding the jury may hamper efforts to provide attorney voir dire. 12-member juries may lead to compromise verdicts because of the difficulty of securing unanimity; the proposal "contains a strong bias against the party carrying the burden of proof – which means that the proposal would work against plaintiffs in civil cases."
95-CV-193: Carolyn B. Witherspoon, Esq., for the Federal Legislation and Procedures Committee, Arkansas Bar Assn.: No objection.
95-CV-198: Hon. John D. Rainey: 12-person juries will result in longer trials, and add delay for illness, car trouble, or the like. There will be more mistrials and more expense.
95-CV-200: Hon. David Hittner: There is no need for a 12-person jury when a unanimous verdict is required. It will add expense.
95-CV-203: Hon John F. Nangle: By eliminating alternates, we have gone to 7- or 8-person juries. "The idea of securing more diversity with 12 is ridiculous! Why not 14 or 16? * * * [A]re you still going to require a unanimous verdict"?
95-CV-206: Dean M. Harris, Esq., for Atlantic Richfield Co.: A 12-person jury is more likely to be representative, and more likely to render an impartial verdict.
95-CV-214: Kathleen L. Blaner, Esq., for Litigation Section, D.C. Bar: The proposal "should foster improved diversity among jury members, resulting in a jury that is more representative of the community."
95-CV-215: Hon. Terry C. Kern: 12 jurors will increase costs, and

lead to a dramatic increase in mistrials. Requiring a unanimous 12-person verdict "would be a heavy burden for plaintiffs and would skew the process dramatically in the defendant's favor."

95-CV-221: Norbert F. Bergholtz, Esq.: 12-person juries will be as representative of society as possible. And "[p]arties in * * * high risk litigation deserve to have the issues decided by the collective wisdom of a reasonable number of individuals."

95-CV-230: Gordon R. Broom, Esq., for Illinois Assn. of Defense Trial Counsel: A 12-person jury is more representative, and less susceptible of domination. But there should be discretion to add alternate jurors for long trials.

95-CV-233: Roger D. Hughey, Esq., for Wichita Bar Assn.: 12 jurors increase the quality of jury discourse and may increase diversity. But "a requirement of unanimity in a 12-member jury * * * will cause an increase in mistrials, and may increase the burden of proof upon plaintiffs." Agreement of 10 jurors should be sufficient to return a verdict.

95-CV-234: James A. Strain, Esq., for Seventh Cir. Bar Assn.: The interests served by returning to 12-person juries "must be juxtaposed to a civil justice system plagued with back-log." It is not clear that a return to 12-person juries is desirable.

95-CV-238: Hon. Lawrence P. Zatkoff: So long as the verdict is unanimous, 12 are not better than 6. The proposal will be self-defeating, because with 12 jurors the parties will stipulate to nonunanimous verdicts. It is difficult to get enough jurors as it is. Costs will soar. The time needed to empanel juries will increase; delays from illness, tardiness, and absenteeism will increase. The total number of minorities serving will increase, but not the proportion.

95-CV-240: Hon. T.F. Gilroy Daly: The increase to 12 jurors "would unduly increase the cost of a trial to no useful purpose."

95-CV-245: Robert F. Wise, Jr., Esq., for Commercial and Federal Litigation Section, N.Y. State Bar Assn.: Most civil juries now are 8- or 10-person juries. The proposal will increase the burdens imposed by jury service at a time when efforts are directed to reduce them. If 12-person juries really are better, the proposal should require that 12 remain at deliberation time. And the belief that 12 are better is suspect; much recent criticism has been directed toward unanimous 12-person jury verdicts in criminal cases. Minority participation is best ensured by developing representative jury-selection lists; the increase in the number of particular juries that include any particular minority is not of itself sufficient reason to increase jury size. This would be a step backward.

95-CV-247: Don W. Martens, Esq., for American Intellectual Property Law Assn.: A 12-person jury "will better represent the community as a whole and collectively bring a better cross-section of experience to the task of deciding * * *."

95-CV-248: Michael A. Pope, Esq., for Lawyers For Civil Justice: History is strong. "Small juries are more prone to err than larger ones. * * * The importance of group dynamics in the jury setting cannot be overstated." Concerns over finding jurors and costs are

minimal. This is a sound proposal.

95-CV-249: Hugh F. Young, Jr., Executive Director, for the Product Liability Defense Council: This is "consistent with the finest tradition of American jurisprudence."

95-CV-253: William B. Poff, Esq., for Executive Committee, Nat. Assn. of Railroad Trial Counsel: Approves.

95-CV-256: Harriet L. Turney, Esq., for State Bar of Arizona: Opposes the proposal. To be sure, 12 members would increase diversity in the makeup of the jury and the views expressed, and make it more difficult for one person to dominate. But the requirement of unanimity makes it easier for one person to deadlock the jury. And the added cost is not insignificant.

95-CV-257: Brian T. Mahon, Esq., for Connecticut Bar Assn.: Opposes. Experience in Connecticut federal courts shows that juries of 8 work well; the problems feared in the Committee Note have not occurred. There is no magic in the traditional 12.

95-CV-258: Hon. Robert N. Chatigny: It is difficult to know whether 12 jurors are better. But a strong case should be shown to overcome the added costs, including the burdens imposed by summoning more people for jury service and by taking longer to seat a jury.

95-CV-267: Hon. A. Joe Fish: Usually uses a jury of more than 6, but fewer than 12, depending on the length and nature of the case. There is no need to revert to 12 — the supporting arguments "are rather nebulous and * * * insufficient to overcome the known, and very real, costs * * *."

95-CV-269: James R. Jeffery, Esq., for Ohio State Bar Assn. Bd. of Governors: Cannot endorse the proposal, for fear that 12 jurors would reduce the likelihood of reaching a verdict. Any increase in jury size should be supplemented by allowing a 3/4 majority verdict, requiring agreement of at least 8 jurors in all cases.

95-CV-271: Hon. Paul A. Magnuson: "To double the number required for civil panels would cripple the system."

95-CV-273: Pamela Anagnos Liapakis, Esq., for Association of Trial Lawyers of America: "[W]here there is a requirement of unanimity, twelve-member juries tend to be a cumbersome mechanism which are more likely to be sidetracked by a single intransigent or biased juror * * *. Nor are six-member juries necessarily destined to be less representative of the community if there is adequate opportunity for voir dire." But there is no reason to have a uniform national practice. The Committee should "draft a new rule which would make the jury size the same whether a litigant is in state or federal court in any given jurisdiction" — conformity to state jury practice. [It is not clear whether this proposal would include state majority-verdict rules as well.]

95-CV-274: Kent S. Hofmeister, Esq., for Federal Bar Assn. by Mark D. Laponsky, Esq., Chair, Labor Law Section: The jury system is as close to participatory democracy as we get. The movement to smaller juries "may well be a cause of public dissatisfaction with the operation of the jury system." Twelve may be as large a jury as can be managed. The benefits of returning to the presumption of 12 "seem to far outweigh the costs."

95-CV-281: Hon. Dean Whipple: 13 years of trying cases with 12-person juries in state court and 8 years with 6-person juries in federal court show "no difference in jury verdicts." The Committee Note arguments "appear to be result driven and an attempt to perpetuate the myth that only juries made up of 12 people are really juries." The dollar cost will increase, as will the time needed to sit a jury.

95-CV-282: Steven R. Merican, for Development of the Law Committee, Chicago Bar Assn.: Our committee has been addressed by Dr. R. Scott Tindale of Loyola University "regarding the dynamics of juror interaction and jury decision-making in large and small groups." The Committee voted unanimously to support the Rule 48 amendment.

95-CV-283: Terisa E. Chaw, Executive Director, National Employment Lawyers Assn.: The Association is constituted by lawyers "who primarily or exclusively represent individual employees in employment-related matters." The 12-person jury amendment is desirable, "providing [sic] that a less than unanimous jury could return a verdict." Unanimity will prolong deliberations and increase mistrials; mistrials are a problem for individual litigants who lack the resources for retrials. "A jury system which is less than unanimous will not engender an overwhelming number of verdicts in favor of plaintiffs." Before adopting the amendment, the Advisory Committee should study "whether the unanimity requirement substantially affects the results of trials compared to states which have 6-person juries."

95-CV-284: Michael W. Unger, Esq., for Court Rules & Administration Comm., Minn. State Bar Assn.: If the costs can be borne, agrees that "the quality of decision-making is improved by a larger jury." But Minnesota has good experience with a rule permitting 5/6 verdict after 6 hours of deliberation; this should be considered, to offset the increased risk of a hung jury with 12 jurors.

95-CV-289: Anthony C. Epstein, Esq., for D.C.Bar Section on Courts, etc.: Supports. "The jury is, next to the ballot itself, the most important civic institution in our democracy. Participation in jury service is one [of] the most important opportunities and obligations of citizenship." And jury service improves public understanding of the judicial system, for the better.

95-CV-290: Reagan Wm. Simpson, Esq., for ABA Tort & Ins. Practice Section: ABA Policy favors 12-person juries, but only if a 10/12 verdict is permitted.

95-CV-291: Hon. Joe Kendall: "[T]here is nothing magical about the number twelve." Smaller juries save precious taxpayer money.

95-CV-295: Thomas F. Clauss, Jr., for "certain members of the Federal Rules Revision Subcommittee of the Pre-Trial Practice and Discovery Committee of the Litigation Section of the ABA": Any concerns about judicial economy "are far outweighed by (i) the improved deliberative process which results from a slightly larger jury and (ii) the need to increase the representative nature of juries and, in particular, to increase the number of jurors who are members of minority groups." The social science evidence relied upon by the Supreme Court when it approved 6-person criminal and civil juries has been shown wrong.

95-CV-297: David K. Hardy, Esq.: We should return to a 12-person jury. "The length and complexity of trials as well as the enormity of the issues to be resolved more than justify the extra cost * * *."

95-CV-298: Hon. Ernest C. Torres: I have tried civil cases with both 6- and 12-person juries and see no difference in the quality of decisions. Elimination of alternates has de facto increased most civil juries to 8. Larger juries will increase the number of hung juries and compromise verdicts. Time and expense will be increased. We should not change.

Testimony on Rule 48

Peter Hinton, Esq., December 15: Tr. 29 to 49: The 12-person jury proposal "is an analytically motivated trip to injustice" unless it is coupled with provision for a nonunanimous verdict. Any increase in the risk of hung juries tips the playing field in favor of corporate defendants, because individual plaintiffs cannot afford retrials. Attorney voir dire will help offset this risk, but not enough. And by increasing the number of jurors, "you have significantly increased the potential for an aberrant jury." "If you had a nine-person majority and adequate peremptories, I would be all for this."

Hon. Michael R. Hogan, December 15: Tr 49 to 63: 6-person juries work. It is increasingly difficult to get citizens to serve as jurors. Many courtrooms are built with 7- or 8-person jury boxes, including our magistrate judge courtrooms. Although with trials by consent before magistrate judges 6-person juries could be made part of the consent process, this might reduce our ability to rely on magistrate judge trials — and we have relied on magistrate judges extensively and successfully.

Dr. Judy Rothschild, December 15: Tr 63 to 87: (Dr. Rothschild's background is described with her Rule 47(a) comments.) There are stray marks favorable to 12-person juries, but most of the testimony focuses on the suggestion that if jury size is increased, the number of peremptory challenges should be increased accordingly.

George J. Koelzer, Esq., December 15: Tr 98 to 113: Has never had an experience, going well back into the days when 12-person juries were used in civil cases as well as criminal, in which the inability to agree on a verdict could be ascribed to the size of the jury. Law and centuries of experience show that a jury of 12 works quite well. It brings more experience and common sense to the task, and is more representative.

Robert Aitken, Esq., December 15: Tr 113 to 125: The shrinkage of the jury is obvious. The number 12 was settled long ago, and worked for centuries. If we can shrink to 6, why not 1?

Robert B. Pringle, Esq., December 15: Tr 133 to 142: Has practiced both on the defense side and — increasingly, particularly in intellectual property cases — on the plaintiff side. Began with the view that a large jury favors the defense, but now prefers it for all sides. A larger jury gives a fair cross-section of the community. It helps in technical cases to have an engineer or two on the panel; there is a risk they will dominate a 6-person jury, but less concern with a jury of 12. I do believe that juries are capable of assessing technical issues, indeed at least as capable as judges. They bring common sense, whatever the level of formal education. There is no need to add alternates.

Elia Weinbach, Esq., December 15: Tr 142 to 151: There is a risk that 12-person juries will result in more hung juries; the federal judges who have made this observation to me were, to be sure, appointed after 1978 (so have no experience with 12-person civil juries).

Louise A. La Mothe, Esq., December 15: Tr 153 to 168: While I was

a member of the California State Judicial Council we had a study done by the National Center for State courts on moving from 12- to 8-person juries. The initial results caused the Council to lose any interest in the change. 12-person juries are more representative, a matter of great importance in our increasingly diverse society. And the influence of any single juror is reduced. The perception of fairness is enhanced.

Professor Charles Weisselberg, December 15: Tr 168 to 185: The return to 12-person juries is good. But it would be better to provide for alternates, to increase the prospect that there will be 12 jurors left to deliberate at the end of a long and complex trial. A fair trial is more important than the disappointment of alternates who are excused without deliberating at the end of trial.

Hon. Duross Fitzpatrick, January 26: Tr 3 to 15: Always uses 12-person juries. They give a good cross-section. The parties accept the results better than might be with smaller juries. I regularly chat with the jurors after the verdict. They understand the instructions. Judge Arnold has made irrefutable points in favor of 12-person juries. Majority verdicts are not a good idea; "a hung jury is not always a bad idea." Fallout from the O.J. case has put people in a panic about jury trial; "I don't think we need to be changing the jury system because of one case that's tried in California."

John T. Marshall, Esq., January 26: Tr 15 to 21: Lawyers select a jury much differently when it is six, because of concern that a single juror can dominate in a way that is not likely with a jury of 12. I have had two experiences when both sides agreed that a 6-person jury came out opposite from what we expected.

Frank C. Jones, Esq., January 26: Tr. 22 to 31: There is a very different dynamic with 12-person juries. One or two strong persons can influence the outcome with 6-person juries, but this is much more difficult with 12. And a 12-person jury is more likely to be truly representative of the community.

Michael A. Pope, Esq., January 26: Tr. 74 to 80: In Illinois we have always had 12-person juries. "There is something about it that seems to work. * * * And it does seem to bring out the best in people * * *." And hung juries "are extremely rare."

Kenneth Sherk, Esq., January 26: Tr 80 to 86: Chair, Federal Rules of Civil Procedure Committee, American College of Trial Lawyers. We endorse the 12-person jury "if for no other reason than for the representativeness factor, just get a better cross-section."

J. Richard Caldwell, Jr., Esq., January 26: Favors the proposal. Magistrate judges try civil cases in M.D.Fla. They can use an empty courtroom with a 12-member jury box, or add a few chairs to their own courtrooms. "They work perfectly well with a twelve-member jury."

John A. Chandler, Esq., January 26: Tr 93 to 100: The rationale in the Advisory Committee Note supports the proposal, "to provide more diversity and to avoid the odd verdict. * * * You get more aberrant decisions with six-person juries * * *. I think predictability helps lawyers and helps clients assess cases." There are anecdotes

suggesting that plaintiffs' lawyers tend to choose the 6-person jury state court in Fulton county, rather than the 12-person jury superior court, because "they believe that they are more likely to get a result that's outside of the box with a six-person jury."

Stephen M. Dorvee, Esq., January 26: Tr 100 to 105: A 12-person jury does bring a wide diversity of viewpoints. But it also "sees everything, hears everything, despite what some of my brethren thinks, understand[s] everything. I'm not sure that's the case with a six-person jury. * * * You want a greater collective memory." They have a much more thorough view of the case.

Hon. Hayden W. Head, February 9: All but 2 of the judges of S.D. Tex. oppose the return to 12-person juries. Their views are largely based on cost, and the belief that they have seen adequate and fair verdicts returned by smaller juries. A poll of the 5th Circuit District Judges Association got 73 responses from 94 members. 63 oppose the proposal, while 10 support it. Again, the feeling is that the proposal increases costs without real benefit.

Hon. Virginia M. Morgan, February 9: Tr 43 to 49. President, Federal Magistrate Judges Association. There are concerns about costs.

Hon. John F. Keenan, February 9: Tr 56 to 64: For all the judges, S.D.N.Y. "There is no data or reliable information to support the concept that 12-member juries achieve better results than 6, 8 or 10-person juries." We use 8-member juries; to do that, we have a venire panel of 22. If we go to 12-member juries, the panel must increase to 33 to offset increased losses. "This would increase our annual expenses for jurors by 50 percent on the civil side, an expenditure which we view as totally unnecessary." In New York we have great diversity, and our jury panels reflect that diversity now. The value of jurors as emissaries for the judicial system is well served by smaller juries.

Hon. John M. Roper, February 9: Tr. 64 to 80: Appearing for the Economy Subcommittee, Budget Committee of the Judicial Conference. This testimony is directed only to cost implications, not to the wisdom of the proposal as a matter of procedure. (The chair of the Budget Committee has vigorously supported a return to 12-person juries as a matter of policy.) The cost of returning to 12-person juries could go as high as $12,000,000. The more jurors you select, the greater the pool, the greater the number of challenges for cause, the greater the number of people who simply do not show up, the greater the need to send marshals out to round up people, and so on. There are also courtroom costs, both with respect to retrofitting existing magistrate judge courtrooms with larger jury boxes and with respect to new court construction plans that contemplated shared use of courtrooms in ways that permit construction of some courtrooms for smaller juries, and others for 12-person juries. Although parties can be told that they can have a magistrate-judge trial only if they consent to a smaller jury, this may reduce the frequency of consents to magistrate-judge trials. Some defense firms believe there is a greater prospect of a hung jury with 12, and are willing to pay for it, whether or not the perception is accurate.

Al Cortese, Esq., February 9: Tr 98 to 109: The National Chamber Litigation Center supports the proposal.

B. Rule 23 Transmitted for Publication

1. Introduction and Synopsis

Rule 23 has been before the Committee since March, 1991, when the Judicial Conference approved a recommendation of the Ad Hoc Committee on Asbestos Litigation by voting "to request its Standing Committee on Rules of Practice and Procedure to direct the Advisory Committee on Civil Rules to study whether Rule 23, F.R.C.P. be amended to accommodate the demands of mass tort litigation." The Committee began with a draft that adopted many of the suggestions made in 1986 by the American Bar Association Litigation Section. This draft would have collapsed the categorical distinctions now observed between subdivision (b)(1), (b)(2), and (b)(3) classes; authorized the court to permit or deny opting out of any class action; created an opt-in class provision; specifically governed notice requirements for (b)(1) and (b)(2) classes; and made many other changes, many of them independently significant.

The initial draft approach was recommended for publication but then withdrawn for further study. At the request of the Committee, the Federal Judicial Center undertook a study of class action files for all cases terminated in a two-year period in four districts where many class actions are filed. The Committee also continued to study the rule, inviting experienced class action practitioners to meet with the committee, holding a conference at the University of Pennsylvania Law School, attending a symposium at Southern Methodist University Law School, and participating in an Institute of Judicial Administration symposium at New York University Law School. Many lawyers and representatives of bar groups attended the November, 1995, and April, 1996 meetings of the Committee, and several spoke to the Committee. A substantially revised draft was the focus of discussion during the later stages of this process. This draft continued to include a large number of revisions, large, medium, and small.

By spring, 1995, the Committee concluded that the work should be divided into two segments. Attention would focus first on the question whether a small number of relatively signficant changes should be proposed. Only after disposing of those changes would the Committee determine whether it was wise to consider and propose additional changes.

The draft now proposed for publication focuses only on the relatively small number of changes described below. Once the Committee concluded that these changes should be proposed, it further concluded that it would be unwise to add other changes. Careful consideration of the proposed changes in the remaining steps of the Enabling Act process will demand close attention and great effort. It is better not to diffuse attention across too many proposals.

Subdivision (b)(3) is changed in several ways that emphasize the distinction between class actions that aggregate small claims and those that aggregate larger claims. Subparagraph (A) is added to the illustrative list of matters pertinent to the predominance and superiority findings. This factor emphasizes the practical ability of individual class members to pursue their claims without class certification. It will confirm and encourage the use of class actions to enforce small claims that will not support separate actions, subject to new subparagraph (F). At the same time, it will encourage courts to reflect carefully on the advantages of individual litigation before rushing to certify classes — such as mass tort classes — that include claims that would support separate actions. Subparagraph (B) is revised to make it clear that the court should consider not only solo litigation but also aggregation alternatives to a proposed class that do not involve "control" by individual class members. Subparagraph (C) is revised, among other things, to include the maturity of related litigation as a factor bearing on certification; this factor has loomed particularly large in the early years of litigating dispersed mass torts. New subparagraph (F) supports a comparison between the probable relief to individual class members and the costs and burdens of class litigation. Certification can be denied if the costs to the parties and burdens on the court of resolving the merits overshadow any probable relief to individual class members.

New subdivision (b)(4) authorizes certification of a (b)(3) class for purposes of settlement. It requires that all of the subdivision (a) prerequisites for class certification be met, and that the predominance and superiority requirements of (b)(3) also be met. But it authorizes evaluation of these prerequisites and requirements from the perspective of settlement. A settlement class may be certified even though the same class would not be certified for purposes of litigation. Although (b)(4) is set out as a separate paragraph, the class is certified under (b)(3) and is subject to the rights of notice and exclusion that apply to all (b)(3) classes. Certification is permitted only on motion by parties to a settlement agreement already reached. The separate subdivision (e) requirements for notice of settlement and court approval continue to apply.

Subdivision (c) is amended by deleting the requirement that the determination whether to certify a class be made "as soon as practicable" after commencement of the action. The change to "when" practicable supports the common practice of deciding motions to dismiss or for summary judgment before addressing the certification question. The change also supports precertification efforts to settle and seek certification of a settlement class.

Subdivision (e) is amended to confirm the common understanding that a hearing must be held as part of the process of reviewing and deciding whether to approve dismissal or compromise of a class

action.

New subdivision (f) is added to provide a method of permissive interlocutory appeal, in the sole discretion of the court of appeals, from orders granting or denying class certification.

In reviewing the Rule 23 proposals, it would help to consider the Minutes of the November, 1995 meeting and Draft Minutes of the April, 1996 Advisory Committee meeting. These Minutes are the final items in this Report.

(2) Text of Proposed Rule 23 and Note

Rule 23

* * *

(B) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: * * *

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the practical ability of individual class members to pursue their claims without class certification;

(~~A~~B) ~~the interest of members of the class in individually controlling the prosecution or defense of~~ class members' interests in maintaining or defending separate actions;

(~~B~~C) the extent~~,~~ ~~and~~ nature, and maturity of any related litigation ~~concerning the controversy already commenced by or against~~ involving class members ~~of the class~~;

(~~C~~D) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(~~D~~E) the difficulties likely to be encountered in the management of a class action; and

(F) whether the probable relief to individual class members justifies the costs and burdens of class litigation; or

(4) the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) ~~As soon as~~ When practicable after the commencement of an action brought as a class action, the court shall

determine by order whether it is to be so maintained.

* * *

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without hearing and the approval of the court, ~~and~~ after notice of the proposed dismissal or compromise ~~shall be~~ has been given to all members of the class in such manner as the court directs.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

ADVISORY COMMITTEE NOTE

Class action practice has flourished and matured under Rule 23 as it was amended in 1966. Subdivision (b)(1) continues to provide a familiar anchor that secures the earlier and once-central roles of class actions. Subdivision (b)(2) has cemented the role of class actions in enforcing a wide array of civil rights claims, and subdivision (b)(3) classes have become one of the central means of aggregating large numbers of small claims that would not support individual litigation. The experience of more than three decades, however, has shown ways in which Rule 23 can be improved. These amendments may effect modest expansions in the availability of class actions in some settings, and modest restrictions in others. New factors are added to the list of matters pertinent to determining whether to certify a class under subdivision (b)(3). Settlement problems are addressed, both by confirming the propriety of "settlement classes" in subdivision (b)(4) and by making explicit the need for a hearing as part of the subdivision (e) approval procedure. The requirement in subdivision (c)(1) that the determination whether to certify a class be made as soon as practicable after commencement of an action is changed to require that the determination be made when practicable. A new subdivision (f) is added, establishing a discretionary interlocutory appeal system for orders granting or denying class certification. Many of these changes will bear on the use of class actions as one of the tools available to accomplish aggregation of tort claims. The Advisory Committee debated extensively the question whether more adventurous changes should be made to address the problems of managing mass tort litigation, particularly the problems that arise when a common course of conduct causes injuries that are dispersed in time and space. At the end, the Committee concluded that it is too early to anticipate the lessons that will be learned from the continuing and rapid development of practice in this area.

At the request of the Advisory Committee, the Federal Judicial Center undertook an empirical study designed to illuminate the general use of class actions not only in settings that capture

general attention but also in more routine settings. The study is published as T.E. Willging, L.L. Hooper, and R.J. Niemic, *An Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules (1996)*. The study provided much useful information that has helped shape these amendments.

Subdivision (b)(3). Subdivision (b)(3) has been amended in several respects. Some of the changes are designed to redefine the role of class adjudication in ways that sharpen the distinction between the aggregation of individual claims that would support individual adjudication and the aggregation of individual claims that would not support individual adjudication. Current attempts by courts and lawyers to adapt Rule 23 to address the problems that arise from torts that injure many people are reflected in part in some of these changes, but these attempts have not matured to a point that would support comprehensive rulemaking.

The probability that a claim would support individual litigation depends in part on the expected recovery. One of the most important roles of certification under subdivision (b)(3) has been to facilitate the enforcement of valid claims for small amounts. The median individual class-member recovery figures reported by the Federal Judicial Center study ranged from $315 to $528. These amounts are far below the level that would be required to support individual litigation, unless perhaps in a small claims court. This vital core, however, may branch into more troubling settings. The mass tort cases may sweep into a class many members whose individual claims would support individual litigation, controlled by the class member. In such cases, denial of certification or careful definition of the class may be essential to protect these plaintiffs. As one example, a defective product may have inflicted small property value losses on millions of consumers, reflecting a small risk of serious injury, and also have caused serious personal injuries to a relatively small number of consumers. Class certification may be appropriate as to the property damage claims, but not as to the personal injury claims. More complicated variations of this problem may arise when different persons suffer injuries that are similar in type but that vary widely in extent. A single course of securities fraud, for example, may inflict on many people injuries that could not support individual litigation and at the same time inflict on a few people or institutions injuries that could readily support individual litigation. The victims who could afford to sue alone may be ideal representatives if they are willing to represent a class, and may be easily able to protect their interests in separate litigation if a (b)(3) class is certified. If a (b)(1) or (b)(2) class were certified, however, the court should consider the possibility of excluding these victims from the class definition.

Individual litigation may affect class certification in a different way, by shaping the time when a substantial number of individual decisions illuminate the nature of the class claims.

Exploration of mass tort questions time and again led experienced lawyers to offer the advice that it is better to defer class litigation until there has been substantial experience with actual trials and decisions in individual actions. The need to wait until a class of claims has become "mature" seems to apply peculiarly to claims that involve highly uncertain facts that may come to be better understood over time. New and developing law may make the fact uncertainty even more daunting. A claim that a widely used medical device has caused serious side effects, for example, may not be fully understood for many years after the first injuries are claimed. Pre-maturity class certification runs the risk of mistaken decision, whether for or against the class. This risk may be translated into settlement terms that reflect the uncertainty by exacting far too much from the defendant or according far too little to the plaintiffs.

These concerns underlie the changes made in the subdivision (b)(3) list of matters pertinent to the findings whether the law and fact questions common to class members predominate over individual questions and whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. New factors are added to the list, and some of the original factors have been reformulated.

Subparagraph (A) is new. The focus on the practical ability of individual class members to pursue their claims without class certification can either encourage or discourage class certification. This factor discourages — but does not forbid — class certification when individual class members can practicably pursue individual actions. If individual class members cannot practicably pursue individual actions, on the other hand, this factor encourages class certification. This encouragement may be offset by new subparagraph (F) if the probable relief to individual class members is too low to justify the burdens of class litigation.

Subparagraph (B), revised from former subparagraph (A), complements new subparagraph (A). The practical ability of individual class members to pursue individual actions is important when class members have significant interests in maintaining or defending separate actions. These interests include such fundamental matters as choice of forum; the timing of all events from filing to judgment; selection of coparties and adversaries; the ability to gain choice of more favorable law to govern the decision; control of litigation strategy; and litigation in a single proceeding that includes all issues of liability and remedy. These interests may require a finding that class adjudication is not superior because it is not as fair to class members, even though it may be more efficient for the judicial system in the limited sense that fewer judicial resources are required. The right to request exclusion from a (b)(3) class does not fully protect these interests, particularly as to class members who have not yet retained individual counsel at the time of class notice.

These interests of class members may be served by a variety of alternatives that may not amount to individual control of separate litigation. The alternatives to certification of the requested class may be certification of a different class or smaller classes, intervention in other pending actions, voluntary joinder, and consolidation of individual actions — including transfer for coordinated pretrial proceedings or transfer for consolidated trial.

The practical ability of individual class members to pursue individual litigation and their interests in maintaining separate actions may come into conflict when there is a significant risk that the insurance and assets of the defendants may not be sufficient to fully satisfy all claims growing out of a common course of events. The plaintiffs who might win the race to secure and enforce individual judgments have an interest that is served at the cost of other plaintiffs whose interests are defeated by exhaustion of the available assets. In these circumstances, fairness and efficiency may require aggregation in a way that marshals the assets for equitable distribution. This need may justify certification under subdivision (b)(3), or in appropriate cases under subdivision (b)(1). Bankruptcy proceedings may prove a superior alternative. The decision whether to certify a (b)(3) class must rest on a judgment about the practical realities that may thwart realization of the abstract interests that point toward separate individual actions.

Factor (C), formerly factor (B), has been amended in several respects. Other litigation can be considered so long as it is related and involves class members; there is no need to determine whether the other litigation somehow concerns the same controversy. The focus on other litigation "already commenced" is deleted, permitting consideration of litigation without regard to the time of filing in relation to the time of filing the class action. The more important change authorizes consideration of the "maturity" of related litigation. In one dimension, maturity can reflect the need to avoid interfering with the progress of related litigation already well advanced toward trial and judgment. When multiple claims arise out of dispersed events, however, maturity also reflects the need to support class adjudication by experience gained in completed litigation of several individual claims. If the results of individual litigation begin to converge, class adjudication may seem appropriate. Class adjudication may continue to be inappropriate, however, if individual litigation continues to yield inconsistent results, or if individual litigation demonstrates that knowledge has not yet advanced far enough to support confident decision on a class basis.

Subparagraph (F) has been added to subdivision (b)(3) to effect a retrenchment in the use of class actions to aggregate trivial individual claims. If the probable relief to individual class members does not justify the costs and burdens of class litigation, a class action is not a superior means of efficient

adjudication. The near certainty that few or no individual claims will be pursued for trivial relief does not require class certification.

The prospect of significant benefit to class members combines with the public values of enforcing legal norms to justify the costs, burdens, and coercive effects of class actions that otherwise satisfy Rule 23 requirements. If probable individual relief is slight, however, the core justification of class enforcement fails.

The value of probable individual relief must be weighed against the costs and burdens of class-action proceedings. No particular dollar figure can be used as a threshold. A smaller figure is appropriate if issues of liability can be quickly resolved without protracted discovery or trial proceedings, the costs of class notice are low, and the costs of administering and distributing the award likewise are low. Higher figures should be demanded if the legal issues are complex or complex proceedings will be required to resolve the merits, identification of class members and notice will prove costly, and distribution of the award will be expensive. Often it will be difficult to measure these matters at the commencement of an action, when individually significant relief is likely to be demanded and the costs of class proceedings cannot be estimated with any confidence. The opportunity to decertify later should not weaken this threshold inquiry. At the same time decertification should be considered whenever the factors that seemed to justify an initial class certification are disproved as the action is more fully developed.

Subdivision (b)(4). Subdivision (b)(4) is new. It permits certification of a class under subdivision (b)(3) for settlement purposes, even though the same class might not be certified for trial. Many courts have adopted the practice reflected in this new provision, some very recent decisions have stated that a class cannot be certified for settlement purposes unless the same class would be certified for trial purposes. This amendment is designed to resolve this newly apparent disagreement.

Although subdivision (b)(4) is formally separate, any class certified under its terms is a (b)(3) class with all the incidents of a (b)(3) class, including the subdivision (c)(2) rights to notice and to request exclusion from the class. Subdivision (b)(4) does not speak to the question whether a settlement class may be certified under subdivisions (b)(1) or (b)(2). As with all parts of subdivision (b), all of the prerequisites of subdivision (a) must be satisfied to support certification of a (b)(4) settlement class. In addition, the predominance and superiority requirements of subdivision (b)(3) must be satisfied. Subdivision (b)(4) serves only to make it clear that implementation of the factors that control certification of a (b)(3) class is affected by the many differences between settlement and litigation of class claims or defenses. Choice-of-law difficulties, for example, may force

certification of many subclasses, or even defeat any class certification, if claims are to be litigated. Settlement can be reached, however, on terms that surmount such difficulties. Many other elements are affected as well. A single court may be able to manage settlement when litigation would require resort to many courts. And, perhaps most important, settlement may prove far superior to litigation in devising comprehensive solutions to large-scale problems that defy ready disposition by traditional adversary litigation. Important benefits may be provided for those who, knowing of the class settlement and the opportunity to opt out, prefer to participate in the class judgment and avoid the costs of individual litigation.

For all the potential benefits, settlement classes also pose special risks. The court's Rule 23(e) obligation to review and approve a class settlement commonly must surmount the informational difficulties that arise when the major adversaries join forces as proponents of their settlement agreement. Objectors frequently appear to reduce these difficulties, but it may be difficult for objectors to obtain the information required for a fully informed challenge. The reassurance provided by official adjudication is missing. These difficulties may seem especially troubling if the class would not have been certified for litigation, or was shaped by a settlement agreement worked out even before the action was filed.

These competing forces are reconciled by recognizing the legitimacy of settlement classes but increasing the protections afforded to class members. Certification of a settlement class under (b)(4) is authorized only on request of parties who have reached a settlement. Certification is not authorized simply to assist parties who are interested in exploring settlement, not even when they represent that they are close to agreement and that clear definition of a class would facilitate final agreement. Certification before settlement might exert untoward pressure to reach agreement, and might increase the risk that the certification could be transformed into certification of a trial class without adequate reconsideration. These protections cannot be circumvented by attempting to certify a settlement class directly under subdivision (b)(3) without regard to the limits imposed by (b)(4).

Notice and the right to opt out provide the central means of protecting settlement class members under subdivision (b)(3), but the court also must take particular care in applying some of Rule 23's requirements. As to notice, the Federal Judicial Center study suggests that notices of settlement do not always provide the clear and succinct information that must be provided to support meaningful decisions whether to object to the settlement or — if the class is certified under subdivision (b)(3) — whether to request exclusion. One of the most important contributions a court can make is to ensure that the notice fairly describes the litigation and the terms of the settlement. Definition of the class also must be approached with care, lest the attractions of

settlement lead too easily to an over-broad definition. Particular care should be taken to ensure that there are no disabling conflicts of interests among people who are urged to form a single class. If the case presents facts or law that are unsettled and that are likely to be litigated in individual actions, it may be better to postpone any class certification until experience with individual actions yields sufficient information to support a wise settlement and effective review of the settlement.

Subdivision (c). The requirement that the court determine whether to certify a class "as soon as practicable after commencement of an action" is amended to provide for certification "when practicable."

The Federal Judicial Center study showed many cases in which it was doubtful whether determination of the class-action question was made as soon as practicable after commencement of the action. This result occurred even in districts with local rules requiring determination within a specified period. These practices may reflect the dominance of practicability as a pragmatic concept that effectively has translated "as soon as" to mean "when." The amendment makes this approach secure, and supports the changes made in subdivision (b)(3) and the addition of subdivision (b)(4). Significant preliminary preparation may be required in a (b)(3) action, for example, to appraise the factors identified in new or amended subparagraphs (A), (B), (C), and (F). These and similar inquiries should not be made under pressure of an early certification requirement. Certification of a settlement class under new subdivision (b)(4) cannot happen until the parties have reached a settlement agreement, and there should not be any pressure to reach settlement "as soon as practicable."

Amendment of the "as soon as practicable" requirement also confirms the common practice of ruling on motions to dismiss or for summary judgment before the class certification decision. A few courts have feared that this useful practice is inconsistent with the "as soon as practicable" requirement.

Subdivision (e). Subdivision (e) is amended to confirm the common practice of holding hearings as part of the process of approving dismissal or compromise of a class action. The judicial responsibility to the class is heavy. The parties to the settlement cease to be adversaries in presenting the settlement for approval, and objectors may find it difficult to command the information or resources necessary for effective opposition. These problems may be exacerbated when a proposed settlement is presented at, or close to the beginning, of the action. A hearing should be held to explore a proposed settlement even if the proponents seek to waive the hearing and no objectors have appeared.

Subdivision (f). This permissive interlocutory appeal provision is adopted under the power conferred by 28 U.S.C. § 1292(e). Appeal from an order granting or denying class certification is permitted in the sole discretion of the court of

appeals. No other type of Rule 23 order is covered by this provision. It is designed on the model of § 1292(b), relying in many ways on the jurisprudence that has developed around § 1292(b) to reduce the potential costs of interlocutory appeals. At the same time, subdivision (f) departs from § 1292(b) in two significant ways. It does not require that the district court certify the certification ruling for appeal, although the district court often can assist the parties and court of appeals by offering advice on the desirability of appeal. And it does not include the potentially limiting requirements of § 1292(b) that the district court order "involve[] a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

Permission to appeal should be granted with restraint. The Federal Judicial Center study supports the view that many suits with class action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings. Yet several concerns justify expansion of present opportunities to appeal. An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.

The expansion of appeal opportunities effected by subdivision (f) is modest. Court of appeals discretion is as broad as under § 1292(b). Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive. Permission is most likely to be granted when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely dispositive of the litigation. Such questions are most likely to arise during the early years of experience with new class-action provisions as they may be adopted into Rule 23 or enacted by legislation. Permission almost always will be denied when the certification decision turns on case-specific matters of fact and district court discretion.

The district court, having worked through the certification decision, often will be able to provide cogent advice on the factors that bear on the decision whether to permit appeal. This advice can be particularly valuable if the certification decision is tentative. Even as to a firm certification decision, a statement of reasons bearing on the probable benefits and costs of immediate appeal can help focus the court of appeals decision, and

may persuade the disappointed party that an attempt to appeal would be fruitless.

The 10-day period for seeking permission to appeal is designed to reduce the risk that attempted appeals will disrupt continuing proceedings. It is expected that the courts of appeals will act quickly in making the preliminary determination whether to permit appeal. Permission to appeal does not stay trial court proceedings. A stay should be sought first from the trial court. If the trial court refuses a stay, its action and any explanation of its views should weigh heavily with the court of appeals.

Appellate Rule 5 has been modified to establish the procedure for petitioning for leave to appeal under subdivision (f).

Item 10D

III Informational Item

The Federal Rules of Civil Procedure Committee of the American College of Trial Lawyers has urged that the Committee reconsider the scope of discovery permitted under Rule 26(b)(1). Rule 26(b)(1) now permits discovery:

> regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the aprty seeking discovery or to the claim or defense of any other party * * *. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Discovery topics have been continually on the Committee agenda for at least three decades. Dissatisfaction with discovery practice has not been allayed by the many amendments that began in 1970. Proposals to narrow the basic scope of discovery continue to be made. Perhaps the most common proposal has been that relevance to "the subject matter involved in the pending action" sweeps too far. Instead, it is urged that discovery should be limited to issues defined by the pleadings. A beginning step was made with the Rule 26(a)(1) disclosure provisions, which tie the duty to disclose to information "relevant to disputed facts alleged with particularity in the pleadings." This step was intended to encourage more specific pleading as a means of deepening the disclosure obligations of an adversary. Several years of experience will be needed to determine whether the intent will be borne out in practice. Whatever comes of this effort, it does not limit the scope of discovery. But it does reflect the difficulty of discovery that is limited only by the "subject matter" revealed by notice pleading.

It remains to be seen whether the scope of discovery can be attacked directly without also taking up the subject of notice pleading. It may be that any effort to define discovery in relation to the pleadings must either surmount the generality of notice pleading or take on notice pleading itself.

An alternative approach may be to make few or no changes in Rule 26(b)(1), but to reconsider the premise that all modes of discovery should be treated alike. Many of the ongoing complaints about discovery relate to document production. It may be possible to restrict the scope of document discovery, both as to parties and

as to nonparties, without making the same changes in the scope of other discovery tools. The full scope of Rule 26(b)(1) may be better suited to depositions, and perhaps also to interrogatories, than to document production.

These matters will be on the Committee agenda in October.

Summary of Comments: Rule 26(c)

95-CV-96: Edward L. Dunkerly, Esq.: "I simply do not think this rule is in the public interest," apparently referring to the stipulation aspect.

95-CV-106: Hon. Bruce M. Van Sickle: Adding item (ii), referring to public and private interests, erodes "the broad principle." "Why not leave the rule clean and pristine? Let judicial decisions articulate the parameters of the rule."

95-CV-135: Peter Chase Neumann, Esq.: The stipulation provision should be deleted, and if anything the good cause requirement should be strengthened. Product-liability and fraudulent insurance practice defendants routinely exact stipulated protective orders, complete with stipulated damages, calculated to defeat sharing information needed to support litigation by others injured by the same products or practices. Procedure should not cripple the ability of the tort system to force correction of dangerous products.

95-CV-136: Gary L. Spahn, Esq.: The proposal has it right. Radical changes promoted by a minority of plaintiffs' lawyers and press interests "constitute a formula for disastrous abuse of the discovery process at the expense of the litigants * * * and for the dubious benefit of those outside the process who have other established channels for obtaining the type of information sought."

95-CV-140: Michael E. Oldham, Esq., and Heather Fox Vickles, Esq.: The proposal essentially codifies existing law and everyday practice. Stipulated protective orders encourage greater cooperation in discovery.

95-CV-161: Hon. David L. Piester: Supports the substance, but recommends clarifications. The Rule should state explicit standards for intervention. It should be made clear whether the (c)(3)(B) standard for modification or dissolution is the same as the "good cause" standard for granting a protective order. It would help to offer advice on appealability.

95-CV-162: J. Richard Caldwell, Jr., Esq.: The proposal reflects existing law. Protective orders are very important, particularly those that protect confidential information. Stipulated orders are common because all parties have an interest in efficient resolution of discovery problems. The order can be enforced against third parties, such as experts, who are a common source of difficulty.

95-CV-163: Hon. Prentice H. Marshall: Shares the concerns of those apprehensive about stipulated orders, but understands that the matter still lies in the discretion of the court.

95-CV-174: Hon. Virginia M. Morgan for the Federal Magistrate Judges Assn.: Supports. Stipulated protective orders are common and are a valuable means of facilitating discovery. The provisions on modification or dissolution provide helpful clarification and

guidance. (The same statement has been given number 95-CV-202.)

94-CV-184: Paul W. Mollica, Esq., for the Federal Courts Committee of the Chicago Council of Lawyers: Supports the proposal, with one change. Documents or exhibits filed with the court should not be sealed without a judicial finding of good cause. Proposes a new paragraph for subdivision (c) that permits stipulated protected orders, without a finding of good cause, with the limit that a stipulated order may not permit or require documents to be filed under seal.

95-CV-191: Walter R. Krueger, Esq.: Plaintiffs are under intense pressure from defendants to accept stipulated protective orders. The only protection for injured workers and consumers is an open court house. A showing of good cause should be required.

95-CV-192: Kieron F. Quinn, Esq.: The problem is too much secrecy, not too little protection. It should be harder to obtain protective orders; public access to litigation information should be easier. Too many claimants are willing to stipulate to protective orders "in exchange for some real or perceived additional cash for themselves." Protective orders in earlier litigation can cause unjustified delay and expense in access to information in later and related litigation.

95-CV-193: Carolyn B. Witherspoon, Esq., for the Federal Legislation and Procedures Committee, Arkansas Bar Assn.: The Committee has no objection, although some concern that (c)(3) may dilute the finality of protective orders.

95-CV-205: Robert L. Abell, Esq.: Stipulated protective orders enable defendants to coerce plaintiffs and keep information from public view, often obstructing discovery in related cases. Protective orders should be less common, not more common.

95-CV-206: Dean M. Harris, Esq., for Atlantic Richfield Co.: It is good to codify stipulated order practice, which saves legal fees and court time.

95-CV-210: Richard J. Gilloon, Esq.: Large defendants can coerce small plaintiffs to stipulate to protective orders that deprive plaintiffs of the important opportunity to share information. A judicial finding of good cause should be required.

95-CV-212: Mary E. Alexander, Esq., for Consumer Attorneys of California: Defendants can coerce stipulations from plaintiffs, creating another barrier to access to court by consumers who are cut off from vital information. By specifying matters that must be considered on motion to modify or dissolve, without adding a similar list to the provisions governing entry of a protective order, the proposal creates an imbalance that favors defendants and harms consumer plaintiffs.

95-CV-213: William R. Fry, Executive Director, and Paul A. Friedman, Program Counsel, for HALT – An Organization of Americans

for Legal Reform: (The original submission was replaced by a new one received on March 15, 1996.) Stipulated protective orders undermine the good cause standard. Ordinarily discovery should take place in public. Reliance of the parties is not a basis for refusing dissolution or modification when the order rests on stipulation, not a showing of good cause. Concern for public health and safety should be paramount. The proposal should be rejected.

95-CV-214: Kathleen L. Blaner, Esq., for Litigation Section, D.C. Bar: Changes to Rule 26(c) are unnecessary, but we support the proposals because they preserve existing practice. The Note should be modified to confirm that the Rule only codifies existing practice. The recent outcry about secrecy rests on "hyperbole and the business interests of a few special interest groups." Stipulated orders do not eliminate the good cause requirement, and facilitate efficient discovery; discovery should be self-executing to the greatest possible extent.

95-CV-221: Norbert F. Bergholtz, Esq.: The proposal incorporates general practice both as to stipulated protective orders and as to the grounds for modification or dissolution. The ability to stipulate to protective orders is important to reduce costs to the parties and burdens on the courts. Protective orders do not prevent access to discovery information by others "where circumstances justify disclosure."

95-CV-224: Donald C. Cramer, Esq.: Encourages adoption of realistic rules that will continue the practice of allowing district courts to enact protective orders. Crucial design data and sensitive financial information must be protected.

95-CV-225: Robert R. Sheldon, Esq., for Connecticut Trial Lawyers Assn.: The amendment would encourage protective orders and made modification more difficult. Protective orders should be discouraged. They increase the cost of parallel litigation and conceal information important to public health and safety. The proposal would permit protective orders without a showing of good cause. It would require consideration of "reliance," a change that will encourage defendants to coerce plaintiffs into protective orders.

95-CV-229: Leslie A. Brueckner, Esq., for Trial Lawyers for Public Justice: This 29-page comment is rich in detail that cannot be easily summarized. There are two main points: stipulated protective orders should not be entered until a judge has made a good cause review and determination; reliance on a protective order should not be a basis for opposing modification or dissolution. General public interest values, the efficiency of related litigation, protection of health and safety, democratic access to the works of the courts, and First Amendment values are urged. Present practice protects unnecessary secrecy at every stage. In 1989 they launched Project Access to combat secrecy. (1) As to stipulated orders, it is stated that present practice requires a

judicial finding of good cause; although some judges may shirk this duty, the cure is not a radical change in existing law but adherence to it. Plaintiffs are coerced into stipulations. The FJC study does not show how many protective orders there would be if stipulations could be made without showing good cause. Sealed records cause great public harm from continued use of dangerous products, exposure to toxic pollutants, and being treated by incompetent doctors. Protective orders commonly provide for filing under seal; limiting the rule to protective orders does not undo this added harm. If the problem is that present discovery is too broad, or "good cause" does not provide enough protection, these practices should be addressed directly. The good cause standard imposes no great burden; it can be found as to categories of documents in cases that present great amounts of discovery material. The opportunity to seek modification is no alternative, because the very nature of secrecy prevents informed applications. (2) As to reliance, this factor ignores the fact that parties are obliged to respond to discovery. It is a particularly weak factor when information is sought for use in related litigation. (3) In addition, the modification standard should make it clear that the party seeking continued protection should have the burden of showing good cause for protection against the present demand; this is particularly important as to stipulated protective orders.

95-CV-234: James A. Strain, for Seventh Cir. Bar Assn.: If the parties can agree to a stipulated protective order, there should be no need to establish good cause. The remainder of the amendments provide an appropriate balance.

95-CV-235: Henry T. Courtney, Esq.: The amendment should be rejected. Many years of litigating automobile injury cases show routine misuse of protective orders by manufacturers for the purpose of preventing access to information needed by plaintiffs in related cases, even when it is clear beyond doubt that the underlying information has no competitive value.

95-CV-243: Richard Vuernick, Legal Policy Director, for Citizen Action: The stipulation provision erodes the public right to know events in the courts, which are public institutions. It will spawn more litigation as more people are injured by products, toxics, and negligent health care providers for want of access to discovery information. The direction to consider reliance means that good cause will be ignored both when the order is entered and again when modification or dissolution is sought.

95-CV-244: Hon. Lloyd Doggett, U.S. Congress: The stipulation proposal admittedly reflects actual practice in too many courts, but runs counter to the principle that courts should function under a presumption of openness. The reliance provision exacerbates the effect of the proposal. "I am convinced that buried in discovery documents are too many secrets that can maim or kill consumers * * *. I have seen such documents during the course of my service as a Justice of the Texas Supreme Court."

95-CV-245: Robert F. Wise, Jr., Esq., for Commercial & Federal Litigation Section, New York State Bar Assn.: The proposals simply conform to general present practice. The decision to recommit to the Committee arose from "a last-minute lobbying effort" by those who appear to be "opposed to any protective orders at all," or who fail to appreciate that the proposal addresses only protective discovery orders. But it would be better to allow entry of stipulated orders without requiring a motion.

95-CV-246: Mary Ellen Fise, Esq., Mary Griffin, Esq., & Jay Feldman, for Consumer Fedn. of America, Consumers Union, and National Coalition Against Misuse of Pesticides: The stipulation and reliance provisions are bad. Concealment of discovery materials hides information important to consumers and government agencies "and allows harmful products to remain in the marketplace." Repetitive discovery will be forced. The purpose of civil actions specifically designed to remedy societal harms, including civil rights actions and other statutory actions — such as for violation of the Consumer Product Safety Act — will be thwarted. Increased concealment will make it more difficult for injured plaintiffs to find lawyers willing to take their cases, for want of knowing how strong the claims are. Rule 26(c) should be amended to include "a presumption against protective orders if the subject matter of the order relates to public health, public safety, environmental protection, or government operations."

95-CV-247: Don W. Martens, Esq., for American Intellectual Property Law Assn.: Proposed (c)(3)(A) is desirable; it confirms the existing power to modify protective orders. This issue often arises when a patent is involved in successive actions, making it desirable to avoid duplicate discovery by allowing access to the materials of the first action. But (c)(3)(B) should be deleted. It is unprecedented to list factors that a court "must" consider. The list clearly is not inclusive, but focus on these factors may mislead a court to weight them too heavily in comparison to factors not listed.

95-CV-248: Michael A. Pope, Esq., for Lawyers For Civil Justice: The proposal strikes a reasonable balance "between dual and seemingly irreconcilable objectives of public access and personal privacy." Those who publicly protest stipulated orders often "derive enormous benefit from entering protective orders on stipulation of parties which has facilitated the full and free exchange of documents." The modification provisions contain important guideposts. This is "a modest but meaningful reform."

95-CV-249: Hugh F. Young, Jr., Executive Director, for Product Liability Advisory Council: The provision for stipulated orders recognizes sound current practice; it does not diminish the good cause standard — good cause must be shown whenever continuing protection is challenged. Stipulated orders are essential to the discovery process. The modification proposal also is sound, but there should be more explicit statements about what it does not do.

It does not change the law of standing to seek modification or dissolution. It does not – and, under the Enabling Act, perhaps could not – apply to confidentiality provisions in voluntary settlement agreements. And it does not create a right of public access to information in the possession of the parties but not filed with the court.

95-CV-250: Jane E. Kirtley, Esq., et al., for Reporters Committee for Freedom of the Press: The stipulation amendment should not be adopted. "Restrictions on access would conceal information important to public health and welfare, serve as de facto prior restraints, and would not be a harmless codification of an already accepted practice." The common-law right of access limits the power to impose protective orders on judicial documents. Access should be permitted only to protect a compelling interest, and should be narrowly tailored to that interest. Parties who oppose protective orders are not likely to resist them, for fear of increased litigation costs and delay. The public interest in disclosure should be considered on entry of an order, and continually on motions to modify or dissolve. Wise courts now insist on a showing of good cause.

95-CV-252: Nan Aron, Esq., for Alliance For Justice: Existing problems of court secrecy would be exacerbated by the stipulation and reliance provisions. Needless secrecy can leave plaintiffs ignorant of their claims, or unable to bear the costs of discovery and proof; it also increases the probability that more people will be harmed by the same or similar products, discriminatory practices, or pollution.

95-CV-253: William B. Poff, Esq., for Executive Committee, Nat. Assn. of Railroad Trial Counsel: Approves the proposal.

95-CV-254: Marjorie E. Powell, Esq., for Pharmaceutical Research & Mfrs. of America: Protective orders in personal injury and intellectual property litigation related to drugs protect not only commercially sensitive information but also personal patient information. Stipulated orders protect against the need to engage in a dispute solely for the purpose of obtaining protections that all parties agree are appropriate. The standards for modification are appropriate, keeping in mind that it is in the public interest to encourage discovery without extensive disputes. Courts should remember that there are other agencies charged with protecting the public interest, and that these agencies commonly have power to compel production of information. The FDA, indeed, requires drug companies to maintain the confidentiality of some information, such as information that would identify the person who reported an adverse drug event and the patient who was involved. It would help to add to the Note an illustration based on the need to protect information involved in intellectual property litigation.

95-CV-255: Kevin P. Sullivan, Esq., for Washington State Trial Lawyers Assn. Court Rules Committee: The proposal will make protective orders easier to obtain, a disservice to the public

interest. Washington State has adopted "sunshine" laws requiring a court to weigh the public interest before signing any protective order, even if the parties stipulate to the order.

95-CV-258: Hon. Robert N. Chatigny: I cause surprise and consternation by refusing to sign stipulated protective orders, without prejudice to renewal when the parties show good cause. "Agreed orders supported by a showing of good cause can be very helpful." But even agreed orders can impose substantial burdens and breed satellite litigation; they should be entered only for good cause.

95-CV-259: Sandra S. Baron, Esq., for Libel Defense Resource Center: Comments of Associated Press, Dow Jones & Co., Magazine Publishers of America, National Assn. of Broadcasters, Newspaper Assn. of America, Radio-Television News Directors Assn., and Socy. of Professional Journalists: The amendment that permits third parties to intervene to seek modification is a positive step, but it cannot substitute for a threshold determination of good cause by the court. Stipulated orders should be forbidden. And the rule should require a showing of compelling interests to justify sealing any material filed with the court. (1) The routine use of protective orders is "[t]roubling because the public, the press, the government, even congressional investigators are shut out, and plaintiffs – and sometimes defendants – are shut up." There are numerous illustrations of secrecy orders that have caused continuing injury by dangerous products. (2) Protective orders impair reporting on the judicial process. Access to trial records is less useful as so few cases proceed to trial; discovery materials are increasingly important. (3) Seattle Times v. Rinehart has been understood to require a judicial determination of good cause to protect First Amendment concerns. (4) The parties share a common interest in secrecy – plaintiffs because they obtain more favorable settlements. The public interest demands publicity. (5) Placing the burden on nonparties to justify access is untoward, because they do not know what is there. Smaller media firms cannot afford the cost of a quest for information that may or may not be of public interest. (6) Courts need not examine every document. They can define categories of documents likely to deserve protection in each case, and articulate categories for which good cause likely cannot be shown. Parties can be required to submit a log describing specific documents designated confidential. (7) Parties commonly stipulate to filing under seal any motion that annexes or refers to protected discovery information, defeating the constitutional presumption of access; this practice should be specifically prohibited, unless a compelling interest can be shown. (A supplement to this filing calls attention to the decision in Proctor & Gamble Co. v. Bankers Trust Co., 6th Cir. 95-4078, March 5, 1996, and the opinions of Chief Judge Merritt and Judge Martin about broad stipulated protective orders.)

95-CV-260: Martin R. Jenkins, Esq., for New Hampshire Trial Lawyers Assn.: "[O]pposes any change in the Rule which would permit greater

secrecy by wrong-doers." The proposal "would seem to do nothing more than allow a broad cloak of secrecy for tort feasors to hide behind."

95-CV-261: John Seigenthaler, Chairman; Paul K. McMasters, First Amendment Ombudsman, The Freedom Forum: "Accustomed to frustration and failure in other venues, the people expect more success in the courts when they go in search of Truth and Justice." "Now comes the Advisory Committee on Civil Rules offering changes that challenge the concept of maximum access and frustrate the search for the truths that serve Justice." Significant injury to First Amendment principles will be caused by the proposals. Expanding secrecy, denying camera access to trials, filing documents under seal, and protection in other forms is untoward. As Chief Judge Merritt has written, common sense tells us that the greater the motivation a corporation has to shield its operations, the greater the public's need to know. (1) Stipulations should not be tolerated. Plaintiffs acquiesce to obtain or speed settlement. (2) This is exacerbated by allowing consideration of reliance. (3) Without access to the discovery documents, potential intervenors cannot obtain the information needed to support an application for dissolution or modification.

95-CV-262: John DeQ. Briggs, Esq.; Walter H. Beckham III, Esq.; Donald R. Dunner, Esq., for ABA Sections of Antitrust Law, Intellectual Property Law, and Tort and Insurance Practice: Stipulated protective orders are essential and conserve judicial resources. They also encourage voluntary exchange of information under Rule 26(a) early in the litigation. There is no evidence, other than anecdotal, of any injury to public health and safety. The court retains complete discretion to reject, dissolve, or modify any stipulated protective order. Courts even now frequently allow access to unfiled discovery information by parties to other litigation, on condition that the applicable protective order include the new parties. (The Section of Intellectual Property Law expresses concern with the provision in (c)(1) requiring a certificate that the movant has conferred in an attempt to resolve the dispute without court action; there is no dispute when the parties stipulate. The language of subparagraph (c)(1)(E) does not make it clear that no one may be present other than the persons designated; this should be clarified.)

95-CV-263: Robert A. Graham, Esq., for Center for Auto Safety and Consumers for Automotive Reliability and Safety Foundation: The stipulation and reliance features threaten "the invaluable role discovery * * * plays both in deterring reckless conduct by manufacturers and in aiding regulatory authorities in their information-gathering functions." Just as ultimate liability, the threat of disclosure of product defects deters manufacturers from marketing defective vehicles. Under the proposed amendments, "the manufacturer no longer needs to forbear from marketing those products." It need only wrest a stipulated order from a plaintiff without time or resources to battle for disclosure. "In the

meantime, the automaker can continue to place defective products on the road and reap whatever economic benefit it can from those sales, all the while effectively immune from serious negative repercussions." (Several examples are given of cases in which private discovery has spurred public enforcement efforts or other correction, including sidesaddle fuel tanks, all-terrain vehicles, and utility vehicles.) To allow reliance on a stipulated protective order to defeat modification "would enable a party to act unilaterally then to rely on that unilateral act."

95-CV-264: Robert C. Nissen, Esq.: Adds his article, *Open Court Records in Product Liability Litigation Under Texas Rule 76a*, 72 Tex.L.Rev. 931 (1994). Concludes that the proposal "is fine for unfiled discovery," but that there should be a separate rule establishing strict standards for sealing discovery information filed with the court or introduced at trial (the focus on information filed with the court seems to be on information used to support a motion). Experience with the Texas rule shows that although courts are required to make findings as to public health and safety, they are not able to review unfiled information to make the required determination; the rule has had little impact. Indeed, the rule may have raised a barrier to settlement.

95-CV-265: Senators Herb Kohl, Howell Heflin, Edward M. Kennedy, William S. Cohen, Paul Simon: There is evidence that protective orders are abused to the detriment of public health and safety. The courts should not become an exclusive, private system. Rather than weaken the current rule by eliminating the good cause requirement for stipulated orders, the Committee should strengthen the rule by requiring consideration of public health and safety.

95-CV-266, Marjorie Heins, Esq., for Committee on Communications and Media Law, Assn. of Bar, City of N.Y.: The change permitting nonparties to intervene is commended. The stipulation provision, which eliminates the requirement of a judicial finding of good cause, is decried on several grounds. (1) It is an impermissible delegation of Article III judicial power to private parties. Courts can implement a "good cause" requirement without looking at every document. They must establish specific types of documents and categories of information for which good cause can be met, and then allow parties to make initial designations subject to challenge. (2) Protective orders are unlike private agreements because contempt is available. (3) The public may have a legitimate interest in access to the information. (4) Protective orders may have collateral consequences for constitutional freedoms. A judicial good-cause finding is essential to protect First Amendment interests, both of parties to speak and of public access to court records. (5) Parties commonly insert stipulated provisions requiring that all protected discovery information be filed under seal, even when used in support of a motion or pleading. The Committee should adopt a specific rule forbidding any provision in a protective order that permits sealing court records on mere stipulation of the parties.

95-CV-268: William S. Dixon, Esq., [apparently] for Albuquerque Journal: The reference to stipulation "would be a disaster for public access to civil proceedings and amounts to practically divesting the trial court of power to superintend discovery material * * *." It is not necessary that there be a hearing on each motion, but a showing of good cause in writing should be required. The debate should not focus on product liability cases, a mere fraction of the problem, but on civil rights and other litigation. "The public interest embraces * * * corrupt politicans, dysfunctional judges, institutional misconduct and pedophile priests." The rule should require that any protective order motion be docketed "in a convenient format in the clerk's office for public inspection and some evidentiary showing in the form of affidavit or testimony to establish 'good cause.' With notification, interested third parties, including the press, will be apprised * * *."

95-CV-270: Edward B. Havas, Esq., for Utah Trial Lawyers Assn.: The stipulation provision should be deleted. "Protective orders * * * while occasionally justified, are most often used to preclude the publication of harmful information regarding a defendant's product or conduct, and to stymie through effort and expense the ability of a victim to obtain the evidence needed to substantiate a legitimate claim." The good cause requirement should be enforced more stringently than it is. And the addition of a "reliance" factor "carries insidious potential," because the party who obtains an order always will rely on it. "This 'reliance' provision will have the * * * effect of maintaining the status quo largely because it is the status quo."

95-CV-273: Pamela Anagnos Liapakis, Esq., for Association of Trial Lawyers of America: Incorporates the February 9 testimony of James L. Gilbert and accompanying statement. "Stipulations are in fact usually agreements of adhesion." Plaintiffs are forced to accede because they cannot afford discovery battles. Courts do not in fact often enter orders on agreement of the parties without a showing of good cause, and should not. The result is to increase the costs of related litigation, or deter it altogether. Often the result also is to suppress information about ongoing dangers "involving products such as drugs, medical devices, and even aircraft." "Reliance is easy to allege and difficult to disprove," and this factor will "harden the resolve of defendants to claim reliance on protective orders * * *."

95-CV-274: Kent S. Hofmeister, Esq., for Federal Bar Assn. by Mark D. Laponsky, Chair Labor Law Section: Endorses the proposal. Discovery proceedings are not inherently public. The proposal does not require that the court enter a stipulated order: "This is the way it should be." As courts increase pressure to expedite discovery, parties may agree to protective orders to enable completion of discovery by cut-off dates. The analogy to Rule 35, however, is not apposite, since physical examination of a party involves only private interests; the public interest in access is

involved with protective orders. The Committee Note "should * * * specifically disavow both a presumption of public access and open disclosure, as well as a presumption of confidentiality." And it should show that protective orders are not disfavored.

95-CV-276: Patrick A. Hamilton, Esq., for Kansas Trial Lawyers Assn.: The stipulation language would promote injustice. Plaintiffs cannot afford the increased discovery costs that follow refusal to stipulate to a protective order. Defendants routinely demand protection for information that is not at all confidential, including television and newspaper advertisements. Secrecy increases the costs of parallel litigation, and often suppresses information about dangers associated with consumer products. The "reliance" provision in (c)(3) "would make it much more difficult for litigants with similar cases to modify a protective order and gain access to non-confidential information * * *."

95-CV-277: Edmund Mierzwinski, Consumer Program Director, for U.S. Public Interest Research Group: The stipulation and reliance provisions "pose grave threats not only to the public health and safety, but also to the critical role the courts themselves play in protecting the public interest, not merely refereeing between the parties." These are not mere technical changes, nor a codification of existing practice. Concurs with the views of Trial Lawyers for Public Justice, expressed at the February 9 hearing.

95-CV-278: Mary E. Alexander, Esq, for Consumer Attorneys of California: The "stipulation" provision should be deleted; good cause should be required for all protective orders. Defendants use superior bargaining power to win stipulations. Defendants often act merely from the desire to hide information. Protective orders conceal dangerous practices and other information the public needs to know. And it is inconsistent to allow stipulated orders without a showing of good cause and at the same time evince distrust of courts by listing factors that must be considered on a motion to modify or dissolve: "This imbalance favors the defendants and limits the ability of consumer plaintiffs to use the vital information that is easily concealed."

95-CV-279: Hon. William W. Deaton: The amendment may be read to permit stipulated protective orders that require automatic sealing of documents filed with the court. This should not be permitted. Sealing is cumbersome for the Clerk.

95-CV-280: Robert Jacobs, Esq.: The "good faith" requirement should be maintained. Corporate defendants routinely insist on boilerplate protective orders that my clients cannot resist, and routinely designate as confidential much that is not. Product liability victims do not have the ability to litigate document production requests time and time again.

95-CV-289: Anthony C. Epstein, for D.C. Bar Section on Courts, etc.: This comment is lengthy and tightly written. A fair summary would run to several pages. Even the highlights run on. The

Section supports the proposed amendments, with the suggestion that it might be better to complete consideration of agreements to return or destroy discovery materials before going ahead with a package of amendments. As an empirical matter, the public interest in access to discovery materials is offset by the legitimate needs for protection and the fact that "in the overwhelming majority of fededral cases," there is no significant nonparty or public interest in discovery materials. Most often, the only real interest is in learning about the workings of the discovery process as part of the judicial process. That is why nonparties rarely seek access to "non-adjudicatory discovery materials." In addition, "the parties should be given considerable discretion to regulate discovery without supervision by the court." (1) Courts should have discretion to enter stipulated protective orders without a pro forma recital of good cause. Including a recital of good cause may make it inappropriately difficult to secure modification later. But judges should be alert to overbroad protective orders in cases "where a strong public interest is apparent." (2) It is useful to confirm the power to modify or dissolve. (3) Several factors should be added to the 26(c)(3)(B) list: [a] whether the circumstances that justified protection have changed (even though this may be implicit in the proposal); [b] whether the order was entered by stipulation, or was based on a judicial finding of good cause after opportunity for public comment; and [c] whether the case has been finally resolved — once a case is over, the parties should not have to spend more time and money on it. (4) (c)(3) should make it clear that the burden is on the party seeking modification or dissolution. (5) The relatively permissive standard for intervention described in the Committee Note is proper. (6) There should not be any requirement that parties make available to nonparties nonadjudicatory discovery materials that have not been filed with the court. The burdens of making these materials available can be substantial. The federal rules should not "become a federally mandated document retention policy." Document retention after judgment should be ordered only in exceptional cases. (7) Private agreements, including return-or-destroy agreements, may deserve treatment in a single package with the present proposal. Finally, there is a separate statement of Arthur B. Spitzer, Esq., taking issue with the Committee's initial statement that the Federal Rules presume that normally discovery materials should be available to the public absent a showing of reasons to restrict public access. He writes that the purpose of discovery is to resolve private litigation. For this purpose, discovery compels disclosure of information that need not be disclosed for any other purpose. "A statute requiring citizens to place such information in a public data bank would be a gross intrusion into personal privacy, and would be unconstitutional." Absent protection, defendants may feel compelled to settle.

95-CV-293: Billie J. Kincaid, for The Victim's Committee for Recall of Defective Vehicles, Inc.: The Committee is a group of those affected by exploding "side-saddle" design pickup trucks. The

writer's son was killed in 1989 when his pickup truck exploded and burned in a collision. At that time the manufacturer had effectively kept the danger secret with protective orders attached to settlement agreements. All court secrecy is a bad thing. But if there is to be protection, it should be ordered by an impartial party – the judge. Only this will protect the public interest.

95-CV-294: Ken Suggs, Esq.: Stipulated protective orders will increase the costs of litigation in related cases, and deprive the public of important information. Consideration of reliance in deciding a motion to dissolve or modify a protective order "impedes the judge's ability to vacate prior orders in the interest of justice * * *." At least in product liability and medical negligence cases, the proposed amendments would have grave negative consequences.

95-CV-296: Jo Anne B. Hennigan, Esq.: As corporate counsel for Michelin North America, is involved in the company's share of federal litigation. The proposed amendment "is unncessary," but "will help to clarify and reinforce approval of the use of protective orders * * *." "The use of protective orders, particularly stipulated ones, allows the parties to focus on the real dispute at issue – liability and damages – without protracted discovery motions necessitated by the fear that any information produced in discovery will be open to public – especially competitors' – view. Absent the availability of enforceable and meaningful protective orders, Michelin would be forced to fight to the death virtually every discovery effort made against it * * *."

95-CV-297: David K. Hardy, Esq.: Most jurisdictions permit stipulated protective orders, a common-sense practice that has worked well to date. "The factors relevant to modification or vacation of a protective order are, likewise, wisely made explicit by the proposed rule."

Testimony on Rule 26(c)

Kevin J. Dunne, Esq., December 15: Tr pp. 5 to 17: Supports the amendments. Experience is defending products cases, including many pharmaceutical cases. There are three alternatives: private agreements governing discovery; stipulated protective orders; and the "maximum pain" approach of contesting every dispute. Ordinarily plaintiffs' attorneys agree to stipulated orders because that is the best means of representing their clients. Stipulated orders save time and expense for all parties, and may save vast expense in complex cases. Public safety seldom is threatened — most product cases are filed after public disclosure of the risk. Most often, courts enter the orders in "rubber stamp" fashion, but some change is possible. The proposed language leaves the court free to reject the stipulation. There is little press interest in most cases: "I represented defendants in DES, Dalkon Shield, Breast Implant. I have negotiated stipulated protective orders for 27 years. Not once has the press ever tried to get any of those documents."

Peter Hinton, Esq., December 15: Tr 29 to 49: Although plaintiff attorneys often stipulate to protective orders, they do not do it "gladly" as Mr. Dunne suggests. The proposed changes are desirable because there may be an increased concern for public safety. Of course as plaintiff in a sexual harassment suit, I would gladly stipulate to an order that protected her privacy.

Frank C. Jones, Esq., January 26: Tr 22 to 31: for Product Liability Advisory Council. The provision for stipulated orders is good. I had a case with some 5,000,000 pages of discovery documents. Under a stipulated protective order, discovery went well; there was no need to burden the court with repeated disputes. If anything, lawyers overproduce under these orders. Once a challenge is made, the burden of showing good cause for protection remains on the party resisting discovery. The consideration of reliance when modification or dissolution is sought is proper. The alternative is always having to burden the court with requests for protection.

Dierdre M. Shelton, Esq., January 26: Tr 31 to 36: "The style changes are excellent. It makes the Rule much easier to read." The stipulation provision does not change anything. The court can still reject the stipulation, and insist on showing good cause; it is difficult to understand how some comments have failed to understand this point. In practice, if the parties are agreed on a protective order, the judge really does not have the information required to draft an order. And when the parties are unable to agree, judges "hate it. And we don't get good rulings because they don't want to deal with it."

Cornish F. Hitchcock, Esq., January 26: Tr 36 to 74: Asks that the proposal be discarded. If it is retained, the references to stipulations and reliance should be stricken; at the end, he concludes that simply removing these items would not require a new

round of public comment. He has often represented journalists, scholars, researchers, and other third parties challenging protective orders. The case law now generally allows third-party applications for relief from protective orders. The key point is that "good cause" can mean different things at different points in the progress of an action. During the initial discovery stages, it can be good cause for a protective order that the order facilitates discovery; if the parties are happy to exchange information under a protective order, there is no case or controversy in front of the judge and no basis for denying good cause. There is no need for a hearing at that stage. Protective orders can be justified "on the grounds that it is temporary, that it is pretrial, because once you get to trial, that's when all the information comes out. * * * Now, the problem in 90 percent of all civil cases is you never get to trial." "We recognzie stipulations still exist and think that the practice could continue." But there is no need for explicit recognition of this practice in the rule. The problem arises later in the litigation when a third party comes in to challenge the order. At that point it should be clear that the party seeking continued protection has the burden of demonstrating good cause for protecting the specific information sought. At that point – and it may be after settlement – "efficient case management may not be good cause any more." The reliance factor should not have any independent force; what counts is good cause for protection at the time access is demanded. The stipulation provision "would change the presumption of openness." Reliance "is a very subjective standard. It's not one that's really amenable to proof one way or the other." What counts is showing a specific justification for continued protection; a show-cause order and response, with the burden on the party seeking protection, is an effective procedure at that point. The reliance argument "will inevitably be made. * * * It cannot be used as a touchstone in and of itself unless it is grounded in a claim of objective harm because there will be a harm following disclosure of a sort that courts don't like to happen."

Michael A. Pope, Esq., January 26: Tr 74 to 80: President, Lawyers for Civil Justice. "The rule has worked fairly effectively up to now, but I certainly see the changes as a proper clarification * * *." "A stipulation provision is a very clear one, and one that certainly is the practice around the country * * *." Privacy is one of the central concerns. Under agreed orders, the parties avoid the costs of fighting discovery, and may produce material that "may not have had to be produced, but it is done by agreement." "Where there is a question, we go ahead and do it because we're relying on the fact that it's only for the purpose of this litigation and will be returned to us at the end." And if the system becomes less predictable – if reliance is not protected – clients will not be as cooperative about producing information. We lawyers "don't control everything." It would be a great disservice to delete reliance from the published proposal; courts would be left puzzling just what is meant.

Kenneth Sherk, Esq., January 26: Tr 80 to 86: The Federal Rules of Civil Procedure Committee of the American College of Trial Lawyers supports the proposal, and earlier wrote at length on the "reasons why stipulated protective orders ought very definitely to be in the rule."

J. Richard Caldwell, Jr., Esq.: January 26: If the stipulation language were deleted now, lawyers would surely argue that the Committee intended to reject stipulated orders. Of course the argument could be met, but it is better to retain the provision. Stipulations work; in my practice, they outnumber contested orders ten to one. Reliance must be protected. One illustration suffices. In litigation involving Widget Model A-5, there may be a demand for production of design drawings, test results, and the like for models A-1 through A-4, and models A-6 through A-20. My client says they all are so different that these materials are not relevant. But it is less costly simply to produce the materials if we can stipulate to a protective order "with some fair degree of confidence that all of this other material and these other widgets are not going to be admissible in any event." If we had resisted discovery, probably we would not have had to produce the material at all. "That's legitimate reliance." And reliance may be the only argument available to defeat modification when someone else comes in and demands access. It would be better not to allow consideration of public injury on a motion to modify or dissolve, but as a package the (c)(3) factors are "very admirable."

John A. Chandler, Esq., January 26: Tr 93 to 100: Strongly favors stipulated protective orders. Accounting firms commonly have client papers, that were given to the firms with an expectation of confidentiality. "Stipulated protective orders in a system such as that [in which there is no federal accountant-client privilege] makes it easier for a protective order I think is essential."

James Gilbert, Esq., February 9: Tr 15 to 25: For Association of Trial Lawyers of America. The proposal "will give an unfair litigation advantage to a broad category of defendants" — "hundreds, if not thousands, of product manufacturers." Consumers come to product litigation with a need for critical information about design, development, testing, marketing, and the rest, all of it in the possession of the defendant. The defendant hopes to maintain its informational advantage, and seizes on the first legitimate discovery request as the occasion to force agreement to a protective order. The plaintiff is forced to acquiesce; his concern is getting a wheelchair, 24-hour care, or whatever, not advancing fair and efficient litigation by others. "The sole objective of the industry is not to keep this away from their competitors, but to isolate the plaintiff." The issue is about litigation advantage, not privacy; manufacturers have asserted confidentiality as to such public documents as federal safety standards, excerpts from the Federal Register, complaints in public files, filings with the National Safety Administration, and technical papers obtainable in any engineering library in the

country. Stipulations should be approved by the court only if an attorney certifies that the information has been reviewed and is indeed private; severe sanctions should be imposed for certification of nonconfidential material. It would be better to delete the reference to stipulations, retaining the good cause requirement of the present rules. As to reliance, it should not be made an explicit rule factor with respect to modification or dissolution, although there may be circumstances in which a court can properly consider reliance, particularly if the court considered all the appropriate factors and entered an adjudicated protective order at the beginning. The easier it is to win a protective order by stipulation, the easier it should be to win modification or dissolution.

Leslie A. Brueckner, Esq., February 9: Tr 25 to 43: On behalf of Trial Lawyers for Public Justice. The stipulation language should be deleted. This goes beyond existing practice — although many judges enter stipulated orders, many judges do not. Some hold that the court is required to make an independent good cause determination even though the parties have agreed. These courts also emphasize the special danger presented by stipulated orders "because none of the parties is advocating for openness in that situation." These orders, moreover, commonly provide for automatic sealing of any discovery materials filed with the court; the court should be required to make an independent determination that the more stringent standards for sealing court records have been met, at least with respect to materials filed in support of a motion. It is enough that the court find that there is good cause for secrecy with respect to categories of information; it is not required that every piece of information be publicly revealed so that the court can determine whether it should not have had to be revealed, nor that the court must examine every document in chambers. As Mr. Gilbert testified earlier today, "what is necessary is that the party seeking secrecy affirmatively aver to the court and is subject to the requirement in the order that anything designated confidential is truly within one of the categories that is considered appropriately secret under Rule 26(c)." The First Amendment, indeed, stands in the way of eliminating the good cause requirement by stipulation; Seattle Times finds the First Amendment is satisfied by protective orders entered for good cause. And "reliance" ought not be a factor on motions to dissolve or modify. The question is whether information continues to deserve secrecy; reliance is not in and of itself reason to maintain secrecy. "[N]o party could reasonably rely on a stipulated protective order," but as drafted the rule seems to protect reliance even on stipulated orders. That goes beyond existing law. It will create a trap, and make it very difficult to unseal protective orders.

Hon. Virgina M. Morgan, February 9: Tr 43 to 49: President, Federal Magistrate Judges Association. The proposal addresses well "the issues of privacy, of moving the litigation forward, of protecting

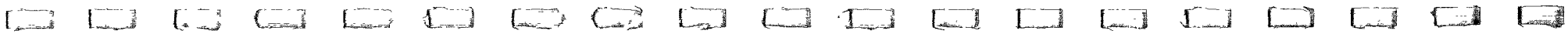
the interests of all the parties." Stipulated orders are appropriate. Commonly they identify categories of documents, and designate those that will be only for the attorney, those that can be shared with the client or house counsel, those that can be shared with experts, and so on. Most of the cases are not product cases. They frequently involve civil rights, or patent or copyright litigation. Reliance is the purpose of entering the order. At times lawyers resist the protective order because they want to share the fruits of discovery with another lawyer who has a different client but a similar claim. That should be addressed up front, recognizing that the purpose of litigation commonly is to provide redress to the plaintiff. It is not a Freedom of Information Act.

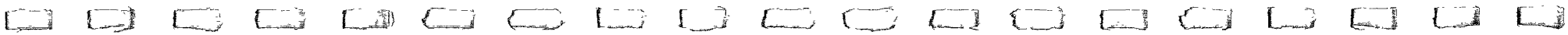
Linda C. Lightfoot, Editor, The Advocate, February 9: Tr 80 to 88: Appears for the American Society of Newspaper Editors. The good cause standard should not be diluted by permitting stipulated protective orders. Indeed, the good cause standard should be strengthened, creating "a presumption of openness to be overcome only by a showing of specific serious and substantial interest that clearly outweighs the public interest in disclosure." Civil litigation often is the business of the public, not the parties and attornies alone. Stipulated orders guarantee secrecy "in the very cases that arouse the most public curiosity and are the most latent with public interest implications." In the Baton Rouge area there are chemical spills and accidental emissions that are of interest to the public; a lawyer owes primary allegiance to the client, and it is the role of the news media and other public interest groups to serve the broader public interest. Secrecy orders impose a form of prior restraint on parties who may want to share information with the public. Even if confidentiality orders facilitate settlement, the interest in achieving settlement should not outweigh the public interest.

Victoria Bassetti, Esq., February 9: Tr 88 to 98: A member of the Senate Judiciary Committee staff, speaking for Senator Kohl. The Judiciary Committee has held hearings on bills designed to protect the public health and safety against protective orders, and has deferred action to allow action by the Judicial Conference. "[W]e are saddened to learn that rather than actually confronting the problems that the Judiciary Committee had identified the Conference seems to be backing away from and holding back the requirements of Rule 26(c)." The factors for modification or dissolution, apart from a quibble about reliance, are a step in the right direction; they could easily be incorporated into the initial effort to enter a protective order. The express provision for stipulated orders is a step backward, even though a judge can demand a showing of good cause for a stipulated order under present practice and under the proposed rule. Notwithstanding a proposed stipulation, "the judge is capable of, say, looking at the facts of the case and exercising his or her own independent judgment * * *." The stipulation provision will encourage parties to rely on stipulations. It need

not be more difficult to get relief from an order entered after a finding of good cause than from a stipulated order – in either case, an intervenor must show new considerations to justify relief. The requirement of good cause – and, we would add, a requirement that the judge find that there are no public health or safety interests affected by the order – can be met without holding a hearing, and without requiring the judge to sort through all of the documents covered by the order. The type of case can provide much guidance. "I find it doubtful that in the course of a civil rights litigation the judge or any of the parties are going to stumble across a smoking gun that indicates the Ford Pinto case." In a product liability case, on the other hand, inquiry should be made whether there is good cause to justify closing off access to information that involves the public health or safety. "[O]ne protective order entered in one case can implicate thousands of lives and thousands of people's health and safety." The inquiry might "cost very little." The judge can ask the parties to indicate which protected documents are simply proprietary sales or economic information. It is proper to rely on the parties. "You have to be able to rely on the parties to stipulate and sift through documents. To rely upon them a little bit more doesn't strike me as that big a burden," particularly since they will be subject to contempt sanctions if they make misrepresentations about public health and safety implications.

Al Cortese, Esq., February 9: Tr 98 to 109: For the National Chamber Litigation Center. "If there's any reason for promulgating this rule, I think basically it is to put an end to the nonissue of court secrecy." The proposal merely codifies existing practice; if there is to be any change in the proposal, it should be to make it even more clear that it simply confirms present practice. There is no common-law or constitutional right of access to discovery materials. To the contrary, "the real constitutional protections are to protect the information that is required to be disclosed in litigation." The property right in information that must be disclosed only because someone has brought a lawsuit cannot be extinguished; a presumption of access "would be unconstitutional because of the right of due process." The stipulation language does not eliminate the good cause requirement. Stipulations enable discovery to go forward, allowing the parties to sort through millions of pages of documents that in large part are totally irrelevant, without the need in advance of discovery to review all the material, create a confidentiality log, and dispute everything. Under a stipulated protective order, the parties can limit any disputes to specific items. The specific provisions for modification protect any asserted public interest. Reliance is a necessary factor on a petition to modify. It is not possible to say in the abstract whether it would be desirable to take a different approach that simultaneously narrowed the overall scope of discovery and made it more difficult to secure protective orders, but it is clear that no matter what the scope of discovery, protective orders still will be necessary.





Summary of Comments: Rule 47(a)

Prepublication Comments

(The prepublication comments are presented in the order of the set presented to the Committee on Rules of Practice and Procedure for the July, 1995 meeting. Most of the comments were elicited by questionnaires sent to judges in the Fourth and Seventh Circuits.)

Hon. Terrence W. Boyle: Commenting on Criminal Rule 24(a): present practices are fair and efficient. This is a striking difference from North Carolina state court practice with lawyer-initiated voir dire examination.

Hon. Albert v. Bryan, Jr.: (Three letters) Judges who favor lawyer voir dire can permit it under the current rule. Most judges in E.D.Va. regularly select juries in routine cases in 30 minutes or less. Lawyers wish to use voir dire to sell the case to the jury.

Hon. J. Calvitt Clarke, Jr.: (Three letters) The proposals will add another ground for appeal whenever any limits are imposed; lawyers will feel compelled to participate to protect themselves against client protests; prisoners will routinely add incomptent voir dire to their complaints. Lawyer participation greatly adds to the time of trial.

Hon. James C. Fox: (Two letters) The new process will be time-consuming; lawyers will "court" jurors; any court-imposed limits will be the occasion for argument and appeal. Intrusions into jurors' personal lives would be increased.

Hon. Marvin J. Garbis: Commenting on Criminal Rule 24(a): "The advantages of having the judge, and not the advocates, conduct the voir dire examination * * * are many and obvious."

Hon. Elizabeth V. Hallanan: Permits lawyers to ask questions during private voir dire examination of individual prospective jurors. All questions asked in the presence of the entire panel are asked by the court. This form of lawyer participation works, but it is essential to maintain judicial control lest the integrity of the jury system be eroded. The proposal is a bad idea. Judge Hallanan's response to the 4th Circuit Questionnaire, filed at p. 170 of the Administrative Office compilation, adds that the proposal risks eroding the integrity of the jury system and creating an "arena marked by confusion and noisy disorder." In a later letter to Judge Stotler, Judge Hallanan states that the procedure described in the proposed Criminal Rule 24 is very similar to the procedure she has followed for more than 11 years. But the process should not be handed over to the lawyers.

Hon. Clyde H. Hamilton: (Two letters) Addressing Criminal Rule 24(a): Voir dire can become a circus, particularly if lawyers have the opportunity to "grandstand" before cameras. Lawyers will use voir dire to present the strong points of their cases. Any attempt to limit abusive practices will create points for appeal. Every

judge of the Fourth Circuit, except for Judge Niemeyer, opposes the proposal.

Hon. Walter E. Hoffman: The judges in this division of E.D.Va. are 100% opposed. The proposed rule will foster serious invasion of juror privacy and will "invigorate[] the emerging parasite industry of jury consultants whose sole purpose is to enable attorneys to select jurors who are biased in favor of their clients' cause." The supposed ability of the judge to control lawyer abuses is illusory. As lawyers succeed in selecting jurors of extreme views, there will be more hung juries.

Hon. C. Weston Houck: (Two letters) The judges of D.S.C. unanimously oppose proposed Criminal Rule 24. "We believe it is unnecessary, unduly time consuming and difficult to control." It will lead to increased appeals. Jurors will find the process distasteful, adding to their resentment of jury service.

Hon. Harry Hupp: Lawyers are taught to misuse voir dire to adversary advantage. Their participation should remain wholly discretionary with the judge.

Hon. Richard B. Kellam: (Three letters) Under the present system, 95% of our juries in E.D.Va. are selected in less than 30 to 35 minutes. Lawyer participation will mean added costs "such as having a great number of jurors return for several days before a jury is finally selected."

Hon. John A. MacKenzie: Lawyer participation "is solely calculated to obtain as biased a jury as counsel can conjure up."

Hon. Robert E. Maxwell: (Three letters) Attorneys and jurors both appreciate having questions asked by the court. When attorneys have been permitted to ask questions, "the jurors have expressed a feeling of harassment, and implied attacks upon their integrity and were offended."

Hon. Robert R. Merhige, Jr.: "[P]articipation by lawyers will place an unnecessary and time-consuming burden on the administration of justice." [The following remarks are added by a response to the 4th Circuit Questionnaire set out at p. 169 of the Administrative Office compilation; the signature appears to be that of Judge Merhige: This would subject jurors to embarrassing questions and extend time beyond reason, indeed tenfold. Counsel would seek to ingratiate themselves. "In any number of times when I was serving on the faculty for new judges, I was reminded by Chief Justice Burger to emphasize the fact that we did not want counsel examining jurors * * *."]

Hon. James H. Michael, Jr.: The proposal will carry unintended consequences. Lawyer participation, intended to be focused and controlled, will loose all controls; the camel will be in the tent.

Hon. William T. Moore, Jr.: As a practicing lawyer, experienced no difficulty with either Rule 47 or Rule 48 as now in force.

Hon. J. Frederick Motz: The judges of D.Md. unanimously oppose proposed Criminal Rule 24. Lawyer participation lengthens voir dire. Too many lawyers improperly attempt to argue their cases or intrude unnecessarily on juror privacy. We commonly allow lawyer participation, but this is possible only because control is maintained through the power to withdraw the privilege to participate at any time.

Hon. John F. Nangle: The present rule works.

Hon. Jon O. Newman: "[D]istrict judges should not be required to allow anything like extensive lawyer-conducted voir dire."

Hon. William M. Nickerson: (Two letters) Proposed Criminal Rule 24 will turn control of voir dire over to lawyers, add to delay, and burden the courts of appeals.

Hon. Richard A. Posner: Is unalterably opposed to proposed Rule 47, and will certainly vote against it.

Hon. Morey L. Sear: The proposal is "very bad."

Hon. J. Clifford Wallace: (Two letters) The Judicial Council of the Ninth Circuit has voted unanimously to oppose the change. The burden of justification lies on the proponents of change.

Hon. H.E. Widener, Jr.: Present practice works well. The change will interfere immeasurably with the processes of district courts, and yield negligent or non-existent benefits.

Hon. Ann C. Williams: The Court Administration and Case Management Committee unanimously declined to endorse the proposal. Many committee members permit lawyer participation, but fear that lawyer behavior will change if the privilege is made a right. Judges have responded to Batson problems by becoming more flexible in voir dire examination.

Hon. Joseph H. Young: (Two letters) Experience sitting in districts that allow lawyer voir dire shows that voir dire takes approximately ten times as long. Counsel in those jurisdictions believe they win or lose as a result of voir dire.

Hon. George Ross Anderson, Jr.: Experience with attorney voir dire quickly led to abandoning it. The experience "was a near disaster. This is partially due to the ineptitude and inexperience of the lawyers participating." Jurors resent it. Lawyers seek to try their cases. Jurors give more honest answers to judges. Questionnaires work far better.

Hon. Joseph F. Anderson, Jr.: Permits attorney voir dire in complex cases and others where appropriate. They are limited to 20 minutes a side. But opposes amendment of Rule 47(a).

Hon. Richard S. Arnold: The better practice probably is to let lawyers question the jury panel, but not for too long. But is inclined to oppose the proposal.

Hon. Sol Blatt, Jr.: Concurs totally in the opposition views expressed by Judge Robert Doumar.

Hon. Charles L. Brieant: The proposal emanates from a committee dominated by practicing lawyers. "This month I selected six civil juries in six different cases during one morning * * *." That could not be done with lawyer voir dire. Opposes the proposal.

Hon. Leonie M. Brinkema: (Two letters) Batson has not created any new need for lawyer participation. Only the judge cares about selecting an impartial jury. Court-conducted voir dire sends a clear message that the judge is in control, with lasting benefits throughout trial. In a later letter to Judge Stotler, Judge Brinkema observes that: "Lawyers are partisans. Their allegiance does not lie with truth or even justice. Their job is to do everything they can to win * * *." It is the judge's job to ensure that the trial is fair. Proposed Criminal Rule 24 "will invite more pretrial disputes, inject more delay at the earliest stage of the trial and, of course, generate entirely new issues for appellate review."

Hon. W. Earl Britt: Counsel seek to select a partial jury; only the judge seeks an impartial jury.

Hon Frank W. Bullock, Jr.: Counsel questioning is too time consuming, too personal, too much inclined to seek juror commitment, and too intimidating. In a later letter to Judge Stotler, reports that the judges and magistrate judges of M.D.N.C. are unanimously opposed to the proposed change in Criminal Rule 24.

Hon. James C. Cacheris: Counsel participation will lengthen the selection process and not produce any better jurors.

Hon. B. Waugh Crigler: Two letters reflecting his correspondence with other judges in the Fourth Circuit, and opposition to the proposal.

Hon. Robert G. Doumar: (Four letters) Lawyer questions will invade privacy, voir dire will become a mini-trial, appeals will increase, and intelligent individuals will seek to further avoid jury service. The proposal may reflect fear that Congress will enact something worse; there are serious doubts whether Congress can interfere with the judiciary in this manner.

Hon. Franklin T. Dupree, Jr.: As a trial lawyer for more than thirty years, I treasured participation in voir dire as an opportunity to curry favor with the jury and create an atmosphere favorable to my client. Questioning by the judge instills in jurors the importance of their role.

Hon. T.S. Ellis, III: As an instructor at the National NITA course, I taught lawyers to use voir dire to argue their cases and to select partial juries. Practice in New York, California, and Alabama exhibits all the evils of lawyer-conducted voir dire, which "is destructive of, and repugnant to, the fair and expeditious

administration of justice."

Hon. David A. Faber: Emphatically opposes the amendment. Lawyers will use voir dire to argue the merits of the case, substantially reducing the judge's ability to control the trial process.

Hon. Claude M. Hilton: (One letter, with copies of three others) Judge questioning is the best way to obtain an impartial jury.

Hon. Raymond A. Jackson: Lawyer participation will not enhance the fairness of trial, will increase the time needed to select a jury, and will add to the charges of retained and court-appointed counsel.

Hon. Frank A. Kaufman: Too often lawyer participation means efforts to sway the jury.

Hon. Jackson L. Kiser: Lawyer participation is desirable only if it is strictly controlled by the judge.

Hon. Benson Everett Legg: The present system works well.

Hon. Peter J. Messitte: Lawyer participation takes inordinate time and yields little benefit. It may incline jurors toward or against a point of view. A jury impaneled after basic questioning by the court "is generally about as fair and impartial as a jury selected after extensive voir dire conducted by counsel would be."

Hon. Henry Coke Morgan, Jr.: Trial attorneys are primarily interested in selecting biased or prejudiced jurors. The present rule works well.

Hon. Graham C. Mullen: Uses jury questionnaire, which helps focus voir dire. Attorneys are given 15 minutes per side after a brief voir dire by the court. Attorney participation is highly desirable. As a trial lawyer, I hated the federal court because there was not a fair opportunity to interact with prospective jurors. If lawyers are given a fair shake by participating in voir dire, they will feel better, this feeling is communicated to clients, and respect for the system will be increased.

Hon. Paul V. Niemeyer: Five letters, reflecting correspondence with many Fourth Circuit district judges.

Hon. David C. Norton: A right of lawyer participation would be "a collossal waste of time." Some will want to prove the case at voir dire. Effective limits will be difficult.

Hon. Robert E. Payne: (Two letters). The court is fully able to elicit all information required for exercise of peremptory challenges. Lawyers will use voir dire to influence jurors and elicit commitment. Voir dire, and intrusive questionnaires, will be used to support the work of jury consultants who help select favorable jurors. Prospective jurors resent these invasions by the court, and the process demeans the courts and diminishes their public respect. Voir dire will be used to argue the case. Voir

dire will take more time, and will add points for appeal. There is no reason to act for fear of Congress; it is "time for the judiciary to take control of the business of the judicial branch." Judge Payne repeated these views in a later letter to Judge Stotler.

Hon. Robert D. Potter: Allows counsel voir dire in civil cases, but not criminal. In criminal cases, counsel use the process to argue the case; in multidefendant cases the process can be very tedious. Counsel ask questions that are irrelevant and duplicitous.

Hon. Dennis W. Shedd: Lawyers would use voir dire to make arguments. They would lengthen the selection process.

Hon. Frederic N. Smalkin: Counsel participation lengthens the process, and will be used to pre-argue the case.

Hon. Rebecca Beach Smith: Opposes, for the reasons expressed by Judges Brinkema, Doumar, and Payne.

Hon. James R. Spencer: I usually seat a jury in less than an hour. I have worked in a jurisdiction with lawyer voir dire, and it takes one or two days. Lawyers are interested in selling their case and seating a partial jury.

Hon. Frederick P. Stamp, Jr.: In some cases, particularly complex cases, allows counsel participation, usually for about ten minutes a side. Does not permit questions that seek to talk a juror into disqualification or challenge for cause, or that argue the case. But as a trial lawyer, saw abuses by lawyer questioning.

Hon. William B. Traxler, Jr.: The average jury selection takes about 15 minutes; the questions asked by the court, and the questionnaires, give enough information for intelligent lawyer jury selection.

Hon. James C. Turk: Within reasonable limits, permits counsel to ask additional questions after initial questions by the court. This is desirable "if it can be done under the control of the presiding judge."

Hon. [Illegible; a response to the Fourth Circuit Questionnaire that may be by Hon. Hiram H. Ward]: Lawyer participation consumes too much time; questions by each side overlap; each side tries to develop a personal relationship with the jury.

Hon. Richard L. Williams: Counsel attempt to make closing arguments; the gifted win an advantage. With questionnaires and jury profiles, biased jurors can be picked; each side could pick six, and all cases will produce hung juries.

Hon. Henry L. Herlong, Jr.: Lawyer voir dire would take too long.

Hon. [Illegible Name on 4th Cirquit Questionnaire p. 166]: Lawyers would attempt to try their cases on voir dire. States that permit this may take weeks to select a jury.

Hon. [Illegible Name on 4th Circuit Questionnaire p. 167]: The proposal would be devastating. It would hand over control of the very first thing that happens, divesting judges of the power to be in full control. It would waste time. (This judge does permit lawyers to ask follow-up questions when they are genuinely searching for material supplemental information.)

Hon. [Illegible Name on 4th Circuit Questionnaire, p. 171]: "Waste of time . . . opportunity for counsel to posture."

Hon. [No name on 4th Circuit Questionnaire, p. 172]: Lawyer participation is desirable. Attorneys are in the best position to know what information should be elicited, and to react with follow-up questions. With more than 6½ years of following this practice, has not seen excess time taken.

Hon. [No name on 4th Circuit Questionnaire, p. 174]: Refers to an attached letter, so this may be double-counting. The judge is the only participant who truly cares about getting an impartial jury. Lawyer questioning will slow down the process and add unnecessary confusion.

Hon. [No name on 4th Circuit Questionnaire, p 175]: To force this on judges will turn control over to the lawyers. Voir dire becomes an additional advocacy hearing, not a search for an unbiased jury.

Hon. [No name on 4th Circuit Questionnaire, p. 177]: Lawyer participation would significantly delay the process without significant corresponding benefit.

Hon. [No name on 4th Circuit Questionnaire, p. 178]: Allows lawyers to ask follow-up questions "under *close* scrutiny." It would be an enormous mistake to do anything but leave this to the judge's discretion "because it has become a tool to circum[vent] justice."

Hon. [No name on 4th Circuit Questionnaire, p. 179]: Strongly opposes. Lawyers seek to seat a favorable jury. Intentionally or unwittingly, as the case may be, they may ask questions that pollute an entire panel. When I have allowed lawyers to participate, they have been inefficient and taken more time than necessary. They tend to ask insensitive questions.

Hon. [No name on 4th Circuit Questionnaire, p. 180]: "Too much confusion, delay, redundancy, and inefficiency would flow" from lawyer participation.

Hon. [No name on 4th Circuit Questionnaire, p. 181]: Judge-directed questioning usually is more efficient. Lawyers generally are satisfied. I have no strong feeling for or against lawyer participation, but we should retain the present system so that each court can make its own policy.

Hon. [No name on 4th Circuit Questionnaire, p. 182]: "Fair and balanced voir dire requires that *the judge* ask the questions." Counsel will attempt to argue and influence jurors.

Hon. [No name on 4th Circuit Questionnaire, p. 183]: Lawyer participation is good. "[T]his method gives both the court and the attorneys a better sense of a juror's stance on controversial issues and possibly aids in eliminating some appeal problems."

Hon. [No name on 4th Circuit Questionnaire, p. 184]: Lawyers want to establish rapport. No lawyer wants an impartial jury. Prying and nonrelevant questions would be asked. The time required for voir dire would be tripled or quadrupled.

Hon. James H. Alesia: The proposal is counterproductive, and should be discretionary if enacted. Experience with questionnaires shows that lawyers often submit excessive numbers of questions, many of which attempt to argue the law or are very invasive of privacy.

Hon. Wayne R. Andersen: My experience with permitting attorneys to ask direct questions on voir dire "has been completely positive." It is fair to allow an attorney to attempt to establish some personal rapport. At times attorneys ask questions that need to be asked and that I had not asked. Attorneys are grateful for the privilege. Very few have even come close to abusing the privilege. But lawyer participation should not be made a right. That will expand the time required, and will inject advocacy. Some judges may operate better by asking all the questions.

Hon. Sarah Evans Barker: The current rule works perfectly well and should not be changed. Lawyers want to try their cases on voir dire. They are not sufficiently sensitive to the "run on the bank" phenomenon that arises when a juror's answer to a loaded question put by counsel prompts others to join in as a device for getting out of jury service entirely. Giving lawyers an entitlement makes it more difficult to rein them in.

Hon. Gene E. Brooks: Strongly favors lawyer participation, not because they have a right but should have an opportunity "because it enhances their representation of their client." It is a one-on-one, give-and-take that enables better assessment of prospective jurors. "I have stronger views if it is a criminal case." Experience has been very favorable. If attorneys attempt to try the case, they can be set straight with a brief bench conference. Generally a civil jury is selected in less than one hour, and a criminal jury in less than two hours. Lawyers have a legitimate complaint when they are foreclosed from the process.

Hon. Elaine E. Bucklo: For eight years, I allowed counsel to participate. I have stopped. They did not elicit additional information that brought out latent prejudice. Sometimes lawyer questions insult the jurors. Many ask loaded questions hoping to obtain statements that will support a challenge for cause. There is a potential risk that a judge will conduct an inadequate voir dire, and that counsel will be reluctant to criticize it. But appellate opinions are a better cure than a right of lawyer participation.

Hon. Barbara B. Crabb: "[P]articipation by sufferance has advantages over participation as of right." There seem to be few problems if the judge has the power to withdraw a privilege of participation. And there will be difficulties if prisoners and other pro se litigants must be allowed half an hour to flounder around asking questions.

Hon. Thomas J. Curran: With 35 years of trial practice experience, understands that lawyers feel that no one can conduct voir dire as effectively as they can. But many use it to ingratiate themselves and make opening statements. Lawyers take longer. And it is difficult for a judge to determine when counsel are making arguments framed as questions, or asserting propositions of law, or attempting to embed their viewpoints. There should not be a right of counsel participation.

Hon. S. Hugh Dillin: 25 years of state-court practice shows what happens with lawyer voir dire. "[S]uch practice is frequently a disaster. It certainly prolongs the trial of a case."

Hon. Frank H. Easterbrook: Summarizes and comments on the responses to his survey of 7th Circuit district judges. Of 30 responses received by February 28, 1995, 4 favor the Rule 47 proposal, 22 oppose it, and 4 take no position. Of the 30, 14 permit lawyers to participate, but 9 of these 14 oppose the proposal. Most judges observe that lawyers are seeking to get favorable juries. Most also agree that the court's right to cut down on time, and to deny lawyer participation entirely, is essential to management of the process. No one believes that different rules should be adopted for civil and criminal cases. Many of the judges enthusiastically participated in voir dire as practicing attorneys, or supervised it on state courts, but have changed on becoming federal judges. Those who have done it both ways prefer judge-conducted voir dire. No judge mentions dissatisfaction of lawyers. None believes that Batson requires greater counsel participation. In addition, lawyers vastly overestimate their abilities to select favorable jurors; such social science as there is shows that they are completely unable to distinguish.

Hon. Terence T. Evans: Having worked in the Wisconsin system with direct lawyer participation and in the federal system, the federal system is better. Many attorney questions "were aimed at conditioning jurors. Most had very little to do with actual fitness of a prospective juror * * *. Also, there is a considerable amount of showmanship and grandstanding * * *."

Hon. John F. Grady: For 19 years, has allowed lawyers to supplement his questioning. It has not been a problem because "I limit it very strictly." "It is rare that a lawyer will take more than five minutes with supplemental questions." Participation adds to the sense that trial has been fair; indeed, that sense of fairness is more important than any new information. But it would be a mistake to adopt the Rule 47(a) amendment. Lawyers would attempt to brainwash the jury. Judges would resist these abuses, creating

controversy in the trial court and on appeal. Most lawyers really do not know how to ingratiate themselves with the jury, and waste valuable time trying. They steer away from sensitive questions, and indeed prefer that the court ask them. Batson problems are rare, and the premise that lawyer questioning will turn up nondiscriminatory grounds for peremptory challenges or for challenges for cause is not likely to be borne out in practice. If we start down this road, the next step likely will be to set minimum times that must be permitted for attorney questioning.

Hon. William T. Hart: Permits lawyers to participate. This process seems fair. "Allowing such participation as a matter of right does not seem to be a problem if the judge retains the discretion to establish reasonable parameters."

Hon. James F. Holderman: Permits attorneys 5 to 10 minutes per party to participate. They are advised that "counsel may not argue their case, attempt to indoctrinate the prospective jurors or attempt to obtain a commitment from the prospective jurors." But the rule should not be changed; in its present form, it supports the effort to see that counsel do not go beyond proper questions.

Hon. Harry D. Leinenweber: My normal practice is to permit attorney participation; the opportunity is often wasted, but is not abused. On a number of occasions, attorneys have obtained answers different from the answers I obtained by asking a question in a slightly different manner. But I oppose the amendment; I want to be able to deny participation if it would be a waste of time because the attorneys are not competent or the case is open and shut.

Hon. George W. Lindberg: Increasingly, has allowed counsel to participate on a limited basis and has had no negative experiences. But if this were a right, "I would expect some counsel would, though guile, ignorance or aggressiveness abuse the office of voir dire."

Hon. Joe Billy McDade: Allows counsel a limited time, usually 10 minutes per party. Rarely do they use the full 10 minutes. But if this privilege becomes a right, selection will take longer. "Inevitably, counsel, like children, will attempt to stretch the boundaries."

Hon. Michael M. Mihm: On first coming to the bench, allowed counsel to participate. "The experiment was a dismal failure in each case. It failed because the attorneys were either unwilling or unable to limit their questions to the areas I had identified or because the questions were an attempt to indoctrinate the jury * * *." A prosecutor is at a disadvantage in a "posturing" contest with defense counsel. It is extremely difficult to control.

Hon. Richard Mills: The Rule 47(a) amendment would be a disaster. As a new state-court judge in 1966, I allowed supplemental questioning, but even that was abused. "Counsel don't want an impartial jury at all."

Hon James T. Moody: No strong feelings. Experience with lawyer voir dire in Indiana state courts was favorable, but in 13 years as a federal jduge has not allowed lawyer participation.

Hon. James B. Moran: Always asks all the questions. "I do not recall in the last sixteen years any party indicating dissatisfaction with the scope of the examination."

Hon. Paul E. Plunkett: The proposed amendment is good. For eight years I have allowed lawyers to ask follow-up questions. Only occasionally to they actually ask questions, and when they do the questions are short and to the point. "[I]t is their jury and they know significantly more about the case than the trial judge." And this builds support for defending a peremptory challenge against Batson attack. "Of coure, my practice is based on sufferance, not right," and I have refused lawyer participation in a few cases that "involve lawyers who are windbags or lawyers who have demonstrated that they simply will not follow my rules in jury selection."

Hon. Rudolph T. Randa: Opposes the proposal."[A] change would subject the process to the negatives that are now precluded * * *."

Hon. Philip G. Reinhard: Experience with lawyer participation in state court shows that the process will take longer. Attorneys will seek to ingratiate themselves. They will not add anything positive toward selecting a fair jury. Jurors are more impressed with the importance of truthful answers when the judge asks the questions.

Hon. Paul E. Riley: Permits each side a reasonable opportunity to participate. "I feel very strongly that lawyers should try their own cases; and an essential element in trying the case is the selection of the jury." "I think the practice is a very positive impression on the potential jurors * * *."

Hon. Stanley J. Roszkowski: Experience with lawyer participation in state court and with no lawyer participation in federal court shows that the best system is to have the court do the questioning. Lawyers seek jurors partial to their side. Most lawyer time is used in selling the jury.

Hon. John C. Shabaz: The proposal is ill-advised and unnecessary. "We need no state court circuses nor further wastes of time and judicial resources * * *."

Hon. Milton I. Shadur: Strongly opposes the proposal. Jury selection should be neutral, not the occasion for advocacy. Jurors are less likely to be offended by questions from the judge; I have never seen even a hint to support the assertion in the Committee Note that jurors may be less forthcoming in responding to the judge. Other judges may prefer to allow lawyer participation. But it would be a mistake to fashion a procrustean bed that forces all judges to follow the same course.

Hon. Allen Sharp: Experience in state court, with rather passive

trial judges, showed "a great propensity to go as far as possible in trying one's case and indeed wringing commitments and promises out of jurors." My practice is to require lawyers to make opening statements during the voir dire process. This enables them to speak to the juror, and spares the judge from having to explain the details of the case. Lawyer questioning is time-wasting. In the hands of some judges, it will get completely out of hand. If the Rule 47(a) proposal is adopted, it should "be controlled by district judges with a wide use of discretion to avoid a waste of time."

Hon. Hubert L. Will: Would not change the present system. Lawyers hope to pick a favorable jury, to establish rapport, and to plant the seed of their theories.

Hon. James B. Zagel: As a trial lawyer, I asked questions designed to establish rapport. The federal system is good because it diminishes the effects of lawyer charm, taking away the opportunity for *individual* communication with jurors. If ingratiating tricks fail, the result is also undesirable because jurors dislike the lawyer for trying. I ask orally questions that many courts put through questionnaires, because it is useful to observe the juror's demeanor in answering. The fact that lawyers know the case better only means that they should be allowed to submit questions to the judge. Although there may be a few jurors who are intimidated by judges, there are many more who neither like nor trust lawyers and who will be less candid in responding to lawyer questions. Under the proposed rule, I would set time limits – and lawyers would use them fully. I would preclude commitment questions, jokes, compliments, and conveying information about the lawyers themselves. All of this will be extra hard work in the effort to maintain control. There will be more appeals on all these issues, and perhaps even more game-playing by lawyers.

Hon. Anthony A. Alaimo: Expresses complete concurrence with the views of Judge John Nangle, described above.

Hon. Lawrence J. Piersol: Supports the change. Commonly conducts initial voir dire, and then allows at least 15 minutes per side for direct questioning. "I am sometimes pleasantly surprised with approaches that are better than mine." "[A]t that point in the trial the lawyers know more about the case than the Judge and this assists them in the voir dire." And "the Court is in a much better position to rule on the Batson challenge when the lawyers conducted at least part of the examination."

Hon. Joseph E. Stevens, Jr.: Expresses complete accord with the views of Judge John Nangle, described above. "[A]s a trial lawyer I used my opportunity to conduct part of the voir dire examination * * * to woo the jury almost to a shameful extent, my questions and comments * * * being replete with argumentative and solicitous suggestions." Lawyers still do this.

Hon. David Warner Hagen: "[J]ury and juror conditioning have become

a fine art in the state courts. It is taught at seminars all over the country. * * * Because the state system allowed us, it became my duty and my opponent's to use voir dire to obtain jurors as favorable to our cases as possible, conditioning them all the while." This does not serve justice. The amendment would bring only improper questions to supplement the proper questions asked by the court.

Hon. Michael A. Ponsor: "The new proposals, if implemented, will complicate the process of jury selection, encourage manipulative tactics by counsel and generate endless appeals unrelated to the merits of the cases." It requires uniform practice, ignoring "the unique legal cultures of our various districts and the practices of various judges."

Public Comments

95-CV-94: Hon. Edward Rafeedie: Offers an example of an inappropriate voir dire question "suggested by counsel in a breach of contract case."

95-CV-98: John Wiggins, Esq.: Lawyers in Washington State shy away from federal court because they cannot participate in voir dire. There will be strong support from the bar for the proposal.

95-CV-99: Hon. Edwin F. Hunter: Was Rules Committee member 20 years ago; they considered and rejected attorney voir dire. His first federal trial, in 1953, involved an outrageous play for sympathy by plaintiffs' counsel; he has put all questions himself ever since.

95-CV-101: Hon. Stanwood R. Duval, Jr.: Regularly allows 10 minutes per side for counsel voir dire. But it should not be made mandatory. What is a "reasonable time" will become a point of contention.

95-CV-102: Charles W. Daniels, Esq.: Attorney participation will not increase time requirements. Has participated in trials after judge-conducted voir dire in which there were "mentally ill, probably incompetent, jurors"; if allowed to participate in voir dire, would have tried to get at least a few sentences of response from each juror "to exhibit whether they were oriented in the proper spheres." Generally, judges do not know cases well enough to do as good a job as counsel.

95-CV-103: Hon. Wayne R. Anderson: Invariably allows attorneys to participate in voir dire, but this works only "because of the power given to us under the current rule." Change the rule, and attorneys will use voir dire for advocacy.

95-CV-104: Hon. Robert Holmes Bell: My practice is to permit attorney participation. But why dilute control and generate appeals by allowing only "reasonable" limits in the judge's "discretion"? The amendment would create a tool "designed to enable lawyers to secure jurors of their philosophical and

sociological persuasion."

95-CV-107: Hon. Martin L.C. Feldman: The Note to Criminal Rule 24 refers to a presumptive right to participate in oral questioning; it should be made to conform to the Note to Civil Rule 47(a), which has no such reference.

95-CV-108: Hon. Robert B. Propst: Lawyers do not want impartial jurors; they want to participate in voir dire to ask improper questions and establish "rapport." If there is to be any change, it should be limited to follow-up questions directed to individual jurors who have given questionable responses to questions by the judge.

95-CV-110: Lester C. Hess, Jr., Esq.: (The numbering is obscure) Lawyer participation in jury voir dire in state court involves "blatant attempts to influence the jury [that] disgust me as an officer of the court." Judge-directed questioning in federal court works better. Rule 47 should not be changed.

95-CV-110: Bertram W. Eisenberg, Esq.: In New York state courts, lawyer-conducted voir dire works rather smoothly when there is a judge in the room. The proposed change is good.

95-CV-111: Frank E. Tolbert, Esq.: Lawyers are more familiar with the case and can frame better questions. Judges too often come too close to the facetious description that they ask the jurors whether they know their names and where they are, leaving no basis for intelligent challenges.

95-CV-112: Hon. Jackson L. Kiser: In W.D.Va., all judges permit counsel to participate in oral questioning. But in pro se cases, judges do the questioning themselves because it is too difficult to cabin pro-se litigants, who "want to make speeches."

95-CV-113: Hon. Judith N. Keep, for the unanimous judges of the Southern District of California: All are strongly opposed. "Faced with the prospect of committing reversible error * * *, it will be very difficult for the court *in fact* to control voir dire. Because personal voir dire is not a right now, we do have control." Lawyers who now enthusiastically accept 15-minute question periods will demand more. Fearful of malpractice, attorneys will push the limits in exercising voir dire, and fear of reversal will restrain judges from attempting control.

95-CV-114: Hon. John B. Bissell: Lawyers can suggest questions for questionnaires or voir dire. That works. Voir dire is expedited, particularly in complex cases with many parties, each of which would seek to participate. Judge-framed questions can reduce the risk of tainting answers.

95-CV-114(second): Hon. A. Andrew Hauk: The judge should be in control. Counsel should be allowed to engage in reasonable and nonrepetitive voir dire. These interests can be reconciled by approving proposed Criminal Rule 24(a) and Civil Rule 47(a)

"provided it is clear that the court, at all times, must be in control of the supplemental examination by parties and counsel * * *."

95-CV-115: Hon. Richard L. Williams: Attorneys are tempted to use voir dire to curry favor or influence the jury. Judges are more efficient, and there is no disadvantage to the parties, who have opportunity to suggest further questions.

95-CV-115(second): Hon. Harry L. Hupp: Twelve years on the California Superior Court bench with mandatory lawyer voir dire and eleven years on the federal bench show the superiority of present Rule 47(a). A judge who does the job properly will elicit all the information needed for challenges for cause and intelligent use of peremptories. "Experience tells me that the lawyers will try to cheat on the voir dire rules and that this is taught as the way to do it in all of the advocacy schools." And most federal practitioners do not know how to do it properly.

95-CV-118: Richard C. Watters, Esq.: Lawyers should be given a specified amount of time to orally question prospective jurors.

95-CV-119: Richard A. Sayles, Esq.: Judge-conducted voir dire varies greatly, but most judges are more interested in preserving the panel than in digging out bias or prejudice and do not ask probing questions. Attorney participation does not lengthen the trial process in any meaningful way.

95-CV-122: Allen L. Smith, Jr., Esq.: Lawyer participation will ensure neutral jurors, or jurors evenly balanced bewteen the parties. And it enables the lawyer to assess the unspoken communications that occur.

95-CV-123: Hon. Arthur D. Spatt, for all the judges of the Eastern District of New York with one abstention: The present Rule works well. The object of most lawyers is to ingratiate themselves and select a favorable jury. Changes are unnecessary.

95-CV-125: Alex Stephen Keller, Esq.: Lawyers know the case best. The process of suggesting questions and then follow-up questions to be asked by the judge is difficult. Judges will be able to control counsel. The proposal will improve the administration of justice.

95-CV-127: Daniel A. Ruley, Jr., Esq.: Judge-directed voir dire is "virtually sterile and of little meaning." Questions submitted in advance by counsel present an impossible task, because the answers may require several follow-up questions. (See also 95-CV-165.)

95-CV-128: Mike Milligan, Esq.: In 22 years of experience, judges have shown no interest in detecting juror bias; they seek only to select a jury as quickly as possible. In the local federal court, all judges permit some lawyer questioning; it is most helpful. Particularly in combination with a return to 12-member juries, this can make more difficult the continuing use of peremptory challenges. As a plaintiff's employment discrimination lawyer, I

usually can find some acceptable reason to excuse the only middle-aged white male on the voir dire panel; this will be more difficult if defendants can ask supportive questions and the panel is enlarged to include more of this type.

95-CV-132: Hon Robert B. Propst: (See also 95-CV-108): The Committee should consider eliminating peremptory challenges. Lawyers usually challenge the best-qualified jurors because they do not want jurors who will understand the issues.

95-CV-133: Hon. John W. Sedwick: (1) Lawyer voir dire is "aimed at obtaining a jury composed of people whose psychological profiles suggest to the lawyer (or her consultant) that a verdict in favor of the lawyer's client will be likely." This modern model demeans our system as "each litigant is seen to be engaged in strenuous efforts to obtain a jury predisposed to a particular outcome." And there are substantial and unjustified invasions of juror privacy. Opposing lawyers will not right the balance, because often they are as interested in the answer as the inquiring lawyer. (2) I work hard in preparing for voir dire; often I think of important questions — and sometimes they are obvious — that are not in the questions submitted by lawyers who are too busy inquiring into reading and television habits to think of the serious grounds for challenges for cause. If, as lawyers say, some judges do not do an adequate job, the cure is "education, peer pressure, and admonitions from chief judges." (3) A whole new body of appellate law of procedure will develop. "The system does not need another body of procedural law with which trial judges, trial lawyers, and appellate judges must become familiar." The new rule would be "a grave error."

95-CV-134: Professor Michael H. Hoffheimer: The dangers of lawyer voir dire outweigh any advantages. There are special problems when parties appear without counsel. And there may be "a disproportionate forensic advantage to more experienced counsel."

95-CV-137: Hon. Philip M. Pro: When direct examination by counsel is appropriate, the vast majority of judges will permit it now. The mandatory language of the proposal goes too far in addressing the legitimate concerns expressed in the Note.

95-CV-139: Hon. Joseph M. Hood: Shares Judge Bertelsman's concern that the object of most attorneys is to select a favorable jury, not an impartial one. (See 95-CV-145, below.)

95-CV-140: Michael E. Oldham, Esq., and Heather Fox Vickles, Esq.: Most district judges permit attorney voir dire, and have no difficulty controlling it. The lawyers are in the best position to elicit information relevant to for-cause and peremptory challenges.

95-CV-141: Brent W. Coon, Esq.: Supports the proposal.

95-CV-142: Hon. Alan A. McDonald: Few lawyers are proficient in voir dire. Argument is common. Disparate skills and aptitudes can tilt the process. Deficient lawyer performance may offend the

entire panel and prevent a fair trial. I have regretted most of the occasions when, prompted by complex issues or familiarity with the abilities of counsel, I have permitted direct participation. "I have a concerned curiosity" about the source of the Rules 47 and 48 proposals.

95-CV-143: Hon Fred Van Sickle: Contrary to the draft Note, jurors respond more readily to the court than to counsel. It is better that embarrassing questions be put by the court, to avoid offense at counsel. A right to participate will increase appeals. Counsel seek to seat a partial jury, not an impartial one. Fifteen years on the state trial bench in Washington showed that counsel participation is contrary to the efficient, wise and fair use of jurors. The Chief Judges of the Ninth Circuit have voted unanimous opposition to the proposal.

95-CV-144: William F. Dow, III, Esq.: The commentary to the proposal articulates the reasons for support. In the few cases in which D.Conn. has permitted lawyer participation, the process has been "edifying, intelligent, and consistent with the desire to obtain selection of a fair jury." And the perception of fairness is increased.

95-CV-145: Hon. William O. Bertelsman: I regularly permit 10 minutes of voir dire for each side. But the proposal will encourage lengthy voir dire, particularly in sections of the country where that is common in state courts. Most lawyers seek a partial jury, and are encouraged by training programs to establish rapport and psychoanalyze prospective jurors. And they invade juror privacy. There is no reason to adopt this proposal.

95-CV-146: Hon. Lewis A. Kaplan: Advance submission of proposed questions, and suggestions for additional questions after initial voir dire, afford ample opportunity to take advantage of counsel's knowledge of the case. If the judge does it right, there is nothing left for counsel but to brainwash the jury.

95-CV-148: Hon. Peter C. Dorsey: Flexible use of the present rule works, preserving the court's necessary control of the voir dire process. Experience in Connecticut state courts shows an expenditure of time that federal courts cannot afford.

95-CV-149: Thomas D. Allen, Esq.: The lawyers know the case better and will ask important questions the judge may overlook. And they can get a "feel" for jurors that facilitates elimination of biased jurors at both ends of the spectrum. In addition to this proposal, the Committee should consider requiring use of questionnaires.

95-CV-151: Hon. J. Frederick Motz for the unanimous judges of D. Md.: Whatever surveys may show, lawyer voir dire will consume more time. Lawyers will attempt to argue their cases, and will intrude on juror privacy. We now permit supplemental questions by lawyers seeking legitimate information, but this works because lawyers know this is a privilege that will be revoked as soon as it is abused.

The attempt to assure continuing judge control will not work well.

95-CV-1252: Richard W. Nichols, Esq.: Framed as a comment on Rule 48, but observes that lawyer participation in voir dire can help achieve the goal of representative juries.

95-CV-153: Hon. Thomas C. Platt: I have attempted to permit lawyer participation. New York state practice has ruined them. They are incapable of asking "unloaded" questions. We have "an unruly and litigious bar" and the proposed rule will simply add new grounds for appeal. There is no reason to compel new practices by judges who achieve sound jury selection by asking the proper questions submitted by counsel.

95-CV-154: Ira B. Brudberg, Esq.: 35 years of experience show that judge voir dire "is seriously deficient." Only modest extra time will be required for lawyer participation, and it "would improve greatly the ability to get impartial jurors."

95-CV-155: J. Houston Gordon, Esq.: Judge voir dire makes it seem the judge's jury, not the parties' jury; party voir dire makes the results more acceptable. Public perception is that judge questions intimidate the jurors, who are reluctant to answer honestly. The parties know the case and can find the crucial questions. The court can control potential abuse.

95-CV-157: Hon. Joanna Seybert: As trial lawyer and judge in New York State court as well as federal court, has found that "the majority of judge voir dires were fairer." Jurors take judge questions more seriously, and lawyers are left free to evaluate juror responses rather than plan the next questions. Jurors are embarrassed to confess their inner secrets in front of people with whom they may serve. Mandatory provisions generate senseless appeals. We should concentrate on training judges on the means of conducting proper, meaningful voir dire examination.

95-CV-158: Hon. Samuel B. Kent: Pro se litigants pose a great risk of abuse. Many lawyers are woefully inadequate, and many have participated in state systems that are remarkably intrusive and abusive. I typically spend two to three hours on voir dire, and permit supplemental questioning by lawyers both of the entire panel and of individual jurors; experienced lawyers can contribute well, but the inexperienced and "frankly incomptent" do not. The courts simply cannot afford anything that will consume additional trial time. (The same statement appears again as 95-CV-196.)

95-CV-159: Hon. B. Avant Edenfield: Most judges permit limited lawyer participation now; lawyers behave because they know the privilege can be withdrawn. Lawyer participation will lead to the great waste of time we see in state courts. (Judge Edenfield renewed his comments in 95-CV-272.)

95-CV-162: J. Richard Caldwell, Jr., Esq.: Some judges conduct thorough voir dire inquiries; some do not. Abuses by counsel can be controlled. Excessive time will not be required.

95-CV-163: Hon. Prentice H. Marshall: As written earlier, wholeheartedly supports.

95-CV-164: Hon. Donald D. Alsop: Lawyers use voir dire to attempt to educate the jury. Their participation will have an effect opposite the Committee's expected improvement in the appearance and reassurance of fairness.

95-CV-165: Daniel A. Ruley, Jr., Esq.: Counsel rarely abuse the voir dire privilege when it is extended. They are more effective at follow-up questions than the process of suggesting questions to the judge after initial voir dire by the judge.

95-CV-166: Hon. Lucius D. Bunton: A poll of all 10 active judges in W.D. Texas shows all oppose any change. Some allow attorney participation now, but none should be forced to. Federal courts try cases quicker and better than state courts; one reason is that not much time is taken to select a jury.

95-CV-167: Professor Bruce Comly French: Attorney voir dire "is particularly important in light of new Supreme Court decisions relating to gender and racial bias."

95-CV-168: Daniel E. Monnat, Esq., on behalf of Kansas Assn. of Criminal Defense Lawyers: Practical experience confirms the studies: jurors tend to be less candid when answering questions put by the judge rather than counsel. Judges are not in a good position to follow up on juror responses. Active give-and-take between counsel and prospective jurors is essential.

95-CV-170: Kenneth J. Sherk, Esq., for the Federal Rules of Civil Procedure Committee of the American College of Trial Lawyers: The race- and gender-bias limits on peremptory challenges make lawyer participation essential. But even more important are the advantages lawyers have in uncovering grounds for for-cause challenges. The empirical data suggest that little extra time will be used by voir dire. As Judge Lay has written, experienced lawyers know that attempts to abuse the system are more likely to offend jurors than persuade them, and in any event judges can control any potential for abuse.

95-CV-171: John S. Gilmore, Esq.: Judges shy away from the open-ended questions that allow jurors to talk, revealing their mental processes and providing insights into potential biases. But it is important to protect juror privacy rights.

95-CV-172: Hon. Jerry Buchmeyer: Generally I permit lawyer voir dire, but not in multiple-defendant criminal cases, nor by attorneys who have shown that they will simply waste the time or abuse the panel members.

95-CV-173: Hon. Sam R. Cummings: Registers opposition.

95-CV-174: Hon. Virginia M. Morgan for the Federal Magistrate Judges Assn.: There is no compelling need for the amendment, and no need for nationally uniform practice. Privacy interests must be

protected. Lawyer voir dire would be an inefficient use of judge and juror time. Parties without counsel will conduct inappropriate voir dire examinations, and will be at a disadvantage. If some judges do not do the job well, the remedy should be judicial training in the importance and techniques of voir dire. (The same statement has been given number 95-CV-202.)

95-CV-175: Stephen M. Dorvee, Esq.: Supplementing statement as a witness. Judges can control attorney voir dire effectively. One value is that attorneys can observe juror reaction to counsel, to test whether something about an attorney offends a prospective juror.

95-CV-176: Hon. W. Earl Britt, adding Resolution of Executive Committee, Federal Judges Assn.: Judge Britt observes that attorneys are advocates; advocacy should begin after an impartial jury is selected, not as part of an attempt to select a favorable jury. Continued judge control is the best means to check the pervasive influence of "jury science." Lawyer participation will waste time, particularly in multi-defendant criminal cases. The Resolution, unanimously adopted by the Executive Committee of the Federal Judges Association, recites the dedication of the Association to preserving the independence of the Federal Judiciary and concludes that the determination whether attorneys should be allowed to participate in voir dire should be left to the discretion of the judge.

95-CV-178: Gordon S. Rather, Jr., for American Board of Trial Advocates: The National Board unanimously supports the Rule 47 proposal, believing that lawyer participation is essential to a fair trial by jury. (The same letter has been assigned number 95-CV-223 also.)

95-CV-179 Illinois State Bar Association Board of Governors: Supports Rule 47 amendments on the "clear and concise rationale" provided in the Committee Note.

95-CV-181: Hon. Thomas P. Griesa for the unanimous judges of S.D.N.Y.: The concerns voiced in the Committee Note are significant, but they can be dealt with under the current rules. Counsel seek to use voir dire to indoctrinate the jury. In S.D.N.Y. we have special problems. Counsel who practice in state court will see the new rule as an invitation to engage in the abuses the state courts are struggling to overcome. We do not have a small, cohesive, collegial bar; there has been "an increase in the number of lawyers whose conduct lies regularly at the outer edge of propriety," and whose participation in voir dire would generate added problems. A torrent of satellite litigation will grow up over the attempt to clarify what are reasonable limits; the attempt to bolster district court discretion will not be effective. (The same statement was forwarded by Judge John F. Keenan, and numbered as 95-CV-195.)

95-CV-182: Hon. Kenneth M. Hoyt: "I write * * * to cast my vote for

the maintenance of the trial judge's discretion that is inherent in the commission that trial judges hold." Experience in state court shows that more than 90% of trial lawyers lack the communication skills needed for effective jury selection; often a case is won or lost in the jury selection process because of the differences in skills. Trial judges, on the other hand, have good sense. (The same letter also is numbered as 95-CV-194.)

95-CV-183: Hon. Fred Biery: Concurs with Judge Bunton, 95-CV-166. Permits lawyers to ask follow-up questions, but would not want to be forced to do this.

95-CV-184: Paul W. Mollica, Esq., for the Federal Courts Committee of the Chicago Council of Lawyers: Supports the proposal because "only advocates can make the fair but focused inquiry necessary." But there is a risk that abusive behavior will not be objected to; the proposal should explicitly state that the court may "on its own initiative" terminate examination.

95-CV-185: Hon. Clarence A. Brimmer: I allow attorneys to conduct voir dire, but oppose the amendment.

95-CV-186: Hon. Sam Sparks: Years of experience with both systems show that present Rule 47(a) has it right. Lawyers seek to persuade or precommit jurors. Judges do voir dire faster.

95-CV-187: Hon. Filemon B. Vela: Experience with lawyer voir dire as a Texas state judge and selecting more than 400 juries as a federal judge shows there is no difference in the fairness of the juries selected. But in state court the process takes days and weeks, where in federal courts it takes hours or days.

95-CV-188: Hon. Edward C. Prado, for the District Judges Assn. of the 5th Circuit: A poll of the 94 5th Circuit district judges had, as of the writing, produced 73 responses. 61 judges oppose the proposal, 11 favor it, and one abstained.

95-CV-189: Hon. Barefoot Sanders: Attorney voir dire is likely to increase time. It is likely to reduce the prospects of sitting an impartial jury; it is too late to correct the damage after abusive questions are asked. Written questionnaires can be used to good effect. Not all attorneys are eager to participate, but will feel obliged to do so. Reasonable limits will become issues for appeal.

95-CV-190: Robert R. Sheldon, Esq., on behalf of the Connecticut Trial Lawyers Association: The Association is dedicated principally to preserving the rights of injury victims. Attorney voir dire is the best way to assure a fair and unbiased jury. The Committee Note should emphasize that the power to set reasonable limits should not prevent meaningful examination in a manner likely to illuminate issues of personal bias, prejudice, or improper preconcpetions. (An excerpt of an attorney voir dire is attached.)

95-CV-193: Carolyn B. Witherspoon, Esq., for the Federal Legislation and Procedures Committee, Arkansas Bar Assn.: No

objection of Rule 47; endorses the change to Criminal Rule 24.

95-CV-197: Hon. George P. Kazen: The proposal will open up a new and fertile field of litigation over what is reasonable. All current proposals are to streamline trial, not add time. There is no compelling reason to change.

95-CV-198: Hon. John D. Rainey: As Texas state judge and federal judge, finds present federal system better. Lawyers seek to argue the case. Jurors prefer the federal system. Allows lawyers to ask follow-up questions; often they do not ask any.

95-CV-199: Hon. Melinda Harmon: "Although I am greatly in favor of attorney voir dire, I do not believe it would be wise to make attorney voir dire mandatory." Experience as a Texas state judge shows lawyers seek to try the case at voir dire, believing the case must be won at that stage. If they fear the outcome, they seek to "bust" the jury by convincing all of the panel that they could not be fair in this case, or by doing something to force a mistrial. Discretionary limits will not always work – a record must be made, and damage may be done (by "throw[ing] a skunk in the jury box") before the judge can intervene. And pro se litigants cannot be controlled effectively.

95-CV-200: Hon. David Hittner: Experience as a Texas state judge shows that lawyers conduct arguments, not jury selection. Almost always permits attorney participation in federal court, admonishing that a lawyer who purposely causes a mistrial will never again select a jury in this court and may be subject to sanctions. This works, but it works because of the power to deny any participation. Pro se litigants also would be a problem under the proposal.

95-CV-201: Hon. Lynn N. Hughes: As a Texas state judge found lawyers arguing the case at voir dire. Questionnaires can give far more information than hours of questioning. The rule "will develop its own complex jurisprudence after the appeals courts are through with it."

95-CV-203: Hon. John F. Nangle: My own practice with attorney voir dire varies from case to case, according to evident needs. Judges should be left free to adapt to individual case circumstances.

95-CV-204: Thomas D. Rutledge, Esq.: The proposal will help lawyers determine the predisposition and bias of prospective jurors.

95-CV-206: Dean M. Harris, Esq., for Atlantic Richfield Co.: Lawyer participation provides the appearance and reassurance of fairness, making jury verdicts more acceptable. The safeguards in the proposal make the risk small in relation to the benefits.

95-CV-207: Hon. Gerald Bard Tjoflat: Appellate courts will be forced to review by a standard of presumed error, because it will not be possible to know what questions would have been asked to follow up on the questions that were prohibited by the trial court. There will be no identifiable standard of review at all, making

trial judges reluctant to curtail voir dire. And all of this will increase appellate workloads by adding new claims of error.

95-CV-208: Hon. Richard G. Stearns: "I am puzzled by the anachronistic consideration of this baleful practice. Citizen jurors are not clamoring for an inquisition by lawyers into their personal lives." Lawyers want biased jurors. "I am often dumbstruck at the inappropriateness of many of the questions lawyers want me to ask prospective jurors." And lawyer participation will waste precious time.

95-CV-209: Gerald Maltz, Esq.: "[L]awyer voir dire is essential if we are serious about identifying bias and prejudice." Jurors are reluctant to answer judges' questions; I have experienced countless times very different answers to the same question when put by counsel a second time. Judges vary greatly in the ability to conduct voir dire. Lawyers know more about the case. Good lawyers are not tempted to abuse the system, and good judges can control lawyers who succumb to temptation.

95-CV-211: Hon. Joseph A. DiClerico, Jr.: As state and federal judge has used different methods; this experience shows that attorney voir dire will take more time. The proposal is unnecessary micromanagement. It will generate new appeal issues. Counsel can get sufficient information through questionnaires and questions submitted to the court for consideration. And it is better to provide a means for jurors to answer sensitive questions out of the hearing of other jurors (as by addressing questions to the array by number; each juror then is asked if there is any problem with any question, and is allowed to approach the bench to identify any question and the problem).

95-CV-214: Kathleen L. Blaner, Esq., for Litigation Section, D.C. Bar: Because participation in voir dire will support better-informed challenges for cause, it will reduce the use of peremptory challenges and help reduce impermissible discrimination.

95-CV-215: Hon. Terry C. Kern: I allow attorney voir dire, but some attorneys consistently attempt to abuse the procedure. If attorney participation is mandated, I will lose the leverage I now have to control behavior by warning that the privilege will be stripped if it is abused. And appeals will further erode the necessary judicial control.

95-CV-220: Terry D. Tubb, M.D.: Attaches a Wall Street Journal article describing a $100,000,000 compensatory and $400,000,000 punitive damages award growing out of a failed transaction to buy two funeral homes. See WSJ, Feb. 14, 1996, p A-15. At the end of the "Rule of Law" piece, by Walter Olson, it is stated: "Amazingly, a federal advisory panel is actually proposing rules * * * that could bring such state-court abuses to the federal courts by ensuring lawyers there a right to grill prospective jurors directly * * *."

95-CV-221: Norbert F. Bergholtz, Esq.: Most courts permit party participation. It is important that this be preserved, to support party faith in the basic fairness of the system.

95-CV-222: Gilbert Adams, Esq.: Attorney participation is essential.

95-CV-226: Debbie Alexander, RPh: As a sales person, "I can assure you that a lawyer can prejudice and obligate jurors prior to ever trying a case without conscious awareness by the juror." Lawyer participation will undermine justice, as it does not in state courts.

95-CV-227: Bernard M. Susman: The proposal would "bring to the federal courts state court abuses."

95-CV-230: Gordon R. Broom, Esq., for Illinois Assn. of Defense Trial Counsel: Firsthand attorney involvement in all phases of trial is important, including jury selection. This is less cumbersome and supports follow-up questions. But the Note should be amended by dropping the statement about protection against unwarranted invasions of privacy. "Questions about what a prospective juror reads, does for recreation and watches on television are often quite probative of the juror's perspective and should be freely allowed. In certain cases, even political and religious subjects may be appropriate."

95-CV-231: J.P. Economos, DDS: "It would be better to leave the system as is rather than let it be pillaged by attorneys as is often done at the state level." We should change to professional juries for complex cases.

95-CV-232: E. Lawrence Hull, CFP: "To allow such a procedure to infect the federal courts would be totally unconscionable and flies in the face of public sentiment that favors limiting outlandish and egregious jury awards as seen in state courts * * *."

95-CV-233: Roger D. Hughey, Esq., for Wichita Bar Assn.: "The opportunity for counsel in a case to interact directly with prospective jurors is critical to counsel's evaluation of each juror's ability to perceive and understand the proceedings, and to discover potential grounds for challenge."

95-CV-234: James A. Strain, Esq., for Seventh Cir. Bar Assn.: There are no apparent serious problems with the present rule in Seventh Circuit districts, but the change appears salutary.

95-CV-236: Malcolm B. Blankenship, Jr., Esq.: Attorney participation would create problems "by elements of the various bars whose motives are contrary to what I believe is very necessary tort reform * * *."

95-CV-238: Hon. Lawrence P. Zatkoff: Lawyers will attempt to select favorable juries, and will begin to try their cases at voir dire. They will take too long. The FJC survey shows that most federal judges agree.

95-CV-239: Richard A. Rossman, Esq., for U.S. Courts Committee, Michigan State Bar: Attorneys know the case better, and can explore the subtle factors that may influence juror perceptions and abilities to decide fairly. Several federal judges in Michigan have expanded the role of attorney voir dire following the urgent recommendation of lawyers participating in a 1990 Federal Bench/Bar Conference.

95-CV-240: Hon. T.F. Gilroy Daly: Lawyers will seek to influence the jury, and will increase the time required. No empirical data suggest that court-conducted voir dire results in unfair juries; the Committee's expressed concerns are not persuasive.

95-CV-241: Philip Allen Lacovara, Esq.: This "is a terrible idea," and "perversely ironic" at a time when state law reform efforts aim at adopting the present federal practice. Lawyers will seek to manipulate the jury by means that never would be permitted at trial, and to distort the randomness of the panel. Lawyer participation works when allowed under the present rule because it is a matter of grace. Attempting to make it a right, controlled as a matter of discretion, "would spark a new issue of partisan wrangling and inject still another new issue for appeal."

95-CV-242: John Frondorf: Opposes, but "would favor any changes that will reform our runaway tort system * * *."

95-CV-245: Robert F. Wise, Jr., Esq., for Commercial and Federal Litigation Section, N.Y. State Bar Assn.: It may not be wise to mandate attorney participation. There is substantial criticism of New York state practice; the difficulties encountered there and in other states do not bode well. Lawyer questions could be used to provide a pretext for supporting challenges in fact rested on antipathy toward minorities. There are special reasons to be cautious as to districts in states that have experienced "certain abuses" in lawyer voir dire. This is a step backward at a time when court involvement is credited with streamlining jury selection. A less drastic remedy would be to require the court to ask questions submitted in writing by counsel, subject to the same limits as set out in the proposal. Criminal cases may warrant direct attorney participation, but not civil.

95-CV-247: Don W. Martens, Esq., for American Intellectual Property Law Assn.: Attorney voir dire is good. The amendment should not require that the judge do any of the questioning. The Note reference to invasion of privacy goes too far. Inquiries into such matters as reading, recreational, and television habits are desirable — that a juror reads Popular Mechanics or Scientific American, for example, might be relevant in a technical case.

95-CV-248: Michael A. Pope, Esq., for Lawyers For Civil Justice: Too often, lawyers believe that judges are more intent on a perfunctory voir dire than on achieving meangingful voir dire. Simply asking jurors whether they can be fair and impartial is inadequate. Jurors are less likely to be forthright when

questioned by judges. Lawyers know the cases better; the opportunity to submit questions in advance does not respond to the need for follow-up questions. The extra time required "is surprisingly short."

95-CV-249: Hugh F. Young, Jr., Executive Director, Product Liability Council: Lawyer voir dire will improve the quality of justice. It will reduce reliance on peremptory challenges in favor of challenges based on cause, reducing impermissible bias. Litigants will gain confidence in the system.

95-CV-251: C. Rollins Hanlon, M.D.: Disastrous experiences in state courts speak strongly against extending to federal courts the right to grill prospective jurors directly.

95-CV-253: William B. Poff, Esq., for Executive Committee, Nat. Assn. of Railroad Trial Counsel: Approves.

95-CV-257: Brian T. Mahon, Esq., for Connecticut Bar Assn.: Endorses. Lawyer participation is particularly necessary to establish cause for excusing jurors in light of recent restrictions on peremptory challenges.

95-CV-258: Hon. Robert N. Chatigny: The proposed amendment codifies my practice, but it may encourage lawyers to engage in the tactics that make it so difficult to seat a jury in the Connecticut state courts where lawyer voir dire is protected by the state constitution. If the rule must be changed, the Note should state that it is common and proper to limit the time for supplemental questions to 15 minutes or less.

95-CV-262: John DeQ. Briggs, Esq.; Donald R. Dunner, Esq.; Walter H. Beckham III, Esq., for ABA Sections of Antitrust Law, Intellectual Property Law, and Tort and Insurance Practice: Fully agree with the Committee's reasons for the proposed changes. Attorney participation will result in less jury bias and prejudice because lawyers know the case better and can be more specific in uncovering bias, and because better information will reduce reliance on stereotypes. There also will be a greater sense of due process. There will be no undue demand on judicial resources. The lack of effective opportunities for appellate review means that now there is virtually no recourse for incomplete or ineffective court questioning. (The Section of Intellectual Property Law would welcome discussion of the reasons for requiring the court to participate in the examination. And they are concerned about allowing all pro se litigants and counsel to participate even in routine cases; the amendment should be modified to allow the court, for good cause on its own motion or on motion of a party, to deny the right to participate in voir dire.)

95-CV-267: Hon A. Joe Fish: Experience as a Texas state trial judge, under a rule that allows counsel to conduct all voir dire questioning, shows that attorneys on each side always try to seat a jury predisposed to their side. The present rule works well and

should not be changed.

95-CV-269: James R. Jeffery, Esq., for Ohio State Bar Assn. Bd. of Governors: Supports the proposal, which "would enhance jury selection without causing undue delay or inconvenience."

95-CV-271: Hon. Paul A. Magnuson: Attorney participation "would destroy the impartiality and efficacy of the trial. * * * By definition, the parties' interrogation of the jury panel is adversary, biased, and opportunistic." The trial-judge discretion established by the present rule "ensures a level playing field for the litigants."

95-CV-273: Pamela Anagnos Liapakis, Esq., for Association of Trial Lawyers of America: The proposal is too limited, because the trial judge retains the preeminent role in voir dire. The Committee should "draft a new rule which would equalize the roles of judge and attorneys."

95-CV-274: Kent S. Hofmeister, Esq., for Federal Bar Assn., (1) by Mark Laponsky, Esq., for Labor Law Section; (2) by Marvin H. Morse, Esq., for the Association: (1) Mr. Laponsky comments on Rule 47(a): it incorporates a "sensible process." (2) Mr. Morse comments at length on Criminal Rule 24(a), strongly supporting the proposed amendments. Finds "real substance to the view that jurors give shorter and more concise answers to a judge's question, especially if that question is so phrased as to embarrass a juror to answer in a way to reveal a bias or prejudice * * *." Lawyers can do it better. A right of participation need not lead down a slippery slope that will erode judicial control of voir dire. Questioning by counsel may be necessary to provide race- or gender-neutral reasons for exercising a peremptory challenge. Finally, lawyer participation gives the appearance of greater democracy in jury selection; a rushed or expedited judge-conducted voir dire "may lead a jury to conclude that a court is more concerned with time and efficiency than the rights of the litigants * * *."

95-CV-281: Hon. Dean Whipple: I permit attorneys to participate in voir dire after I begin the questions. There is no need to amend the rule; this is a step toward all voir dire being conducted by attorneys. "A seasoned attorney or attorneys who can use jury experts will easily out perform an inexperienced attorney in getting their biased jury," fulfilling the universal desire of attorneys "to pick the most biased jury they can for their client."

95-CV-283: Terisa E. Chaw, Executive Director, for National Employment Lawyers Assn.: In urging adoption of 12-person juries coupled with provision for nonunaimous verdicts, observes that if juries return to 12 members, "it is essential to expand voir dire * * *. [W]ith the minimal voir dire currently permitted by the federal courts, it is extremely hard if not impossible to discern biased attitudes of prospective jurors. If the jury panel is enlarged to twelve, it is more likely that biased jurors will be seated unless lawyers have a reasonable opportunity to eliminate

them * * *."

95-CV-284: Michael W. Unger, Esq., for Court Rules & Administration Comm., Minn. State Bar Assn.: "[T]he fairness of jury selection is substantially improved and * * * juror bias is more effectively detected when attorneys are permitted to participate in the voir dire."

95-CV-285: Hon. Dudley H. Bowen, Jr.: Adopts the views of Chief Judge Tjoflat, 95-CV-207, opposing the amendment.

95-CV-286: U.S. Atty. Harry D. Dixon, Jr.: Supports the proposal as "prudent * * * as it would make the selection of a jury more meaningful."

95-CV-287: Barry F. McNeil, Esq., and Christine E. Sherry, Esq., for ABA Section of Litigation: This comment supplements the testimony of Section members at the public hearings. It reflects a nonscientific survey of practices and experiences in 9 federal districts that could readily be explored by Litigation Section leaders. Practices varied widely across the 9 districts, and to some extent within individual districts. (1) Where attorney voir dire is permitted, "lawyers not surprisingly consider that the process is a fairer one for all parties." Court-conducted voir dire too often furnishes little information and makes it difficult to select a jury intelligently. (2) Both in districts that routinely permit attorney voir dire and in districts that permit it on a limited basis, there do not appear to be complaints of abuse. "[T]he supervisory authority of a trial judge is unquestioned" in these matters. (3) There is "no obvious reason" that explains the refusal of some courts to permit attorney voir dire. (4) Federal courts should be encouraged to use jury questionnaires.

95-CV-288: Hon. Frederick P. Stamp, Jr.: Thirty years of practice in West Virginia state courts showed that even the most competent judges "found it difficult to properly control what frequently developed into a rather freewheeling phase of the initial part of the trial." Counsel attempted to argue the evidence, submit legal theories, and persuade jurors to remove themselves from service. The present federal rule works well; the amendment would "bring a measure of disorder and undue delay to federal jury trials."

95-CV-289: Anthony C. Epstein, for D.C. Bar Section on Courts, etc.: The amendment will promote the confidence of litigants and the public in jury trial. Social scientists have shown that jurors may respond more candidly and completely to questions by lawyers. It may be difficult for the judge to formulate questions to elicit bias or prejudice without appearing to favor one party; the resulting leading questions evoke little information. Lawyers can ask more open-ended questions that are more effective. Courts can maintain effective control. Although the proposal is supported by the need to support effective use of peremptory challenges, it will be important even if peremptory challenges are eliminated — peremptory challenges often are used to strike jurors who would be

stricken for cause if more effective voir dire were had.

95-CV-291: Hon Joe Kendall: More than five years of experience as a Texas state judge shows the superiority of federal practice. After literally hundreds of state trials, saw no more than five in which lawyers failed to turn voir dire into opening statements. The use of the word "reasonable" will subject every limit on voir dire to armchair quarterbacking by an appellate court. I permit participation by lawyers who want it; many do not want it, but would feel compelled to participate for fear of criticism later on.

95-CV-292: Nanci L. Clarence, Esq., for Executive Committee, Litigation Section, State Bar of California: "We wholeheartedly endorse and support the proposed amendment as it would ensure that the parties are given an opportunity to participate in the critical stage of jury selection."

95-CV-295: Thomas F. Clauss, Jr., for "certain members of the Federal Rules Revision Subcommittee of the Pre-Trial Practice and Discovery Committee of the Litigation Section of the ABA": The strongest argument for the change is the need to justify the exercise of peremptory challenges. Lawyer participation may ensure an impartial jury. Attorneys elicit more truthful responses than do judges. Although attorneys are motivated to select a favorable jury, the adversary process cancels this out. There may be problems with "lawyer theatrics," but the safeguards in the proposed rule are adequate. If there is some cost in "efficiency," it is outweighed by the benefits in selecting impartial juries. And jury questionnaires should be considered because they help save judicial resources.

95-CV-297: David K. Hardy, Esq.: Attorney participation in voir dire "is often critical to the selection of an objective, fair-minded jury; and I strongly support the proposed amendment * * *."

95-CV-298: Hon. Ernest C. Torres: The proposal is a mistake. Legitimate needs are met under the current rule. Counsel will seek to undercut selection of an impartial jury. They will feel compelled to participate even when they would prefer not to participate, particularly when the adversary chooses to participate. Disputes over limits imposed by the court will protract voir dire and generate issues for appeal.

95-CV-299: Hon. James K. Singleton: For the unanimous judges of the District of Alaska. Three of the judges have experience with Alaska state-court voir dire by lawyers, and others have experience with it as lawyers. Routine participation by lawyers, endemic to the local culture, is undesirable. "It is simply unreasonable to assume that skilled advocates can be kept within reasonable bounds by judicial admonitions." Judges give up in disgust. Voir dire often becomes an opening argument. If the judge does attempt to maintain control, "tempers flair, unfortunate comments are made, the jury is bewildered, and the appearance of justice suffers." The current rule is a fix; the proposal would break it.

W. Reece Bader, Esq., December 15: Tr 17 to 30: A former member of Civil Rules Advisory Committee and Standing Committee. A similar Rule 47 amendment was proposed in 1984. We were too concerned with lawyer conduct and Rule 68 then; I should have pushed for the amendment then. I support it now. Where active lawyer voir dire is regularly utilized, in general lawyers have not sought to use it to ingratiate themselves or indoctrinate jurors. The trial bar is responsible. Judges can control efforts to misuse the process, and the proposed rule ensures that power. A lawyer knows the case better than the judge, and can spend more time thinking about voir dire questions appropriate to the case. It is important to have as much information as possible to support peremptory and for-cause challenges. I have been involved in only one Batson-type situation; the opportunity to ask questions myself would have been valuable. The adversary process can work to negate attempts to gain advantage. The amount of time spent on voir dire need not unnecessarily delay the process; much can be done in a relatively short time. It is proper to require that some types of questions be directed to the panel as a whole. If a questionnaire has been used, voir dire questions can be narrowed accordingly. Having the judge pose questions requested by counsel does not work as well; in 30% to 40% of my cases this has an adverse impact. It may be urged that the right to participate is particularly important in capital cases, but that simply reflects the fact that participation makes the process work better. The same values are gained in other cases.

Peter Hinton, Esq., December 15: Tr 29 to 49: I have tried more than 150 jury cases to verdict. In every case I wanted a role in voir dire. Judges cannot put jurors in the same place as counsel can. Judges are more intimidating, and jurors are not as inclined to give honest answers to an authority figure. Sue Jones did a doctoral dissertation that demonstrates this difference. Lawyers — at least good lawyers — no longer "try to do the kind of mind-bending snow job that was de rigueur 30 years ago." Instead they ask open-ended questions "and try to do the most difficult thing an attorney has ever tried to do, which is listen to the answer." They are interested in orderly and effective voir dire. Courts can control any effort at abuse; California, after great study, has reconfirmed the practice of lawyer voir dire, and state judges exercise effective control. Code of Civil Procedure § 222.5 defines improper questions as those that attempt to precondition or indoctrinate the jury, or that ask jurors about the applicable law. One sanction judges use is to require a lawyer who has gone too far to submit all questions in writing to the court before asking them of the jury. Lawyers, moreover, do not really "select" a jury; they can only "deselect" the most obviously biased members of the panel. The need for deselection is increased by the increasingly firm views many people hold on subjects involved in litigation, views that may be entrenched by public debate that has been called

jury tampering on a national scale. Arbitrary time limits cannot be defined, and California practice forbids them; the time required need not be great, and whatever is required is worth it. Questionnaires are encouraged, and reduce the time needed for voir dire. They also encourage honest answers to questions that might be embarrassing, particularly if assurance is given that follow-up questions will not be dealt with in front of the group.

Hon. Michael R. Hogan: December 15: Tr 49 to 63: Every judge in D. Ore. allows some attorney voir dire. My own practice is to receive proposed questions a week before trial, sort through them, meet again before trial, and then begin the voir dire. Then I ask the lawyers for follow-up questions and ask them. Then I invite the lawyers to ask questions themselves; usually they are satisfied and do not follow up. This works well. "If I do a good job, then I don't really have to exercise any controls." I encounter few efforts to take advantage of the process. When an effort is made, it can be controlled. But to make it a right is to invite appellate review, and appellate judges removed from the scene of trial may impose untoward restrictions. Attorneys want to seat favorable juries, not impartial juries.

Dr. Judy Rothschild: December 15: Tr 63 to 87: Dr. Rothschild is a research sociologist with the National Jury Project West, and also works as a trial consultant. She is a visiting scholar at the University of California, Berkeley, in the Institute of the Study of Social Change, where she is studying jury decisionmaking in complex cases. Lawyer participation in voir dire is important. (1) Jurors are terribly intimidated by the courtroom. They bring many television-derived misconceptions to their task. (2) Social science research shows that people seek to portray themselves in socially desirable ways, and are quite sensitive to verbal and nonverbal clues indicating the desired "correct" answer to questions. A wide range of factors affect the candor of answers to questions. (3) One important factor is the fundamental difference of status between judge and juror, a difference enhanced by the symbols and practice of the courtroom. A screening process goes on in responding to judge-put questions. When a judge asks whether panel members can be fair, "it's pretty clear that there's one right answer to that question. * * * It's far easier * * * for that question to be answered more honestly and candidly and comfortably when the question is not propounded from an authority figure sitting up high." Attorneys are literally on the same level in the courtoom, and this encourages candor. The judges who are good at voir dire are those who are aware of the obstacles they face because of their status. (4) The need to speak publicly also exacerbates the problem. "People tend to avoid embarrassing themselves, and one way to do that is by providing minimal responses." "People's responses tend in the direction of conformity. One doesn't want to seek out attention" in the trial setting. Questionnaires have real advantages, including privacy, in eliciting information. (5) Jurors do come to the courtroom with

real biases and disagreements with the law. In criminal cases, for example, many jurors believe that a person brought to trial is probably guilty, that defendants should be required to prove their innocence, and that defendants should be required to testify. (6) Global questioning of a panel is less effective because "people have a reluctance to raise their hands. * * * [I]t's easier to avoid answering a question. The best voir dire is that in which jurors do most of the talking. (7) Some lawyers are not good at voir dire, even hate it.

James Farragher Campbell, Esq., Dec. 15: Tr 88 to 97: Appeared on behalf of the National Association for Defense Lawyers, California Attorneys for Criminal Justice, and the Executive Committee of the Litigation Section of the [California] State Bar. Testified only as to Criminal Rule 24. Attorney voir dire is important to discover bias and prejudice in prospective jurors, and has become more important because of limits on stereotyped use of peremptory challenges. It need not pit lawyers against judges, nor result in attorneys taking over the courtroom. The power of control built into the proposed rule is adequate. The vision of silver-tongued orators using voir dire to try the case is out-of-date. Lawyers now are interested in using voir dire to search out bias. Reasonable time limits can be set, although it is not possible to adopt a single period of time that is appropriate for all cases. Judges should be reassured on these points by the experience of the many judges who now permit attorney participation. Yes, to Judge Wilson: attorney voir dire works in practice, and the time has come to stop worrying whether it will work in theory. The opportunity to participate is important to give the appearance of fairness as well as the reality.

George J. Koelzer, Esq., December 15: Tr 98 to 113: Was asked to testify by the ABA Litigation Section. Supports attorney voir dire. In more than 30 years of trial experience has tried jury cases in many state and federal courts, working with all the different modes of voir dire. Over that time, judges have taken over more of the voir dire – perhaps in part because the general level of trial bar skills has declined. But judge-conducted voir dire "is not acceptable in the adversary system." Judges are interested in ferreting out matters that would support for-cause challenges, but not matters that will inform peremptory challenges. Peremptory challenges are "inherent" in the Seventh Amendment right to jury trial. Batson has made the selection process more complicated. There is no realistic recourse in appellate review; the prospect of reversal for inadequate voir dire inquiry is too remote to be of real value. And any competent federal judge will deal quickly and effectively with any abuse by counsel. There have been problems with inadequate judge-conducted voir dire in personal experience, commonly involving refusal to ask suggested questions, and usually involving "a younger, less experienced judge without a lot of courtroom experience."

Robert Aitken, Esq., December 15: Tr 113 to 125: Lawyer voir dire

facilitates selection of a fair and unbiased jury, and increases lawyer comfort with the jury. It does not work as well to have an intermediary – the judge – ask the questions. Any competent judge can control any prospect of lawyer abuse. There are some questions that counsel would prefer to have addressed by the court – for example in a case against a mental hospital, whether any prospective juror had had mental problems. General preliminary questions also are appropriate for court inquiry.

Christine Sherry, Esq., December 15: Tr. 125 to 133: Was asked to testify by the chair-elect of the ABA Litigation Section. Has begun inquiries among lawyers in N.D.Cal. about varying practices and experiences. This testimony is preliminary. Lawyers who have been able to conduct their own voir dire have found it very helpful. Preliminary questionnaires encourage people to provide information that might not come out on oral examination, and can be followed up to great effect. A number of lawyers have reported that 20 to 25 minutes of follow-up questioning can produce great benefits.

Robert B. Pringle, Esq., December 15: Tr. 133 to 142: Current chair, Intellectual Property Litigation Committee, ABA Litigation Section: Experience with voir dire is mostly with extensive lawyer participation in California state courts and limited participation in N.D.Cal. Lawyers do it better. I know more about the evidence and witnesses. My clients generally are able to afford extensive jury studies, and in some cases I have done several mock juries before trial. I and my adversaries have studied prospective jury behavior, deliberations and reactions to the evidence. We come to court equipped to assess jury bias. To deny the opportunity for thorough voir dire is to cut off the most effective means of inquiry. Lawyer abuse need not be feared; a competent judge will control voir dire.

Elia Weinbach, Esq., December 15: Tr 142 to 151: The amendment is desirable. I have had experience where "the judge's handling of the voir dire was ineffective and where we had problem juries simply because the judge was more interested in proceeding expeditiously * * *." "Most federal judges with whom I've dealt in the voir dire process really go through the process solely for the purpose of getting through the process * * *." It should be recognized that so many people avoid jury service that juries are not representative, and will not be – professionals, small business people, and the like do not serve. This makes it more important to preserve peremptory challenges.

Louise A. La Mothe, Esq., December 15: Tr 153 to 168: California state judges allow attorney participation. C.D.Cal. judges generally do not, and their "questions have a tendency to be perfunctory and pretty superficial. * * * [T]he judge does not have the same interest in getting out the information as the lawyers do. And I think that the judge obviously is looking for the most obvious types of bias, but frankly it doesn't always come out." A

number of judges, as a matter of speed, want to impanel the first six in the box. Lawyers can do it better because they know the case better. "Not every client can afford extensive jury research"; it can cost fifteen to twenty-five thousand dollars, or more, including trials to mock juries. Abuse by lawyers does occur, and judges may prefer to do voir dire themselves because it is easier than controlling the lawyers. But it is better for the judge to ride herd on the lawyers than to cut them off. They can and do control lawyers in California state courts.

Professor Charles Weisselberg, December 15: Tr 168 to 185: Attorney voir dire is essential to support challenges for cause and to enable use of peremptory challenges not based on group stereotypes. Denial of participation is not suited to the Batson era — challenges based on individual characteristics require knowing more about jurors than is revealed by judge-conducted voir dire. My experience in C.D.Cal. is like that of Ms. La Mothe: voir dire is "fairly routinized." Judges tend to ask close-ended questions. No juror is going to respond to a question: "You can be fair, can't you"? Nor to questions asking them to raise their hands if they would have trouble following instructions, or would not afford a presumption of innocence. In two cases I was allowed about 15 minutes for voir dire, and discovered that it was possible to learn a lot in 15 minutes — even though the regular local practice meant that I had not had much experience with direct voir dire. The goal will be to focus on jurors who need further questions, not detailed inquiry of all. I have not had the experience, asked about by Judge Dowd, that civil plaintiffs and criminal defendants seek to "dumb down" juries. As a federal public defender I had the benefit of selecting juries with the aid of a full-time psychologist on our staff; we lawyers learned to be more sophisticated with her help. Judges will set limits, and as the limits become known there will be fewer attempts to argue the case on voir dire. These efforts may spur additional appeals in the beginning, but these problems should disappear as practice becomes firmly established.

Hon. Duross Fitzpatrick, January 26: Tr. 3 to 15, 21 to 22: Having practiced in Georgia state courts, took lawyer voir dire to the federal bench. Lawyers file their written questions before voir dire, and serve each other. Usually there are no objections; if there are objections, they can be ironed out in a few minutes. Reasonable follow-up questions are allowed. Voir dire never lasts longer than about an hour. If a lawyer comes in from out of town and engages in grueling voir dire, the local lawyer may well announce that there are no questions, the jury will do the right thing, "and it almost always works." Lawyers learn not to wear out a jury with foolish questions. Perhaps peremptory challenges will be abolished one day, "but as long as we have them, I think lawyers ought to have an opportunity to ask the questions." We have a 3- or 4-page questionnaire that is used in every case, civil and criminal. Lawyers love it. We are revising it now to eliminate questions that are "kind of silly," such as what magazines jurors

read, and questions that are unnecessary invasions of privacy. We treat the answers as confidential, and require lawyers to certify that they will destroy the questionnaires.

John T. Marshall, Esq., January 26: Tr. 15 to 21: In N.D.Ga., questions are outlined in the pretrial order and the judge asks them. Lawyers are permitted follow-up. I would prefer, as the lawyer, to go first. Juror answers to the judge are wooden, tainted by the formality with which the first question is put. It is better for a lawyer to open a conversation "because most jurors are very, very intimidated by the judge." Georgia state courts let lawyers do the voir dire. There are attempts to abuse the system. One abuse is an attempt to ask jurors to prejudge the case; judges promptly prevent that. Totally irrelevant or impermissible questions also are stopped short. Voir dire is not extended to the two- or three-day ordeal that people fear. Jury questionnaires are very helpful. They get away from perfunctory questions. And they make it possible to avoid "the land mine," the question and answer that taint the entire panel. They also allow a juror to say things about the difficulty of jury service that may not be said in voir dire.

Frank C. Jones, Esq., January 26: Tr 22 to 31: for Product Liability Advisory Council. "I have never seen a serious problem with lawyer-conducted voir dire where the judge is clearly in control of the courtroom." And I have had very few experiences in which the judge did fail to control. There is a need for lawyer participation to establish a dialogue, to find out whether jurors are proper for the case. And as peremptory challenges are increasingly limited, it becomes more important to enable intelligent challenges for cause.

Michael A. Pope, Esq., January 26: Tr 76 to 80: "There are some judges who don't have that much experience at trying cases and, therefore, they don't do that good a job at voir dire, it's as simple as that. * * * [T]o open up the door and allow the process where the lawyers can actually talk to the jurors is really important * * *."

Kenneth Sherk, Esq., January 26: Tr 80 to 86: The Federal Rules of Civil Procedure Committee of the American College of Trial Lawyers (a Committee of some 230 members) is unanimously in favor of the proposal. It is more limited and restricted than the Committee would prefer. Long experience with lawyer voir dire has not shown any problem of abuse in Arizona state courts. With Batson and related restrictions on the use of peremptory challenges, lawyer participation is all the more important. The Advisory Committee Note sets out the reasons for the amendment. Lawyers and judges cooperate in every phase of the case, and there is no reason why cooperation cannot extend into the voir dire process with the lawyer being allowed to ask some questions. The many judges who now do a good job on voir dire will find that lawyers' supplemental questions will not be extensive at all.

J. Richard Caldwell, Jr., Esq., January 26: Tr 86 to 93: The proposal is good. Questionnaires "can be extremely useful in many, many ways. Either avoiding the dynamite question, saving time." As compared to the judge, the lawyer can initiate a conversation. And, standing close to the prospective jurors, can detect little quivers or hesitations that suggest the need for follow-up questions. The amendment makes it clear that this is limited voir dire, and that the court remains in control.

John A. Chandler, Esq., January 26: Tr 93 to 100: Georgia statutes give lawyers a broad voir dire right. Most federal courts in Georgia permit follow-up questions by lawyers. We have a lot of experience. It seems to work well, to be very helpful. The lawyer gets a better feeling for the jury by asking questions and listening to the answers. Their better understanding of the jury may lead to more mid-trial settlements. Some judges ask questions well; some do not. Judges are concerned to keep the case moving. Lawyers pace the questions better; they wait for the answers, and listen to the answers.

Stephen M. Dorvee, Esq., January 26: Tr 100 to 105: Judge-conducted voir dire "is somewhat inadequate." The judge does not know the case as well as trial counsel. The problem of overreaching counsel is not significant. "As long as a judge can control his courtroom, then he can control voir dire." In the working of the adversarial process, each side usually strikes the jurors the other side most wants and the result is a fair, balanced jury. It is not so important that the lawyer be the one to initiate the conversation as that there be a conversation. A lawyer needs to evaluate the juror's reaction to the lawyer – at the most direct level, to learn whether the juror can understand the lawyer. There may not be much time, but even 15 minutes of examination is enough to get a feel for the jury.

Hon. Hayden W. Head, February 9: Tr 3 to 15: The judges of S.D. Tex. are unanimously opposed to proposed Rule 47(a). A poll of the 94 judges in the 5th circuit District Judges Association garnered 73 responses; 63 oppose the proposal, and 10 support it. It is the judge's responsibility to select an impartial jury, and the adequacy of voir dire is not easily reviewed on appeal. An attorney seeks a partial jury, not an impartial jury. There are no more than a few, if any, district judges who fail to do adequate voir dire examinations; the cure is in part appellate review, as a recent Fifth Circuit decision shows, and in part education through judge workshops. No matter what discretionary authority seems to be written into the proposal, "the whole ability to control changes. * * * [W]hat will develop is a practice of the most generous or tentative district judge, as affirmed by the most generous panel in the United States." The idea that the adversary system will balance out, with each side preventing the other side from winning a favorable jury, does not work out. Some lawyers are better at jury selection than others. It takes the balance of a judge "to control the flow of the jury selection."

Hon. Virginia M. Morgan, February 9: Tr 43 to 49: President, Federal Magistrate Judges Association. Joins the opposition to attorney voir dire. There are special problems with pro se litigants, both in prisoner cases, employment cases, and others. Is the judge to help the pro se litigant, departing from a position of neutrality? Appoint counsel from the pro bono panel? What should be done in districts that handle pro se prisoner cases with video-conferencing? Will there be new issues for appeal?

Robert Glass, Esq., February 9: Tr 49 to 56: for the National Association of Criminal Defense Lawyers. Spoke only to Criminal Rule 24. "With a little training [of lawyers], the attorney-conducted voir dire is enormously productive. It airs views." "[M]ost judges are afraid of the lawyer-conducted voir dire because it can get out of hand. Well, that's true, but the judges, under the amended rule, would have the power to control the lawyers." An obnoxious lawyer is shut down in the same way as an obnoxious lawyer is shut down on cross-examination. A brief period of time can be set; there is no reason to let it get out of control. Involving attorneys as a matter of right "will force judges to rethink and to be reeducated on how to do it. It is easy once you learn. It doesn't take much time to learn." In criminal cases there is no significant problem with pro se defendants; perhaps there should be a special rule in civil cases, but that is not the subject of this testimony.

Hon. John F. Keenan, February 9: Tr 56 to 64: For all the judges, S.D.N.Y. The judges of S.D.N.Y. include many who practiced in New York state courts, and some who were judges there. Their experience with attorney participation in voir dire is extensive. We unanimously oppose the proposed amendment. "The state experience has not been a pleasant one, nor has it been a successful one." The time it takes to select a jury is mind-boggling. "New York City does not have a particularly collegial bar." Requiring lawyer participation would reduce judge control, and do so at the beginning of trial, setting the tone and mood for the whole trial. The attempt to authorize reasonable limits will open a new array of satellite litigation, and spawn a new publication market for voir dire manuals. Appellate courts would set the limits of discretion. The knowledge lawyers have of their cases can be utlized through questions they suggest to the judge.

Hon. John M. Roper, February 9: Tr 64 to 80: Appearing for the Economy Subcommittee, Budget Committee, Judicial Conference. All testimony is directed toward budget implications, not policy. Estimates of the cost of lawyer voir dire are based on estimates of the increased time needed to sit a jury. If indeed judges find it difficult to control the time spent by lawyers, costs will increase more than otherwise. To be sure, time can be saved by jury questionnaires — my own experience has been favorable — but it is difficult to know how much time. Nor do we know how much time must be devoted to voir dire by pro se litigants. The costs will escalate still further if this is coupled with 12-person juries.

Of course these estimates do not account for the time that may be saved when, for example, improved voir dire excludes a juror who would have forced a mistrial later. And, more important, the cost estimates that have been made so far are based on fully distributed costs, not the relevant measure of marginal costs incurred by adding lawyer voir dire. There are likely to be additional costs as well, arising form the need to train panel attorneys and federal defenders. Lawyers also will need to be compensated for the time spent to prepare for voir dire – at least in criminal cases, that can be a direct expense. Our main request is that there be more careful study of costs before embarking on a procedure that may have a significant impact on already-strained judicial budgets.

Al Cortese, Esq., February 9: Tr 98 to 109: The National Chamber Litigation Center supports the proposal.

Item 10E

MINUTES

ADVISORY COMMITTEE ON CIVIL RULES

NOVEMBER 9 and 10, 1995

The Advisory Committee on Civil Rules met on November 9 and 10, 1995, at The University of Alabama School of Law. The meeting was attended by all members of the Committee: Judge Patrick E. Higginbotham, Chair, and Judge David S. Doty, Justice Christine M. Durham, Francis H. Fox, Esq., Assistant Attorney General Frank W. Hunger, Mark O. Kasanin, Esq., Judge David F. Levi, Judge Paul V. Niemeyer, Carol J. Hansen Posegate, Esq., Professor Thomas D. Rowe, Jr., Judge Anthony J. Scirica, Judge C. Roger Vinson, and Phillip A. Wittmann, Esq. Edward H. Cooper was present as reporter. Former Committee Chair Chief Judge Sam C. Pointer Jr., and former member John P. Frank, Esq., also attended. Judge Alicemarie H. Stotler attended as Chair of the Standing Committee on Rules of Practice and Procedure; Professor Daniel R. Coquillette attended as Reporter, and Sol Schreiber, Esq. attended as a member, of that Committee. Judge Jane A. Restani attended as liaison representative from the Bankruptcy Rules Advisory Committee. Peter G. McCabe and John K. Rabiej, along with Karen Kremer, represented the Administrative Office of the United States Courts. Thomas E. Willging and Robert J. Niemic represented the Federal Judicial Center. Professor Francis E. McGovern attended as an invited speaker on experience with state-court class actions. Observers included Frank Bainbridge, Esq., Sheila Birnbaum Esq., Robert S. Campbell, Jr., Esq. (liaison, American College of Trial Lawyers), Alfred W. Cortese, Jr., Esq., Robert Heim, Esq., Professor Deborah R. Hensler, Robert Klein, Esq., Barry McNeil, Esq. (Chair-elect, ABA Litigation Section), Professor Linda S. Mullenix, Fred Nisko, Esq., Professor Carol M. Rice, Evan Schwab, Esq., Fred S. Souk, Esq., Melvin Spaeth, Esq., and H. Thomas Wells Jr., Esq. (liaison, ABA Litigation Section).

Judge Higginbotham opened the meeting by welcoming the Committee and observers to Tuscaloosa and the Law School.

The Minutes of the April 20, 1995 meeting were approved.

Judge Higginbotham reported on the September meeting of the Judicial Conference of the United States. Shortly before the meeting, the proposals to publish for comment revised jury voir dire provisions in Criminal Rule 24(a) and Civil Rule 47(a) were moved to the discussion calendar. It was proposed that the Judicial Conference direct the Standing Committee that the revisions not be published for comment. This proposal raised concerns on at least two scores. The first concern is that it would be a new and unfortunate precedent to bring the Judicial Conference into the rulemaking process before the ordinary consideration of proposals that have worked through the full processes of the Advisory Committees and Standing Committee. The second concern is that such interference could make it more difficult to persuade Congress that the Enabling Act process should be respected because it provides an orderly and designedly deliberate process for considering rules changes. After spirited discussion, the Judicial Conference decided not to interfere with the proposed publications. This action seems to reflect a judgment about the need to respect the regular Enabling Act process, not final approval of the merits of the Criminal Rule 24(a) and Civil Rule 47(a) proposals. There seems to have been a strong sense that allowing public comment is particularly important with respect to attorney participation in jury voir dire. The matter is of great importance to the bar, and the bar should know that it has had full opportunity to make its views known.

Brief further discussion was given to the Civil Rule 47(a) proposal. It was noted that the public comment period may propose alternatives that will improve the initial proposal. Jury questionnaires are often suggested, but must be controlled both to protect juror privacy and also to reduce the opportunities for manipulation of psychological profiles or other jury selection devices. New York, which has followed the practice of selecting civil juries outside the presence of a judge, is moving toward a system of greater judicial involvement that nonetheless is likely to leave room for lawyer participation. And thoughtful attention must be directed to the fact that many judges who permit substantial lawyer participation under present Rule 47(a) oppose amendment of the rule to require this practice. If possible, some means must be found to address the underlying concern that judges are better able to control improper uses of voir dire if they have an unconditional right to deny any participation.

The report on pending legislation pointed out that it was decided that the "Contract With America" bills were moving so fast in the House of Representatives that it would not be fruitful to attempt to voice Rules Committee concerns in the House. The Subcommittee chaired by Judge Scirica, including members Doty, Rowe, Vinson, and Wittmann, has met with some success in working

with members of the Senate staff. Congress is working toward a conference report on securities legislation, although as of the time of this meeting the Senate had not yet appointed conferees. Some difficulties continue to divide the House and Senate. The chair of the SEC has stated profound reservations about the legislation. It is still too early to guess the prospects for eventual passage. There are important substantive provisions in the bill, and the subcommittee has been at pains to state repeatedly that substantive matters are outside the area of proper Committee concern. When substance and procedure are tied together in the bill, as often happens, this approach has necessarily constrained the subcommittee's freedom to make suggestions. And there are many procedural provisions, dealing with pleading, discovery, Civil Rule 11 sanctions, jury interrogatories, class actions, and other matters. Some of the troubling procedural provisions have been dropped, such as the proposals for steering committees or guardians ad litem in class actions. Other class action innovations — and there are many — are limited to securities actions, but seem to have reached a stage that is beyond further modification. Pleading requirements have been moved to a relatively "low stakes" table; the most recent version incorporates Second Circuit standards for pleading with particularity. The Rule 11 provisions continue to be a challenge. The current version requires the court to review the complaint, responsive pleadings, and dispositive motions, and make findings whether there has been any violation of Rule 11. Any Rule 11 violation in the complaint that is not de minimis presumptively requires an award of the full attorney fees incurred by the defendant, no matter how small a portion of the fees was incurred by reason of the violation rather than entirely proper portions of the complaint. These Rule 11 provisions have become a surrogate for a more general fee-shifting proposal, and the compromise seems untouchable during this session. If the bill does not pass this session, however, there may be an opportunity for further consideration and improvement of these provisions.

Rule 23

Civil Rule 23 formed the central focus of the meeting. The materials with the discussion draft suggested that four major proposals should be discussed first: (1) The new Rule 23(f) provision for permissive interlocutory appeals; (2) that Rule 23(b)(3) be modified to require that a class action be "necessary" for the fair and efficient adjudication of the controversy; (3) that Rule 23(b)(3) require consideration of the probable success of the class claim on the merits, and of the significance of even probable success; and (4) that Rule 23 be modified — most likely with respect to (b)(3) classes only — to make clear the appropriateness of "settlement" classes. The meeting provided

opportunity for full discussion of each of these four proposals, and tentative decisions were reached as to the first three. No time was available to discuss the more detailed changes that also were proposed in the discussion draft. The discussion draft posed two separate issues with respect to these changes. The first issue is whether it is wise to propose a number of significant changes in tandem with a set of major changes. The choices to be made will not be easy. If the Committee finds several aspects of Rule 23 that bear useful improvements, it seems undesirable to defer these matters for a period that is likely to extend several years into the future. On the other hand, consideration of even two or three fundamental changes will continue to require careful attention and much hard work. If the Standing Committee, members of the bench and bar, Judicial Conference, Supreme Court, and Congress are asked to consider fundamental changes, there may be a risk that other significant changes will not receive the attention required to ensure the best possible revisions. The second issue really is all the other changes. None can be advanced without careful Committee review. If it is decided that they should be considered on the merits with an eye to determining which merit a recommendation for publication, the Committee must review them to support appropriate determinations.

Rule 23(f): Permissive Interlocutory Appeals

Draft Rule 23(f) would provide for permissive interlocutory appeal from a district court order granting or denying class certification. The draft is closely modeled on the language of 28 U.S.C. § 1292(b), in an effort to invoke familiar concepts that will ease application of a new rule. It departs from § 1292(b), however, in important respects. First, it does not require permission to appeal from the district court, nor even an initial request to the district court for permission. Second, it does not incorporate any of the limiting § 1292(b) requirements that have limited use of § 1292(b) in the class certification context — that there be "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Although § 1292(b) has provided a useful opportunity for appeal with respect to various Rule 23 rulings, the draft is intended to make appeals more readily available. The opportunity for more frequent review may be particularly important if other substantial changes are made in Rule 23. Particularly during the early years of any new Rule 23 provisions, the opportunity for appellate guidance by interlocutory appeal can be invaluable.

The limits built into the draft were noted repeatedly

throughout the discussion. Application for permission to appeal must be made within 10 days of the order granting or denying certification. District court proceedings are stayed only if a stay is ordered by the district judge or the court of appeals — the stay provision is modeled on § 1292(b) to ensure there is no confusion of meaning. The district-court-first analogy to Appellate Rule 8(a) also was noted repeatedly. The Advisory Committee Note to this provision should observe that ordinarily an application to stay district court proceedings should be made first to the district court. The question was raised whether the rule should provide a presumptive stay of discovery when a court of appeals grants permission to appeal. It was agreed that it is better to adhere to the general provisions of the § 1292(b) model; such problems seem to be worked out well in practice under § 1292(b), and creation of a presumption might distort the stay decision.

The first question addressed to the nature of the permissive appeal was whether there should be an opportunity to appeal as of right, even broader than the former "death-knell" theory that was used by some courts to permit appeal when a denial of class certification seemed to threaten the practical termination of litigation that could not be pursued to vindicate individual claims alone. The discretionary opportunity provided by the draft was thought to be illusory. It was observed that at least in some circuits, certification for appeal under § 1292(b) frequently fails because the court of appeals denies permission to appeal; eliminating the need for district-court certification does not ensure that the court of appeals will grant permission.

The response to the fear that a discretionary system of interlocutory appeal would prove illusory was the fear that a right to appeal would lead to abuse. The Federal Judicial Center study confirms the belief that there are many "routine" class certification decisions. Appeals in such cases are likely to do little more than increase delay and expense. Yet there will be strong temptations to appeal certification decisions; defendants will be particularly tempted to appeal orders that grant certification. Perhaps worse, the right to appeal certification decisions might lead a party to contest a certification that otherwise would be accepted by stipulation. It is anticipated — and the Advisory Committee Note would make clear — that permission to appeal, although discretionary in the court of appeals, will rarely be given.

It was further urged that the draft provides significantly greater protection against improvident certification decisions than § 1292(b) now provides. Removing the power of the district court

to defeat any opportunity to appeal is a significant change. A grant or denial of certification can "make or break" the litigation, and the need for review at times will be greatest in situations that are least likely to lead to district-court certification. And the danger of delay is reduced not only by the draft requirement that permission to appeal be sought within 10 days, but also by the prospect that the courts of appeals generally will act quickly, likely within 30 days or so, in deciding whether to grant permission.

An argument was advanced for restoring the requirement of district court permission to appeal, drawing from the observation that a class certification decision may be provisional. When a judge has reached a reasonably firm decision as to certification, appellate review often will be welcome, particularly in cases that present uncertain questions of law. There is little reason to fear that necessary appeals will be thwarted by district court intransigence. And if the district judge has no voice in the appeal decision, there will be a tendency to defer certification rulings. These arguments were later renewed, with the added suggestion that district-court discretion is particularly important in cases that have generated lengthy records on the certification question. The district court's familiarity with the record will support a better evaluation of the value of appeal. The response was renewed also, this time with the added observations that certification for appeal might be inappropriately denied by a judge bent on pursuing settlement following a grant of class certification designed to encourage settlement, or that certification for appeal might be inappropriately denied by a judge who has denied class certification because of distaste for the underlying claim.

Discussion returned to the fear that the draft rule would encourage too many efforts to appeal; it was suggested that appeals would be attempted in the overwhelming majority of cases. It was rejoined, however, that this prediction rested on experience with the most complex and contentious of class actions. More routine actions are not likely to involve such persistent efforts. The explicit invocation of court of appeals discretion, moreover, is a significant safeguard against feckless attempts to appeal. Although adding "in its discretion" to an openly permissive appeal provision may seem redundant, it is valuable as an explicit reaffirmation of the sweep of appellate discretion. The phrase is lifted bodily from § 1292(b); the Committee Note should state that the scope of appellate discretion is as broad under proposed Rule 23(f) as it is under § 1292(b). Invoking this familiar concept should allay concerns about the risks of improvident and disruptive appeal attempts. It is expected, moreover, that most certification decisions will depend heavily on specific case circumstances.

There will be little reason to grant appeal in such cases; the major impetus for appeal will come in cases presenting unsettled questions of law.

Further discussion led to the conclusion that the Committee Note should discuss the possible importance of district court contributions to the decision whether to permit interlocutory appeal. District courts should be encouraged to offer advice on the desirability of appeal at the time of making certification decisions. The advice would not be a condition of appeal, but would be more or less persuasive according to the reasons offered by the district court and the extent to which certification turns on case-specific facts developed at length in the district court. District courts can be quite helplful in "separating the wheat from the chaff" of intended appeals. District court advice may help the parties as well as the court of appeals; a cogent statement of reasons for refusing appeal may often discourage a party who otherwise would attempt an appeal.

It also was asked whether an appeal provision could reasonably be discussed before deciding whether to propose any other changes in Rule 23. Until the Committee has concluded its deliberations on Rule 23, it will not be possible to know what the Rule will be. The scope of appeal, the nature of the issues that may be advanced, and the frequency or infrequency of "routine" certification decisions, all depend on the nature of the rule itself. It was responded that the Committee may decide to urge only the appeal amendment. But it was further agreed that a decision to propose an appeal provision may appropriately be revisited, at the behest of any Committee member, at the conclusion of the Rule 23 deliberations.

A motion to approve proposed Rule 23(f) passed, 11 for and 1 opposed as to particular (unspecified) features of the draft.

CERTIFICATION "NECESSARY"

The discussion draft proposed that to certify a Rule 23(b)(3) class, a district court must find that certification is "necessary" for the fair and efficient adjudication of the controversy, not merely superior to other available methods:

> **(3)** the court finds * * * that a class action is ~~superior to other available methods~~ necessary for

> the fair and efficient adjudication of the controversy. * * *

The background of this proposal was described as the great level of interest and concern that have come to surround use of Rule 23 to address mass torts, and particularly dispersed mass torts. The Committee has heard many views on this set of problems through its activities focused on Rule 23. There has been a strong sense that much of the difficulty has been due to the substantive law, a difficulty beyond the reach of this Committee. There also has been much concern that certification of a class can give artifical strength to claims that individually lack any significant merit. The greatest concern focuses on claims that, if valid, would generate substantial individual damage awards. Although many of the claims may be brought as individual actions, the defendants would defeat most. If all are aggregated in a single action, however, even a relatively small risk of losing on the merits must be weighed by the defendants against the crushing liability that would be imposed by a loss on the merits. This calculation may be further affected by a fear that the sheer weight of the responsibility of denying any recovery to all members of a class may increase the prospect that the class will win on an aggregate claim that would be lost far more often if pursued in individual litigation. The result is a great pressure to settle. The pressure to settle also may be enhanced by the transaction costs of litigating individual claims — if a defendant can purchase "global peace" by settlement, much of the settlement cost may be offset by saving the expense of individual litigations.

On the other side of the equation is the familiar phenomenon of class litigation to enforce claims that are strong on the merits but that would not bear the expense of individual litigation. Consolidation of actions in the same court under Civil Rule 42, and aggregation of actions in different courts under 28 U.S.C. §§ 1404, 1406, and 1407 is not a particularly effective means of addressing this problem, even recognizing that the efficiencies of consolidated proceedings may make it possible to pursue claims that would not bear the risks and expenses of separate adjudication. Class actions in such circumstances do far more than merely achieve efficiency. The proposal is not designed to deter consolidations, but only to limit class certification to settings in which individual litigation is not a realistic alternative.

Changing this criterion of Rule 23(b)(3) certification from superiority to necessity could emphasize the role of class actions in addressing claims that do not bear the costs of individual litigation. For such claims, class certification is necessary. Certification is not necessary for claims that could reasonably be

pursued in individual actions. It may be that a single event or set of events will give rise to claims of both types because some victims suffer substantial injury, while many other victims suffer only relatively minor injuries.

Such is the purpose of the proposal. It is limited to (b)(3) classes. The questions the Committee addressed began with the central issues: is the change desirable? What might it mean in practice — is there force to the concern that "necessary" might mean a lower threshold, not a higher threshold? Should the change be broadened to include (b)(1) or (b)(2) classes?

The first response was that the proposal was a mere cosmetic change that is not adequate to address any of the real problems of Rule 23.

The next response was that indeed the change seemed to lower the standard, making it easier to achieve certification. The annotations to the proposal say that the test of necessity is a practical test, not an absolute one; is this something that can safely be left to the Committee Note, or should it somehow be worked into the language of the Rule? Another view of this question was that there is no meaningful difference between superiority and necessity; unless we can find and express a difference, we should not amend the language of the present rule. In any event, the concept of necessity is ambiguous.

And then the proposal was championed as a good thing. The only way to effect change is to modify the language of the rule. The problems indeed are clustered around (b)(3) and the "freeway" effect it has in generating claims that, but for class certification, would not ever develop into litigation. If it were possible to find the equivalent in formal drafting language, the rule should caution against "willy-nilly" certification. The Note should say this. A clear and convincing preponderance of the factors conducing to certification should be required.

The opposing view conceded that necessity implies a higher standard than superiority, and argued that a higher standard is undesirable. To find that a class action is superior is to find that it is a better means of proceeding. To change the standard is to require that a court deny certification even though a class action would be better than — superior to — the realistically available alternative methods of proceeding. The change may seem to be loading the rule too much in favor of defendants. The perceived problems would be better addressed through the proposed

factors that look to the probability and social benefits of success on the merits of the class claim.

Another concern about the necessity standard was expressed in relation to employment discrimination claims. The statutory amendments that have added damages remedies now bring these cases into the ambit of (b)(3) classes. Class certification may be necessary to ensure that all affected individuals recover damages; a rule that emphasizes necessity may lead to certification of a class that will generate many practical problems, and that would not be "superior" to other available methods that often would not be invoked. This result may be a good thing, but we need to think about the problem before deciding on a language change.

The concern about the ambiguous relationship between the superiority and necessity standards led to the suggestion that the rule retain the superiority requirement and add necessity as an additional requirement. This should make it clear that the standard is being ratcheted up. This proposal was in fact adopted after much further discussion.

Attention then moved to the element of this requirement that focuses on the "fair and efficient adjudication of the controversy." It was observed that the meaning of this phrase depends on the "controversy" that it refers to. If the controversy includes claims that grow out of a common fact setting but that would not give rise to individual litigation, the concepts of fairness and efficiency may diverge. A class action may be superior and indeed necessary precisely because there is no viable alternative means of adjudication. It is more fair if the claim deserves to be enforced. At the same time, class proceedings may be "efficient" only in the sense that the alternatives are so inefficient as to be unavailable. For that matter, certification also may not be "fair" in light of the prospect that an aggregation of worthless small claims may gain leverage that forces settlement to avoid the costs of class litigation and the risk of a mistaken judgment on the merits. This discussion did not lead to any proposal for amending any of the three terms involved.

Another suggestion was that as a matter of drafting, factor (C) should be reframed. "Desirability" somehow duplicates the inquiry into superiority or necessity; it would be better to refer to the consequences of concentrating the litigation in the particular forum. This suggestion was met, however, with the concern that the longstanding language of Rule 23 should be changed only when a change of meaning is intended. Any substitute for desirability must be explained in the Note as a styling change, not

a change of meaning, and even then there would be a risk that the Note would be overlooked and some change of meaning read into the change of language.

These concerns provoked the observation that before addressing matters of language, it is most important to determine what policy should be embodied in the rule. Should we maintain present policy, or is it desirable to suggest some change?

One broad policy issue was found in the question whether adoption of a higher standard for (b)(3) class certification would be, or would be perceived to be, a pro-defendant choice. The response was that the change cannot meaningfully be seen in that light. The purpose of this change is not to address the classes that aggregate numerous small claims; if anything is do be done about such classes, it will be through other proposals. Instead, it addresses the classes that include plaintiffs who have substantial individual claims and who could pursue individual litigation. In the last few years, defendants have often sought certification of such classes. The interests of the defendants, often spurred by liability insurers, are to achieve a global settlement that avoids the costs and uncertainties of individual litigation. Making certification more difficult in these cases could at least as easily be seen as a pro-plaintiff change. As an additional complication, the interests of the defendants may overlap with the interests of some members of the plaintiff class because a class adjudication can effect a more orderly and uniform distribution of the assets available to satisfy the claims of all plaintiffs. A carefully structured class disposition can ensure that all persons injured by a common course of conduct share in the judgment, not simply those who got the earlier judgments. The purpose is not so much to favor plaintiffs or defendants as to find a procedure that most effectively recognizes the interests of all.

The Committee then was admonished that this proposal reflects rulemaking at its worst. The Rules were, in the beginning, relatively simple. People could understand them. They have become complex. The cognoscenti understand them still. But there are 800,000 lawyers who may need to understand them, and it is counterproductive to continue along a course of trivial changes that generate confusion far out of proportion to any incremental benefit that might be achieved.

The policy issues were brought back into the discussion with an illustration of a "single event" mass tort. An airplane crash might generate 150 claims. Each claim could be tried separately. A joint class proceeding may be more efficient, but is not

necessary. This is a real situation that causes real difficulty. Individual actions in the federal courts can be consolidated without difficulty, given the array of consolidation devices. The Note should comment on this alternative to certification. This change is important. This argument was met by the contrary view that class certification is suitable for the single-event mass disaster. And in return it was accepted that perhaps in some single-event settings a class action is necessary because consolidation will not accomplish all the appropriate results. Class certification, for example, might help address settings in which individual state-court actions cannot be consolidated with a mass of federal actions.

A different perspective was opened by the observation that the proposed necessity standard seems calculated to underscore a preference for individual litigation where individual litigation is possible. It was answered that this is indeed the purpose, that many lawyers believe there is too much emphasis on moving cases, getting rid of them, even though individual actions would be better. This is the policy that should be addressed before language is chosen.

This policy was then underscored by referring to the decision in Matter of Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995). It was suggested that the result in the Rhone-Poulenc case is right, and that Rule 23(b)(3) should be amended to make it easier to support similar results in future cases. We need to find a way to make it easier to refuse certification. This view was echoed in the statement that the issue is whether Rule 23(b)(3) should be amended to discourage class certification.

The earlier suggestion was renewed by a motion that the superiority language should be retained, and supplemented by adding a requirement of necessity. There would be no change in the "fair and efficient language," which refers to matters that depend heavily on the context of specific cases. This change may indeed encourage certification of small-claims classes; whether there may be offsetting changes that may discourage certification depends on the additional proposals still to be discussed.

The virtues of this proposal were urged to be twofold. The existing body of doctrine that elaborates the superiority requirement will be retained, providing a familiar first step of analysis. The additional necessity requirement need be addressed only if superiority is found. Necessity then will provide an additional and higher requirement that will require further evaluation of the same factors that bore on the superiority

determination.

The objection was made that it seems undesirable to require this two-step process. The proposal seems to be that necessity is a higher standard that always embraces superiority, and always requires something more. The finding of superiority will be necessary in all cases, but never sufficient for certification. Why not focus on necessity alone, explaining it as well as can be, without retaining both requirements?

The motion to retain the superiority requirement and add a necessity requirement passed by vote of 8 to 4. This portion of Rule (b)(3) would read:

> **(3)** the court finds * * * that a class action is superior to other available methods and necessary for the fair and efficient adjudication of the controversy. * * *

State Class Actions

Professor Frances McGovern then addressed the Committee on current experience with class actions in state courts. He spoke from extensive experience with state-court class actions, including experience as a special master charged with facilitating coordination between state courts and the federal court supervising the consolidated federal cases arising out of claims concerning silicone gel breast implants. He has worked extensively with the MTLC committee established by the Conference of Chief Justices.

There has been an explosion in state class actions. Many of them involve claims that are framed as "fraud" claims arising out of the terms of various kinds of insurance and loan transactions. The volume is remarkable. The procedures also are remarkable; state judges achieve much greater uniformity of procedure than federal judges, largely by adhering closely to the recommendations made in the Manual for Complex Litigation. There are some major problems.

Polybutelene pipe cases illustrate one type of state actions. Chlorine attacks the pipe joints, causing them to leak. State law governs, and individual claims ordinarily are too small to meet the amount-in-controversy requirement for diversity jurisdiction. Some

individual claims have been tried to judgment. The defendants want to settle. A Texas state judge refused to certify a nationwide class for a $750,000,000 settlement. A federal judge denied jurisdiction of an attempted class action. The result was that class actions were filed in three states. A California judge took on the task of persuading judges from the other state to go to California to work out a settlement. When that did not work, he conducted a settlement conference that came very close to a settlement. The lawyers have been "sent back" to the other state courts to attempt to conclude the settlement of all actions in all states. It may work.

For some time, class actions have provided the "end game" after a number of individual actions have been tried to judgment, establishing a framework of information that facilitates just and reasonable settlement on a class basis. But recently some lawyers are attempting to bypass this process, putting the class action "up front" before there have been many individual adjudications.

State judges increasingly are turning down "sweetheart" settlements that establish res judicata for the defendants in return for deals that benefit the class lawyers more than the class.

State class actions have become very important. And federal Rule 23 is very important to what the state courts do. Most states follow Rule 23, although there are variations in the extent of its adoption.

Deborah Hensler then stated that Rand is trying to put together a project to get a good view on the frequency and diversity of class actions. The methodology would be different than that used by the Federal Judicial Center study, aiming at generating complementary information. A survey of potential plaintiffs would be an important element in the study. A series of case studies, based on data collection from sources outside court files, would be attempted as the basis for a systematic measure of the costs and benefits of class actions for plaintiffs and defendants. This is a very ambitious proposal, which will require substantial independent funding. It may not be possible to mount as ambitious a project as would be desirable. Although it takes a while to make sure that the cases studied are fairly representative, not "eccentric," results could be available in time to inform this Committee's ongoing consideration of Rule 23.

PROBABILITY OF SUCCESS

Over the course of the past year, it has been urged that Rule 23 should incorporate a test, akin to preliminary injunction analysis, that balances the probable outcome on the merits against the burdens imposed by class certification. The discussion draft included this feature in two — perhaps redundant — ways, dealing only with (b)(3) classes:

> **(3)** the court finds * * * that the probability of success on the merits of the claim [by or against members of the class] warrants the burdens of certification, and that a class action is superior * * *. The matters pertinent to the findings include: * * * (E) the probable success on the merits of the class claims, issues, or defenses.

Discussion began by framing the general issues: should any consideration of the merits be required? If so, what should be the means of calibrating the strength of the claims to the certification decision? Should the preliminary injunction analogy be used, or does it suggest an unnecessarily elevated standard of success? How would this approach affect the relationship between the certification decision and other proceedings — would it require substantially increased opportunity for discovery on the merits, delay the certification decision, create difficulty for certification of settlement classes, increase the occasions for interlocutory appeal? Although the provision may seem a boon for defendants, may it generate offsetting problems by elevating the stakes at an early stage of the litigation for fear that a preliminary finding of probable success may increase settlement pressure and even affect a defendant's standing with the financial community? So, in the end, is this an approach that may help plaintiffs in cases that lead to a favorable preliminary appraisal of the merits, and may harm plaintiffs when the preliminary appraisal is unfavorable?

It was suggested that perhaps it would be more appropriate to rely on analogy to temporary restraining order practice rather than preliminary injunction practice. The difficulty with preliminary injunction procedure was thought to be that it may be akin to trying the case before certification. Civil Rule 65, indeed, authorizes the court to combine the preliminary injunction hearing with trial on the merits. A temporary restraining order often issues only after a hearing, but the hearing is expedited and there is little or no discovery. The key is to find an abbreviated procedure, a matter that invokes the procedural distinctions between temporary restraining orders and preliminary injunctions, not any supposed difference in the standards for preliminary relief.

It was observed that with preliminary consideration of the merits, lawyers inevitably will demand an opportunity for discovery to support well-informed presentations on the merits. And, once discovery is opened up, it will be difficult to limit its scope. It will be difficult to resist this pressure, and it will be difficult to keep the focus of discovery narrow. If the purpose is to separate out claims that gain settlement power by certification despite scant prospect of success at trial on the merits, an abbreviated procedure will not do the job. During the delay, it may happen that some individual claims are tried; that is not necessarily an undesirable thing.

The fear that a probable success requirement would impede certification of classes for the purpose of settlement was stated to be a real problem. It also was noted that defendants often push for certification of a plaintiff class if they believe they have strong cases, and that the probable success requirement could prove adverse to defendants in this way as well.

Concern with the effects on settlement classes was met by the suggestion that a probable success requirement could be viewed from the perspective of settlement. If certification is made to support future efforts to settle, the requirement means only that there is a reasonable prospect that settlement will be achieved, since settlement will count as success on the merits. If certification is made to support a settlement already reached, the measurement of success on the merits becomes one with the proceedings to determine whether to approve the settlement. The defendant wants certification, the plaintiff wants certification, and a probable success element should not be a problem if the rule is properly drafted.

The probable success factor was urged to be a good token of the broader problems of class actions today. Some class actions are very good, as shown by the wide array of opinions gathered by the Committee's efforts to reach out to the bench and bar for advice. Other class actions are simply means by which complaisant plaintiffs' lawyers offer res judicata for sale at bargain rates to intimidated defendants. The Federal Judicial Center study shows that individual recoveries are small in most class actions. Account should be taken both of the prospects of meaningful recovery for anyone, and whether there is enough real good in any recovery to justify the burden of class proceedings. Although the Rhone-Poulenc decision in the Seventh Circuit does not say so expressly, it turns in part on an estimate of the probable merits of the class claim, and also on the costs to the system even if the class claim succeeds. The history of plaintiff failures at trial generated a particular fear that a single class proceeding might

reach a wrong result. Even if a right result should be achieved, great difficulties would be encountered in further proceedings to translate the class judgment into individual judgments. Other cases involving minuscule individual recoveries, administered and distributed at great cost, impose quite different burdens. "Fluid" class recovery in such cases involves elements of social policy that should be beyond the reach of the Rules Enabling Act process.

It was asked whether success on the merits should be measured by the representative parties' claims or by the class claim. The response was that it is the class claim that is important, but that the plaintiffs' individual claims may be strong evidence of the strength of the class claim. The question is how many class members have claims sufficiently similar to the individual representatives' claims to warrant certification.

This discussion led to more pointed suggestions as to the nature of the showing that might be required. Rather than a thorough appraisal of the merits, it was suggested that a "first look" might be sufficient, or that the effort should be only to ensure that the claims are not "bogus."

The first look approach was resisted on the ground that the certification decision is very important. If the merits are to be considered, it should not be done on the basis of half-a-dozen affidavits. If there is to be discretionary consideration of the merits at the certification stage, it should not be so open-ended.

The "bogus" claim approach met the response that few cases involve bogus claims. Most contemporary criticism of Rule 23 arises from dispersed mass-tort cases, and these cases do not involve bogus claims.

These observations returned the discussion to the opening point. The class device should facilitate prosecution of strong claims, but should not be misused to add strength to weak claims. Many experienced lawyers say that, despite the difficulties of making a rigorous empirical demonstration, a significant share of class actions involve coercive use of the class device to force settlement of claims that have little chance of success on the merits but that promise overwhelming liability should the slender prospect of success on the merits mature into reality.

The quest for alternative formulations led to additional

suggestions looking to a "significant probability of success," or "sufficient merit to warrant certification." These and other formulas led to the suggestion that before further drafting efforts were made, the Committee should determine the general question whether any consideration of the merits might be appropriate.

A motion to add to the (b)(3) certification some consideration of the probable merits passed by 11 to 1.

Robert Heim, an observer, then told the Committee that although he had been an early proponent of the preliminary injunction probability-of-success analogy, the Committee discussions had persuaded him that this approach might impose an undue burden on plaintiffs. The burden would be particularly troubling if appraisal of the probable outcome were to be made early in the litigation. Defendants too may have cause to fear this approach, particularly as the preliminary appraisal might come to influence such subsequent matters as settlement negotiations, summary judgment, or even attitudes at trial. It would be better simply to adopt a low threshold that gives the court discretion to look at the merits without embarking on an extended inquiry. This result could be accomplished by adopting a new element in the Rule 23(b)(3) calculus, requiring the court to find that the issues presented by the facts and the law are not insubstantial [and have been sufficiently well developed through prior judicial experience].

Immediate response to this suggestion was that perhaps this inquiry should be reduced from an element of the certification decision to a mere place in the list of factors that bear on the elements of certification — the most obvious fit would be with the determination that certification is superior and necessary for the fair and efficient adjudication of the controversy. The question is one of weeding out weak cases, and a simple role as one factor in the certification process will accomplish that task. It was suggested that if this look at the merits should become only a factor, a balancing element should be incorporated, so that a greater prospect of success on the merits would be required when the burdens of certification are greater. Treating the inquiry as a mere factor in the certification determinations was urged to reduce the risk of untoward consequences. Indeed, it was urged that as a mere factor, this inquiry could actually help plaintiffs win certification of classes on strong small claims, reducing the concern that preliminary consideration of the merits may seem an unfairly pro-defendant provision. (And it was responded that perhaps the bilateral impact of this approach is enhanced if it is made an element of certification, not a mere factor.)

Another response was that it is dangerous to require prior judicial experience with the underlying claims. This element seems to reflect concern with dispersed mass torts. There is no reason to insist that there have been earlier litigation of related claims before determining whether to certify claims that arise out of a single transaction — securities fraud actions offer a common example. It was responded that the concern really goes to the newness of the kind of claim. Securities litigation often presents issues of a kind made familiar by much earlier litigation that arises out of distinct events but invokes common principles. So of other kinds of class actions. But some class actions present issues that are new and unfamiliar; it takes time for the claims to mature through individual adjudication before courts can safely consider class litigation. Premature class certification can create many claims that otherwise "would not be."

The balancing approach reappeared, with the suggestion that a "not insubstantial" test standing alone would not have much effect. Insubstantial claims should be dismissed without regard to attempted class certification. It also was urged that "not insubstantial" has a double-negative ring that is not well-suited to rule drafting. The effort to sort out claims that can proceed as individual claims but not as class claims also seems to intrinsically involve balancing. What is sought is a sufficient prospect of success by the members of the class to justify the incremental costs, delays, risks, and settlement pressures that flow from certification. Why not say this openly, recognizing that the adverse consequences of certification vary from case to case, and allowing only relatively strong claims to support a certification that imposes relatively onerous burdens?

The difficulty of making a cogent appraisal of the likely outcome returned to the discussion. A "determination" of probable merits should not be required, but only a preliminary assessment. But there is a danger that in many cases the assessment will not in fact be preliminary. Any requirement in this dimension will put real pressure on the judge. Findings will be made. Discovery will be had. The determination may be tied to, or sequenced with, summary judgment.

A separate question was raised about the risk that an adverse ruling on the probable success factor might spur a plaintiff to mount a second action. The same representative plaintiff might allow the first action to meander along without certification, but seek certification of the same class in another court with another opportunity to persuade a different judge on the probable success issue. It would be a nice question whether the first determination should preclude relitigation by the same plaintiff, particularly if

there is no final judgment in the first action. And the problems would become much more tangled if the same lawyers simply found a different representative plaintiff to maintain a second action. Certification and defeat of the class claim brings some measure of finality. Denial of certification is less likely to do so. These questions were met with the response that if there is a need to make certification more difficult, the need should not be put aside because of the prospect that a plaintiff who once fails to make the required showing may try a second time to make the same required showing.

Comparisons with present practice also were noted. One comparison is the finding in the Federal Judicial Center study that in a majority of the class actions studied, motions to dismiss or for summary judgment were made before a ruling on certification. Another was that evidentiary hearings now are required on only a small fraction of class certifications, and that the hearings that are had typically run from two hours to perhaps a single day.

Discussion of the probability-of-success factor resumed after an overnight break. It was suggested at the beginning of the morning session that it would be difficult to be achieve a final formula, with confidence, at this meeting. There will be many opportunities for review, aided by comment, before the present discussion draft can be transformed into a new rule. The Committee should seek to do the best it can for the moment, recognizing that the time has not yet come to take a proposal to the Standing Committee with a recommendation for publication and comment. Instead, the draft that emerges from this meeting can be reported to the Standing Committee as an information item at its January meeting, seeking their views as support for further consideration at the April meeting of this Committee. If a proposal for publication can be reached at the April meeting, and is approved by the Standing Committee in early summer, it would go out for public comment at the same time as a proposal presented to the Standing Committee in January.

Turning to the actual approach to be taken, it was observed that the "not insubstantial" claim approach involves a double negative in one sense, but it reflects a common recognition that goes beyond the surface logic of words. Lawyers understand that however precise a line we might imagine between "substantial" and "insubstantial," there is a big difference between requiring that a claim be substantial and requiring that a claim be not insubstantial. Earlier discussion has shown many difficulties with a balancing test. It seems more attractive to adopt a test that allows a first look at the merits, but that often can be met without a need for extensive discovery or formal hearings. The

test would be designed to screen out claims so weak on the merits as to gain potential strength only by class certification. Even at that, the certification decision will be a major event, just as it often is now. If the rule requires only a finding that the claims are not insubstantial, it will be far different from requiring that a means be found to weigh different measures of probable success on the merits against different levels of certification-induced burdens, risks, and pressures to settle. There even is a virtue in the negative reference to "not insubstantial," moving away from the dangers of early factfinding.

Initial discussion settled on a draft that incorporates the "not insubstantial" requirement among the findings required for certification of a (b)(3) class, and that adds "on the merits" to make it clear that insubstantiality does not refer to the dollar amount of individual or aggregate claims. The draft would add this element to (b)(3):

> **(3)** the court finds * * * that the class claims, issues, or defenses are not insubstantial on the merits, * * *. The matters pertinent to ~~the~~ these findings include * * * (E) the probable success on the merits of the class claims, issues, or defenses * * * .

This approach was contrasted with the balancing approach that dominated much of the earlier discussion. The balancing approach continued to find support, particularly if the rule were to identify explicitly the continuing concern that certification of a class can impose not only great expense but also a coercive pressure to settle in face of a very small probability that a weak claim may result in liability for large damages. This alternative was offered as a proper matter for further discussion at future meetings. Indeed, the Committee may wish to provide an alternative discussion draft in its informational report to the Standing Committee.

This point of uncertainty was the occasion for one of the frequent observations anticipating the later discussion whether the burdens of class proceedings may be so important as to justify refusal to certify claims that are likely to succeed on the merits. It was suggested that although this question is conceptually distinct from the probability-of-success question, it affords an alternative approach to the concern that class proceedings may at times be much ado about too little.

These uncertainties also provoked one of several discussions of the frustration that inheres in a process of surveying many possible changes, large and small, before finally determining what path to take. The Committee has not finally determined whether to propose any changes at all — the only commitment is to make thorough use of the information that has been gathered. If changes are to be proposed, there is no determination whether there will be only a few small changes, a major overhaul of the rule, or a substantial set that includes some important changes and a number of smaller improvements. The frustration, however, is a necessary price to be paid for carefully reviewing each of many possibilities, suspending judgment until all have been considered.

Returning to the probable-success issue, it was moved that the Committee present two alternatives to the Standing Committee for information and advice. One alternative would be the "not insubstantial on the merits" version set out at pages 19 to 20. The second alternative would not for the moment refer expressly to the effect of certification in creating pressure to settle, but would include an explicit balancing requirement and raise a higher threshold than the "not insubstantial on the merits" version. This alternative would read:

> **(3)** the court finds * * * that the prospect of success on the merits of the class claims, issues, or defenses is sufficient to justify the costs and burdens imposed by certification * * *. The matters pertinent to ~~the~~ these findings include: * * * (E) the probable success on the merits of the class claims, issues, or defenses * * * .

Retaining both versions for purposes of further discussion will provide the opportunity for further consideration. They are intended to be quite distinct.

The motion to present both alternatives passed 11 to 1.

Benefits and Costs of Class Victory

The next topic was a proposal, drawn from various state law models, that a court have discretion to refuse certification of a (b)(3) class if the benefits gained by success on the merits would not be sufficient to justify the costs of administering the class action and distributing individual recoveries. This proposal is

distinct from the probability-of-success question because it can be applied by assuming that the class will prevail on the merits. In pure form, it would be administered by assuming that the class will prevail and asking whether the victory will justify the costs entailed in reaching the merits and implementing the judgment.

The discussion draft shaped this issue by adding a new item to the list of factors to be considered in determining whether a class action is superior and necessary to the fair and efficient adjudication of the controversy:

> **(F)** the significance of the public and private values of the probable relief to individual class members in relation to the complexities of the issues and the burdens of the litigation;

The first observation was that it is logically difficult to fit this drafting form into the list of findings required in the initial paragraph of (b)(3). It clearly does not bear on predominance of common issues, or probable success. It fits, if at all, only with the determination whether a class action is superior to other available methods and necessary for the fair and efficient adjudication of the controversy. This factor is likely to be relevant only when individual claims are too small to justify the cost of nonclass adjudication, so that a class action is necessary if the controversy is to be adjudicated, and so that it is difficult to deny that a class action is superior to alternatives that will not lead to any adjudication of the controversy. There may be a better drafting solution if this factor is to be adopted.

In support of some such approach, it was urged that this issue is a major matter. Although the Federal Judicial Center study shows median individual recoveries in class actions across a range from $300 to $500, there are many illustrations of far smaller recoveries. The "two dollar" individual recovery is trivial, and is responsible more than anything else for the "bad name" of class actions. The courts are asked to shoulder a considerable burden, to conscientiously administer cases that mean little or nothing to individual class members but enrich class counsel.

Of course the contrary argument will be made that what is important is not the perhaps trivial individual recovery but enforcement of the social policies embodied in the legal rules that support the recovery. The malefactors must not be allowed to retain their ill-gotten gains because they have managed to profit from small wrongs inflicted on many people, and because public

enforcement resources are not adequate to the task assumed by the class-action bar. But courts must pay the price of administering this form of justice, and the price is paid at the expense of litigants who present individually important claims that also rest on important social policies. The question whether to devise means to punish all wrongdoers is a question of political and social policy that should be left to other agencies of government. They should find the means to reach a proper level of enforcement, not civil rules adopted through the Rules Enabling Act process.

The median individual recovery figures of the Federal Judicial Center study were again advanced to show that although the typical figures are far below the level needed to support individual litigation, the figures are not trivial. Across the four districts in the study, median individual recoveries ranged from $315 to $528.

It was proposed that all of these concerns might better be addressed by a more thorough revision of factors (D), (E), and (F) in the Rule 23(b) calculus:

> **(D)** the likely difficulties, expenses, and burdens if the controversy is resolved by class adjudication rather than by separate individual actions;
>
> **(E)** the likely benefits to individual class members if the controversy is resolved by class adjudication rather than by separate individual actions; and
>
> **(F)** the public interest, if any, in having the controversy resolved by class adjudication rather than by separate individual actions
>
> **(F)** {alternative} whether the predominant motivation for class certification is counsel's interest in fees rather than the benefits sought for class members

It was agreed that if there is to be a factor F, and if it is to have the force suggested, its structure and placement are important. Various committee members had attempted to combine factors (E) and (F) of the draft version, and encountered difficulty. These efforts commonly wound up in the direction of asking whether the probable relief to individual class members is

sufficient to justify the costs and burdens of class litigation, or more simply whether the probable relief is worth the effort. One difficulty arises from the meaning of the relatively neutral but open-ended reference in the draft to the "significance" of the public and private values of class relief. Identification of public and private values, and particularly of "public values," involves a wide-open element of discretion that may be too broad.

Turning to the cost and effort dimension, the Committee asked for a review of the attorney fee awards found in the Federal Judicial Center study. The response was that median gross monetary recoveries ranged in the four different courts from $2,000,000 to $5,000,000; attorney fees ranged from 20% to 40% of class recoveries, and the higher percentages ordinarily were associated with smaller gross recoveries.

Attention then focused on the issue that many believed to lie at the core of the F-factor issue. There are significant problems in administering class actions that yield only trivial individual recoveries — the "$2 recovery" became the symbol of this phenomenon. But there is a deterrence value in enforcing existing social policy as captured in current law. The F factor seeks to incorporate this value by focusing on the public value of the probable relief, but may not capture the importance of deterrence and forcing disgorgement of ill-gotten gains. The very elasticity of the public value concept, indeed, virtually ensures that very good judges will reach different results in cases that seem indistinguishable. A focus solely on the insignificance of private relief, however, leaves out the deterrence function.

The need to pursue deterrence through privately instituted class litigation was challenged. Congress can, if it wishes, create a bounty system to encourage private enforcement of public values. Qui tam actions embody precisely such a system. The question is whether Rule 23 should continue to play a comparable role. This function has been absorbed by Rule 23(b)(3) over many years in which it was adapted to functions that never were anticipated by its authors. There was no imperative command that the rule be adopted. There was none that it be adapted as it has been. It should be possible to reexamine the question whether it must continue to function as an incentive to lawyers who at best can pursue the public interest only by means of the inefficient, costly, and pressure-ridden device of artificially aggregating vast numbers of individually trivial claims. Why not cut back on this outgrowth, leaving it to Congress to devise better means of enforcement in the public interest where better means really are desirable? Even the class action represents litigation with parties. It began life simply as a procedural device to facilitate

effective determination of individual claims. It becomes quite a different procedural device — and perhaps more a substantive tool than a procedural device — when it is abused by fee-inspired lawyers in the name of social policy. It is brought on behalf of the constituent members of the class, and it is they who are bound by the judgment. It cannot be brought without defining a class of real people or legal entities. Why not focus solely on the benefits to the class members, as parties? If there is meaningful individual relief, class litigation makes sense. Lawyers who bring such class actions will be rewarded, and the public interest is served. But there are actions in which individual benefits are trivial or nonexistent. Why should class actions be the means of enforcing public values in such settings?

Quite apart from the direct costs of achieving public enforcement by aggregating trivial individual claims, it was observed that this device has contributed to a public sense of cynicism about courts, lawyers, and the law.

A first rejoinder was that the image of the $2 recovery is misleading. There are few such cases. What of a case with 20,000 claimants with $25 individual recoveries: is $500,000 too trivial to ignore? How will a judge decide whether $25, or $200, is important enough — whether the calculation also includes public values, or is limited to private values?

A second part of the response was that whatever may have been intended when the 1966 amendments were adopted, the social-enforcement function has become part of Rule 23. It is, in a real sense, woven into the fabric of social justice. The idea is to deter the conduct, in a manner somewhat analogous to punitive damages. If the costs of administering individual remedies are untoward, the answer may lie in substituted relief in the models often characterized as "fluid" or "cy pres" recovery.

Sheila Birnbaum was then asked to address the committee. She began by noting that many practitioners are exposed to class actions across the full national scene. They are proliferating. One new field of growing activity involves state-law attacks on the drafting failures of insurance policies, loan forms, and the like, framed as fraud claims but in fact involving highly technical matters. There are no statistics, but actions like this are common. And they enforce no meaningful social policies at all. Anticipating the later discussion, she also addressed the use of settlement classes. They often are proper; disagreement with the result in one or another prominent case should not disguise the importance of settlement as a means of resolving problems that

otherwise may be intractable. Choice-of-law problems provide one illustration of the reasons that may support use of a settlement class where a litigation class would not be possible. It is not clear that the Rule 23 draft does enough to support settlement classes.

Further doubts were expressed about allowing courts to turn a certification decision on assessment of the public values to be served by a class victory. Rule 23 is what it has become. It is troubling. But the fact is that public enforcement agencies simply do not have the resources to achieve comprehensive enforcement of all our public laws against all significant violations. Rule 23 enforcement has become a major feature of the enforcement system, and only political judgments can justify substantial alteration. In addressing securities class actions, for example, pending legislation seeks simply to address specific perceived abuses, not to retrench the central role of class actions in vindicating individually small claims for violations that, in the aggregate, have inflicted sufficient total injury to repay the private costs of class-action enforcement. These problems are too much political to be addressed through the Enabling Act process. Congress is the agency to correct them.

These doubts were repeated in a different voice. Discretion needs anchors, it needs guidelines. Members of the Committee have expressed quite different views as to the proper interpretation of the draft (F) factor. It will be very difficult for district judges to administer, and the difficulty will generate costly uncertainty. This approach almost invites the troubling response that class actions are being trimmed to the "just-the-right-size" formula: if the problems are too small, or too large, Rule 23 assistance will be denied. When suit is filed, the parties and lawyers do not agree that it is a "$2" case. If attorney fees are the problem, the Committee should address that problem directly.

Another problem was seen in the feature of the draft that limits consideration of the burdens of certification to (b)(3) classes. Various illustrations offered in the Committee discussion have included (b)(2) classes in which injunctive or declaratory relief seemed to offer trivial benefits to individual class members. And in any event, it does not seem practicable to separate consideration of the probability of success from the importance of success. As with the approach sketched on page 22, it would be better to restructure factors (D), (E), and (F) together. It also might be better to incorporate a direct reference to cases in which attorney fees seem to be the motivating factor behind the litigation.

The suggested direct focus on attorney-fee motivation spurred the observation that the private attorney general aspect of class actions is not of itself untoward. It is accepted in actions that yield significant benefits to individual class members. The question is whether it should be accepted in actions that do not yield significant individual benefits. Private enforcement can be wise; the question is whether it is desirable absent significant individual benefits. The antitrust laws, for example, encourage private enforcement by treble damages and attorney-fee awards, but provide these encouragements only to people who can prove antitrust injury.

So, it was suggested, the draft F factor may be too general. How might it be narrowed, reducing concerns about open-ended discretion and avoiding even the appearance of trespass on areas of social-political policy? Would it help to seek something simpler than a factor that bears on the also discretionary (b)(3) determination whether a class action is superior and necessary? The questions are first, what is the proper role of the committee in reconsidering the ways in which Rule 23(b)(3) has evolved over three decades of judicial interpretation? Second, what direction should be taken? And, third, what language will best effect the intended changes?

One approach would be to attempt to distinguish between the deterrence that arises from a meaningfully compensatory remedy and the deterrence that arises from the in terrorem function of aggregating trivial claims. Not all deterrence is desirable, particularly if it arises from the disproportionate burdens and risks of pursuing judgment on the merits. Focus on the public interest may legitimately recognize that there may be no public interest in a particular proposed means of enforcement – the rule even could be drafted to focus on "the public interest, if any * * *." This leaves substantive concerns to substantive law, not the mode of relief. This approach, however, does not directly address the difficulty of understanding just what public values are involved in any particular proposed class action. It must be remembered that all of this discussion addresses a situation in which there is a strong claim on the merits but small individual damages. What is the public interest then?

The difficulty of the values concept was finally addressed by a proposal that the factor be redrafted in terms of public interest and private benefit. On motion, the Committee cast 11 votes, with no dissent, to adopt the following language as a working draft:

(F) whether the public interest in – and the private

benefits of — the probable relief to individual class members justify the burdens of the litigation;

The Committee Note to this factor would explain that the burdens of litigation include not only the costs of class litigation and the complexity of the issues, but also the in terrorem effect of certification.

Settlement Classes

Discussion of settlement classes began with the reminder that this topic has come in for renewed attention in conjunction with dispersed mass tort actions. In re General Motors Corp. Pick-up Truck Fuel Tank Litigation, 55 F.3d 768 (3d Cir. 1995) has surveyed the terrain. Two asbestos cases are approaching appellate arguments in the Third and Fifth Circuit. The issues are open for debate and the law is in flux. The first question is whether the Committee should attempt to deal with these issues while the litigation cauldron is boiling. This question does not imply that the Committee should not consider the problem; to the contrary, the Committee already has begun the process, and should make a deliberate decision whether anything useful can yet be done. But it may be the course of wisdom to decide that the time for action is not ripe. The risks of defendant-created plaintiff classes are not new. But the risks are much affected by the way in which the class is structured. An opt-out class is less threatening; consent is very important. An opportunity to opt-out knowing the actual terms of a proposed settlement can be particularly useful to ensure individual fairness. Other questions include the basic question whether it makes sense to certify a class for settlement purposes when the same class would not — and often could not — be certified for litigation, and whether it is proper to permit a class that is first proposed for certification at the same time as a proposed settlement is presented for approval. Settlements that seek to include "futures" claimants who do not yet have enforceable claims present quite different issues. Great savings in transaction costs can be achieved by means of settlement classes. And they may facilitate claims administration structures that achieve a measure of equality in the treatment of different claimants that could not be achieved by any other means.

The questions are large. The drafting chore may not be difficult once the questions are answered. But finding the answers remains difficult. The Committee has elected not to press forward with the draft that would have collapsed the categorical distinctions between (b)(1), (b)(2), and (b)(3) classes,

recognizing the special origins and legitimacy of (b)(1) and (b)(2) classes and the risk of losing this history. Is the tie to litigation equally important to the legitimacy of class certification, or can the real-world importance of settlement be recognized in the text of the Rule? Notice and adequate representation will remain crucial. The opportunity to opt out, perhaps at the time of settlement as well as at the time of certification, may remain equally important.

The gravity of these questions led to the suggestion that perhaps settlement classes should not be treated simply as a factor subsumed in the (b)(3) certification process, but should become a new and separate Rule 23.3. The rejoinder was that any new rule would have to duplicate many provisions of Rule 23; there should be a way to make settlement classes a separate part of Rule 23.

It was urged that the decision whether to act now should not turn on anticipation of the guidance to be provided by pending cases. These cases will be controlled by the current language and structure of Rule 23, and by the specific settlement events in those cases. The first issue is whether the rule should address settlement classes as a separate phenomenon; the mechanics should be deferred until that decision is made. The question is whether it is proper to view the requirements for certification differently when certification is sought solely for purposes of settlement, not for litigation. The Rule or the Note can emphasize the distinctive importance of notice and adequacy of representation in settlement classes.

One ground for resisting settlement classes is the danger of sloppy thinking about the class definition. Another danger is presented by cases in which the settlement is worked out before the request for certification. Two parties negotiate a prepackaged complaint, certification, and settlement, and then present it for approval by a process that lacks any of the safeguards provided by a true adversary proceeding. It is not really clear whether there is an Article III case or controversy in this setting. There is some force to the view that the court is simply being asked to peddle res judicata through the group of plaintiffs' lawyers who made the lowest and most attractive bid to the defendants. How can a court ensure that there was genuine adversariness in negotiating the settlement? And how can it ensure that there was no disqualifying conflict of interests among different people who are lumped together in a single supposed class? There is a great practical value in settlement classes, but also a great strain on the system. How can adequate representation of class members be ensured, and by whom? Perhaps the impending Third and Fifth Circuit decisions will provide helpful guidance.

From a somewhat different perspective, it was urged that there should not be any need to amend Rule 23 to support settlement class certifications. All of the requirements for certification must be met. But the question whether the requirements have been met can be addressed from the perspective of settlement, not the problems of adjudication. The Third Circuit General Motors Pickup decision can be read to reject this view, and to insist that certification is permissible only if the Rule 23 requirements would be met for purposes of litigation. If the opinion is read that way and is followed, then Rule 23 should be amended to restore the meaning that should be found in its present text. The purpose of certifying a settlement class is to provide benefits for class members — present claimants — and to reduce the risks and transaction costs for all parties. The court has an important role to play by administering settlement through Rule 23; without this judicial supervision, defendants in the dispersed mass tort cases may attempt to establish nonjudicial claims-administration procedures that settle individual claims by means that do not inform claimants as well, and that do not protect individual interests as well. Most settlements in these cases occur after there have been individual judgments in individual actions; the terms of settlement are informed by the results of actual adjudications, and the exercise of judicial review is similarly informed.

This defense of settlement classes focused attention on Rule 23(e). It was observed that it is difficult enough to provide effective judicial review of settlements reached in actions certified for class adjudication, in substantial part because the parties cease to be adversaries when they join in seeking approval of a settlement, and suggested that these problems may be exacerbated with settlement classes. The fairness hearing, urged by some as adequate protection, does not do the job. The best lawyers and best judges can work together to fashion a fair settlement, present the alternatives effectively, and accomplish an effective review. But not all can get it right. Once a settlement is proposed, moreover, other class-action lawyers can undertake a campaign to encourage opt-outs, promising to get a better deal.

The case-or-controversy theme returned to the discussion, with the statement that it is essential that there be a bona fide dispute between real parties. There is no authority in the Enabling Act or Constitution to provide for settings that do not involve a valid dispute presented for actual decision. A settlement class divorced from a litigation class is illegitimate. Courts may be doing it, but it should be off-limits.

This view of the "real dispute" issue was met by the

observation that many cases come to court this way. At the very least, there are nonclass individual actions pending, ordinarily many of them. Some of the individual actions may be consolidated by nonclass means. A settlement class is sought because everyone involved wants a global resolution, and for good reason. The proposed settlement reflects many antecedent real disputes. It should be enough that the settlement class meets Rule 23 requirements as applied to settlement, not litigation. And there are objectors — there is always someone who comes forward to challenge the settlement. Some settlement classes involve large claims, some involve small claims. Settlement classes will continue to occur unless the Committee acts to prohibit the use of Rule 23 in dispersed mass torts. The settlement terminates claims that were real cases or controversies; it simply moves them into a class context.

The case-or-controversy discussion led to the question whether a settlement class can be used to expand jurisdiction, reaching people who could not be forced into an adjudicated class. It was suggested that "force" is not proper, nor even an opt-out approach, but that an opt-in class should be proper.

The praises of settlement classes were then sung by reference to the silicone gel breast implant cases. They could not be tried as a class. Choice-of-law problems would be insurmountable. In addition, differences in the facts relevant to different defendants would defeat a single action against all defendants. The critical thing is to get understandable notice to plaintiffs who demonstrate understanding by making informed choices. There are now thousands of individual actions outside the class, and thousands more are being filed every month. Asbestos litigation may provide even more persuasive justifications. There are large numbers of plaintiffs with clearly "real" claims. Manageability is very different for settlement than for litigation. If individuals consent, the settlement class should be appropriate.

Robert Heim observed that it is easy to be distracted by the common concern for the settlement class action that first comes to court as a prepackaged complaint, certification-by-consent, and settlement. The fear of collusion is genuine, and it is fair to worry whether courts can provide effective protection in the process of reviewing the settlement. But defendants who face massive litigation want to resolve the many problems that arise from dispersed actions. It should not be controlling whether the negotiations occur before or after the comprehensive class action is filed. The court can gain help in reviewing the settlement by making sure that effective notice is provided to class members. In addition, there is a whole new group of class-action lawyers who

represent objectors, providing the adversary elements that otherwise would be missing. Beyond that, it would be desirable to appoint a guardian ad litem to provide independent representation for the class; if it is congenial to achieve this function by relying on the "master" label, that should be helpful.

The view was repeated that even prepackaged settlements come to court as the fruit of much earlier litigation.

It also was suggested that more thought should be given to adding to Rule 23(e) more detailed guidance on the process for reviewing and approving proposed settlements. The Manual for Complex Litigation provides guidance now. But perhaps Rule 23(e) should be elaborated along the lines recently developed by Judge Schwarzer.

The focus of the settlement discussion on dispersed mass torts led to the question whether Rule 23 should be used to make it easier to resolve these problems. The easier it is to resolve claims, the more claims there will be, and the more mass-tort class actions.

The prospect that ready access to settlement-class litigation may increase the volume of litigation was discounted by the observation that at least in asbestos litigation, the focus on the detailed manageability of class litigation blinks the reality that the alternative is no more individual than a class action. There are lawyers with hundreds or even thousands of clients, whose relationship with their clients is no more real than the relationship between class lawyers and nonrepresentative class members. And they too are said to be settling cases in batches, by group settlements that focus on a total sum that, as a practical matter, is allocated among clients by the lawyer who represents them.

The settlement-class topic was left unresolved. The Committee is anxious to hear specific proposals that go beyond the tentative beginnings in the discussion draft. The topic will remain on the agenda for the April, 1996 meeting.

Federal Judicial Center Study

The Federal Judicial Center study of class actions was

referred to throughout the class-action discussion. Committee members had the nearly-final version of the report that was prepared for this meeting. A brief summary of the report was provided by Thomas Willging, and as to the appeal portion by Robert Niemic. The study, conducted in four districts, examined all actions that involved a class allegation and that were terminated between July 1, 1992 and June 30, 1994. The districts, chosen for believed high levels of class action activity and geographic dispersion, were the Northern District of California, the Northern District of Illinois, the Eastern District of Pennsylvania, and the Southern District of Florida. The total number of cases with class allegations was 418. The data are representative only for those courts over the study period.

The first summary observation was that the study shows that class actions are commonly necessary means of enforcing the claims that they involve. Among the four districts in the study, the highest individual recovery figure was $5,331, an amount too small to support individual litigation. (By way of contrast, a study of litigation in the 75 largest counties by the National Center for State Courts showed average recoveries of $52,000 in personal injury actions, and $57,000 in fraud actions.)

The next observation was that despite the modest amount of individual recoveries, the aggregate recoveries showed that class litigation is an effective deterrent instrument. After deducting attorney fees, the median net settlements in certified Rule 23(b)(3) class actions ranged from $800,000 to $2,800,000 in the four courts; the median class sizes ranged from 3,000 to 15,000.

The entire study included 13 certified (b)(2) classes with no net monetary distribution. Some had nonmonetary distributions such as rebate coupons that could not be valued by the study. It seems likely that if the court had been able to foresee the results in the cases that did not involve significant injunctive relief, the classes would not have been certified.

It is not possible to use the study to predict what effects would follow from a requirement that the certification decision consider the probable outcome on the merits. The present system strongly discourages any consideration of the merits. But the study does show that through motions to dismiss or for summary judgment, judges commonly do look at the merits before certification. A majority of the cases in all districts had a ruling on dismissal before or at the same time as the certification ruling, and many had summary judgment rulings.

The study found 28 cases, 18% of the total certified classes, that involved simultaneous certification and settlement. A substantial share of the classes were certified for settlement only.

The class actions endured far longer than average litigation in the same courts.

Turning to appeals, 15% to 34% of the study cases had at least one appeal. There was a higher rate of appeal in the cases that were not certified as class actions than in the certified cases. There was a dramatically increased rate of appeal in the cases that went to trial — appeals on trial-related issues were taken in 12 of these 18 cases, a very high rate for civil actions. The appeals led to affirmance in about 50% of the cases, to reversal and remand in about 15%, and to dismissal of the appeals in the remainder.

Few appeals dealt with class certification issues. The study cases involved one § 1292(a)(1) appeal. The only attempt to win mandamus review involved an attempt to remove the trial judge.

DISCOVERY

Robert Campbell, representing the Federal Rules Committee of the American College of Trial Lawyers, reported on the Committee's informal review of the scope of discovery under Civil Rule 26(b)(1). The Committee studied alternative possibilities in detail. The rule now permits discovery of "any matter * * * relevant to the subject matter involved in the pending action." It also permits discovery of information "reasonably calculated to lead to the discovery of admissible evidence." The committee includes a wide variety of plaintiff- and defendant-lawyers, and they achieved a strong consensus that the expense, time, and difficulties parties encounter in litigation are caught up in Rule 26(b)(1). A distinguished federal judge has estimated that 95% of all discovery is irrelevant and never used. That figure may be a bit high, but it is in the right neighborhood. This is the core of the discovery problem. They urge the Committee to consider both of these sweeping elements of discovery. Their committee was unanimous in making this recommendation, an unusual event.

The Committee agreed to include this topic on the agenda for the April meeting. Deep concerns with discovery were voiced at the Southwestern Legal Foundation conference on procedure attended by

many Committee members in March, 1995, and it is appropriate for the Committee to review these problems as part of the continuing duty to study the rules. The Committee should not simply put the topic aside because the same concerns have been expressed for many years without leading to any direct response. Many efforts have been made to cabin the occasional excesses of discovery. If they have not done the job, it must be considered whether the time has come to reconsider the central issues. The purpose of the suggestion is large. The inquiry must not be undertaken lightly.

Standing Committee Self-Study Draft

Professor Coquillette, as Reporter of the Standing Committee, addressed the Committee on the draft self-study report prepared for the Standing Committee. The draft is tentative; it has not yet been approved and does not reflect considered Standing Committee views. The Standing Committee is anxious to have the draft reviewed by members of all of the Advisory Committees. Some of the recommendations are very important to the future of the rulemaking process.

Discussion began with the composition of the Advisory Committees and the Standing Committee. The Standing Committee is important not only to coordinate the several advisory committees, but also to provide deliberate review of their recommendations. The history of the relationships has been one that expands the role of the advisory committee chairs. Some earlier chairs of the Standing Committee did not ask the advisory committee chairs to attend the full Standing Committee meeting. Now it is routine to have the advisory committee chairs attend the full meeting. They have become valuable participants. Their role would be enhanced by making them voting members of the Standing Committee. As a practical matter, the advisory committee chairs now do most of the work that would be entailed by full membership on the Standing Committee, participating actively in discussion of recommendations made by all of the advisory committees. This change can be effected without significant dislocation; the Standing Committee can simply be enlarged to include the advisory committee chairs. There is no need for legislation.

The Committee unanimously adopted a resolution supporting Standing Committee membership for advisory committee chairs.

Other Rules

Admiralty Rule B had been on the agenda for this meeting. The need to integrate Rule B with the 1993 amendments of Rule 4, however, presents challenging questions. Discussion of the necessary changes was put off to the next meeting to allow more thorough preparation.

A proposal that the rules require use of recycled paper and double-sided copying for all papers filed in district courts was held for continuing study.

Two proposals that had been made to the Committee were put aside as outside the Committee's role. One was creation of a privilege against discovery of police internal investigation reports. This proposal was found better suited to the Evidence Rules Advisory Committee. The other proposal was adoption of a requirement that successful defendants recover attorney fees in actions under 42 U.S.C. § 1983 or the Americans with Disabilities Act; if the unsuccessful plaintiff is unable to pay the award, payment by the plaintiff's lawyer should be ordered. This proposal was found to involve matters of substantive law suitable to Congress, not the Rules Enabling Act process.

Several other significant proposals were deferred for future consideration. Although many of them involve potentially useful improvements of the Civil Rules, the Committee does not have sufficient time to devote appropriate attention to every such proposal when the proposal is first advanced. Perhaps more important than Committee time constraints are the limits on the capacity of the full Enabling Act process. It is not only this Committee, but also the Standing Committee, members of the bench and bar, the Judicial Conference of the United States, the Supreme Court, and Congress that must lavish searching scrutiny on proposed rules. The Committee has proposed a continuing series of important rules changes, and must husband the resources of the process to ensure full evaluation of the most important proposals.

The Copyright Rules present a special problem because it seems that few lawyers have the experience needed to help the Committee determine what (if anything) should be done beyond amending Copyright Rule 1 to reflect that the 1909 Copyright Act has been superseded by the 1976 Copyright Act. Advice is being sought.

Next Meeting

It was tentatively decided that the next Committee meeting would be held on April 18 and 19, 1996.

With thanks to the several observers who participated helpfully in the meeting, and to the Administrative Office staff for its unfailing strong support, the meeting adjourned at 4:40 p.m. on November 10.

Respectfully submitted,

Edward H. Cooper, Reporter

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 18 and 19, 1996

NOTE: THIS DRAFT HAS NOT BEEN REVIEWED BY THE COMMITTEE

The Civil Rules Advisory Committee met on April 18 and 19, 1996, at the Administrative Office of the United States Courts in Washington, D.C. The meeting was attended by all members of the Committee: Judge Patrick E. Higginbotham, Chair, and Judge John L. Carroll, Judge David S. Doty, Justice Christine M. Durham, Francis H. Fox, Esq., Assistant Attorney General Frank W. Hunger, Mark O. Kasanin, Esq., Judge David F. Levi, Judge Paul V. Niemeyer, Carol J. Hansen Posegate, Esq., Professor Thomas D. Rowe, Jr., Judge Anthony J. Scirica, Judge C. Roger Vinson, and Phillip A. Wittmann, Esq. Edward H. Cooper was present as reporter. Former member John P. Frank, Esq., also attended. Judge Alicemarie H. Stotler attended as Chair of the Committee on Rules of Practice and Procedure; Professor Daniel Coquillette attended as Reporter, And Sol Schreiber, Esq., attended as liaison member, of that Committee. Judge Jane A. Restani attended as liaison representative from the Bankruptcy Rules Advisory Committee. John K. Rabiej and Mark D. Shapiro represented the Rules Committee Support Office, and Karen Kremer of the Administrative Office of the United States Courts also attended. Thomas E. Willging represented the Federal Judicial Center. Other observers and participants are named in the appendix.

Judge Higginbotham welcomed the members of the Committee, other participants, and observers.

The Minutes of the November, 1995 meeting were approved.

RULES PUBLISHED FOR COMMENT IN 1995

Amendments of four rules were published for comment in 1995. Rules 9(h), 26(c), 47(a), and 48 drew substantial written comments. Hearings were held in Oakland, California; Atlanta, Georgia; and New Orleans, Louisiana. All members of the Committee had the complete written comments and transcripts of the hearings. Summaries of the written comments and the hearing testimony also were provided. Action on these proposals came first on the Committee agenda.

Rule 9(h)

The proposal to amend Rule 9(h) would remove an ambiguity in the present rule provision relating to interlocutory appeals in admiralty. It is not clear whether appeal can be taken under § 1292(a)(3) when, in a case that includes both an admiralty claim and a nonadmiralty claim, the court acts on a nonadmiralty claim by an order that would qualify for § 1292(a)(3) appeal if it had involved an admiralty claim. The proposal resolves the ambiguity by permitting appeal. Public comment was sparse, but was

approving. The Committee voted unanimously to recommend that the Standing Committee recommend adoption of the amendment to the Judicial Conference.

Rule 26(c)

The proposal to amend Rule 26(c) has been discussed extensively by the Committee. The proposal that was published in 1995 was discussed extensively at the October, 1994 and April, 1995 meetings. The proposal drew substantial written comment and testimony.

Discussion began by observing that the most frequently expressed concern was that the proposal expressly recognizes the common practice of entering discovery protective orders on stipulation of the parties. This reference to stipulated orders rested on the Committee's belief that in creating explicit procedures to modify or dissolve protective orders, existing stipulation practice should be confirmed. In March, 1995, the Judicial Conference asked the Committee to reconsider the proposal. One basis for its concern was that the proposal submitted to the Judicial Conference had been modified from the proposal that was first published. The Committee responded by recommending publication of the same proposal for a new round of public comment. Publication in fact prompted extensive comment that repeated concerns that had become familiar from earlier public comments and Committee deliberations.

The new round of public comment and testimony also focused substantial attention on the reliance factor that was listed in both the first and second published proposals as one element in the determination whether to modify or dissolve a protective order. The fear expressed is that this factor will make it too difficult to get relief. The thread of the comments seems to reflect a desire to require a judge-made finding of good cause before a protective order can be entered, and at the same time to make it easier to modify an order. This combination of desires does not seem likely to be realized in the real world; once a judge has made an express determination of good cause, it is likely to be more difficult to persuade the judge to modify the order.

Exploration of Rule 26(c) was initially prompted by Congressional concern that protective orders may be thwarting access to information that is important to protect the public health and safety. Throughout consideration of the gradually developed proposal, several members of the Committee have been skeptical of the need for any action. This history may help in choosing among the present alternatives: (1) change the proposal still further, perhaps so extensively that another round of public comment should be requested; (2) reject the proposal; (3) send the proposal forward with a recommendation for adoption; or (4) continue to study the proposal in a broader framework that includes study of the Rule 26(b)(1) scope of discovery.

The first observation expressed a lack of enthusiasm for going forward with the proposal. This subject has been studied extensively, and it is not clear that the proposal is any better than present practice, that it will improve anything. The inquiry began in response to a desire to integrate the Enabling Act rulemaking process with Congressional study. If our conclusion is that there is no real need to act, perhaps it is better to hold the topic for continuing study as part of a broader review of discovery. This view was repeated later, with the observation that there are not many problems in actual practice. The proposal may upset general procedure that now works perfectly well by stipulation, creating a whole series of hearings that are not held now. Other members of the Committee agreed that they simply do not encounter problems in practice.

Kenneth Sherk, representing the Federal Rules of Civil Procedure Committee of the American College of Trial Lawyers, noted that they had concluded that the proposal is innocuous so long as stipulation practice is clearly protected. They could easily agree, however, that there is no need to make any change.

The responding view was that the changes are good and should be sent forward. The decision of the Sixth Circuit in the recent Proctor & Gamble litigation with Business Week may show skepticism about stipulated consent orders that could cause difficulty in the future. But the language relating to stipulated orders should be revised to require that the stipulation show good cause, or that an evidentiary showing be made: "for good cause shown by motion, by stipulation of the parties, or by evidentiary showing."

The need for language referring to an evidentiary showing was questioned. If there is a hearing, the opportunity to advance evidence is clear. The requirement that there be a motion if there is no stipulation carries a hearing opportunity with it. And the Sixth Circuit concerns were thought to arise from the fact that the parties had, by consent, sought to seal pleadings and other materials filed with the court.

Other advantages were urged in support of going ahead with the proposal. Rule 26(c) now seems to require a showing of good cause. Stipulated orders are common, however, and can be beneficial. The stipulation practice should be confirmed by the rule. And the explicit provisions for modification or dissolution clarify many lingering doubts that beset present practice. The factors listed in subdivision (c)(3)(B) also make it clear that if a protective order is entered by stipulation, the court must consider the need for protection de novo when a motion is made to modify or dissolve the order. This change too is good.

Discussion then returned to themes that were sounded at earlier meetings. Protective orders are an integral part of the arrangement that makes tolerable the sweeping scope of discovery allowed by Rule 26(b)(1). Discovery sweeps in much information that otherwise is protected against any public inquiry, and sweeps

it in merely on showing that it is relevant to the subject-matter involved in the pending action. There is no need to show that it would be admissible in evidence, so long as it appears reasonably calculated to lead to the discovery of admissible evidence. The proposal that the Committee reconsider this scope of discovery will provide occasion for further consideration of protective orders. The scope of discovery has been approached in the past, but no changes have been recommended. In 1970, the requirement of good cause was dropped from the document-production provisions of Rule 34. The concern with stipulated protective orders today seems to focus in large part on documents produced in discovery, and historically there has been an interaction between the working of document production and protective orders. Perhaps further consideration of protective orders should be integrated with a broader study of the scope of discovery. If the scope of discovery is to be narrowed, it may be important to reappraise the role of protective orders in relation to narrower discovery.

A motion was made to hold the Rule 26(c) proposal for further study in conjunction with study of the broader scope of discovery. Discussion suggested that it should be made clear that the Committee is not backing away from the proposal, which expresses good practice. An additional reason for going slow is that the RAND report on local practice under the Civil Justice Reform Act will be available soon, and likely will bring additional Rule 26 topics to the Committee agenda. The ABA plans a major program on the RAND study early next year.

It was asked whether deferral would require yet another round of publication and public comment if the Committee should decide in the future to recommend adoption of the current Rule 26(c) proposal. It was recognized that at some point, continued delay might give rise to a need for new comment in relation to whatever developments might occur in actual practice. No clear time line was identified for this possibility.

The motion to join further consideration of Rule 26(c) to study of the general scope of discovery provided by Rule 26(b)(1), and the related question whether document discovery should be governed by standards different than those that govern other discovery methods, was adopted by unanimous vote.

Rule 47(a)

The Rule 47(a) proposal published in 1995 would establish a right for lawyers to participate in voir dire examination of prospective jurors, subject to reasonable limits set by the court in its discretion. This proposal drew extensive comment. Almost all of the many federal judges who commented on the proposal spoke in opposition. Comments from the bar were not as nearly unanimous, but the very large majority of bar comments supported the proposal.

Discussion opened with the observation that in an ideal world, virtually all federal judges would allow lawyer participation in

voir dire under present Rule 47(a). The common theme of most comments by federal judges is the fear that they will lose control if they lose the unlimited right to deny any lawyer participation in voir dire. There also is a hint of the "random selection" philosophy that there is no real value in jury selection, that any group of six or more jurors will do as well as any other, although this view is seldom made explicit. Many of the adverse comments reflect direct experience with state systems in which the right of lawyer participation has run riot.

As compared to judicial comments, many lawyers say that selection practices are inadequate in many courts. Judges do not adequately understand the case, and fail to appreciate the importance of direct lawyer questioning to supplement initial questioning by the judge. Written questions submitted to the judge simply to not provide sufficient opportunity to follow up answers with further questions. The lawyers recognize that they will not be allowed an open field with the jury.

These competing visions of reality make it difficult to write a rule.

Most federal judges now do what the draft would have them do. They can share their experience with other judges, encouraging them to test the waters. The Federal Judicial Center can be encouraged — and indeed seems receptive — to put voir dire on its educational agenda for new judges and for judge workshops. The workshops may be vital. Simply bringing judges together with small numbers of respected local attorneys for frank discussion can prove highly productive.

The comments from the bench and bar before and during the comment period have proved most useful. They can set the stage for new educational efforts and improved communication on these issues. In addition, they identified the potential problems that arise from the use of questionnaires to supplement oral voir dire. Questionnaires can be quite useful. But they also can become quite extensive, seeking information for a psychological profile to be used by "jury consultants." This is cause for concern.

Discussion turned to the most effective means of encouraging education of both bench and bar. The first step should be an information report to the Standing Committee, for the Judicial Conference, describing the problems that have been reported to the Committee. Significant problems with jury selection have been clearly identified by comments from the bar, and the conclusion that the best present solution may not involve amendment of Rule 47(a) does not justify complete inaction. The Committee should encourage informal meetings between groups of judges and respected local lawyers for frank discussion of the problems. The Committee also should consider whether there is some other means of spreading the information gathered during the public comment period. There may be some room for systematic experimentation to test the information provided by the Federal Judicial Center survey of

federal judges.

Concern was expressed that Rule 47(a) was published for comment in tandem with identical proposed changes in Criminal Rule 24(a). The Criminal Rules Advisory Committee had not yet met to discuss the public comments — most of which were addressed alike to both rules — and might reach a different conclusion as to the wisdom of pursuing rules amendments now. The need for lawyer participation in voir dire examination may seem even stronger in criminal prosecutions, particularly in capital cases. The Committee anticipated, however, that the Criminal Rules Committee also would conclude that education is the better part of immediate reform efforts.

The Committee concluded unanimously that it should continue to study Rule 47(a), while encouraging the Federal Judicial Center to go ahead with educational efforts and also encouraging further study of jury questionnaires.

Rule 48

The 1995 proposal would amend Rule 48 to require that all civil juries begin trial with 12 members, absent agreement by the parties on a smaller number. As under present practice, there would be no provision for alternates, and the unanimity requirement would remain unchanged. This proposal drew substantial public comment. Much of the comment approved the proposal. No part of the comment suggested that 12-person juries are intrinsically inferior to the 6- or 8-person juries commonly used in civil actions today. Concerns were expressed about cost and delay, however, focusing on the need to assemble larger panels, select and pay more jurors, and meet the problem arising from the fact that some magistrate-judge courtrooms have jury boxes too small to accommodate 12-person juries. Some concern also was expressed with the prospect that failure to agree on a verdict might be more common with 12-person juries than with smaller juries.

Discussion began with reflections on the great divergences among estimates of the marginal costs associated with moving to 12-person juries, and on the equally great uncertainties of all the estimates. None of the plausible estimates, however, seem to threaten undue additional cost. The problem of inadequate jury boxes can be addressed in various ways, including scheduling magistrate-judge civil trials in district court rooms that are equipped for 12-person juries; when that is not possible, the parties will need to add the need for agreement on a smaller jury to the factors that influence the decision whether to consent to magistrate-judge trial. The available data, including most persuasively the comparison between 6-person civil juries and 12-person criminal juries, indicate that there is no measurable difference in the failure-to-agree rate.

In voicing tentative support for the proposal, one reservation was noted arising from trials in sparsely populated rural areas.

It may prove difficult to assemble sufficiently large jury panels to ensure 12-person juries, particularly in cases that involve frequent acquaintances between potential jurors and the parties or people related to the parties. If 30 jurors are summoned, it is never certain how many will appear. In at least some of these cases — especially civil actions brought by prison inmates — the parties are not likely to stipulate to smaller juries. Perhaps, as with Rule 47(a), it would be better simply to encourage the use of 12-person juries.

Reservations were expressed on the basis of the public comments. Some suggest that the comments do not reflect a groundswell of support for the change: Eight-person juries have become common in civil trials of any expected length because of the abolition of alternate jurors, and 12-person juries are common in complex cases because of the fear that jurors will be lost as the trial extends to several days or even weeks. And we may have underestimated the costs, including the burdens imposed on the jurors themselves, their employers, and others. So long as we have a unanimity requirement, defendants will always prefer 12-person juries, and will not stipulate to smaller juries simply to have an earlier trial before a magistrate judge.

The magistrate-judge concern was met by reference to data showing that in the most recent year available, the average was 1.9 civil jury trials per magistrate judge. Many magistrate judges never try jury cases. Most jury trials before magistrate judges occur only in specific parts of the country. Concerns about prisoner litigation should not control a matter of such general importance. There is also some hope that the prisoner litigation problem will be eased by proposals pending in Congress.

It was observed that the entire cost of the jury system, including both civil and criminal cases, is less than the cost of one manned bomber. It is not so much as a blip on the screen of the national budget, and is a tiny fraction even of the budget for the judiciary.

Six-person juries have been used only since Chief Justice Burger, by extra-curial comment, effectively directed their use as a cost-saving measure, and perhaps also with some sense of hostility to jury trial. "Six is half-way to zero." To say that people are comfortable with the system is not comforting; those who have experience with 12-person juries in civil cases often are less sanguine about smaller juries than those whose experience has been only with smaller juries.

Unanimity is a false issue. In criminal cases, studies show that the unanimity requirement affects the dynamics of deliberation, but not the rate of hung juries. Hung juries are very rare, both in civil and criminal trials.

It is incontestable that 12-person juries more than double the probability that a particular jury will include representatives of

various minority groups. The increase in representativeness is almost exponential. Many lawyers have commented as well that it is easier for a single forceful person to dominate a smaller jury, lending anecdotal support to the regular findings of psychologists and sociologists. The dynamics of jury deliberations are different in larger juries. The jury studies that lent support to the initial proposal remain convincing. The actual experience of a 12-member jury trial is more reassuring. Putting aside any mystical qualities, the 12-person jury developed and was adhered to for centuries, distilling the wisdom of vast experience. "Carpentry costs" should not stand in the way.

The question whether bankruptcy-judge and magistrate-judge trials should be exempted from a 12-member jury requirement was discussed briefly. It was concluded that it is better to encourage scheduling in 12-person jury courtrooms, so as not to complicate the choice between district-judge and other-judge trials. Consent to smaller juries can resolve such scheduling difficulties as remain.

The motion to recommend that the Standing Committee recommend adoption of the proposal to provide for 12-person juries in Rule 48 was approved by vote of 11 for, 2 against.

Rule Not Yet Published

Rule 23

Discussion of Rule 23 began with an invitation to consider the draft by asking what can be achieved by (b)(3) class actions that cannot be achieved by consolidation and other tools. The 1966 version of Rule 23 came into being as the Advisory Committee worked through concerns about civil rights injunction class actions. What would the world look like if (b)(3) were abrogated? Is (b)(3) desirable for single event disasters, such as airplane crashes? What of the securities field, where private enforcement often takes the form of a (b)(3) class action? And what of other fields of litigation that amass large numbers of small claims into a (b)(3) class?

One of the changes that emerged from the November, 1995 meeting was an addition to (b)(3) of a required finding that a class action be "necessary" for the fair and efficient adjudication of the controversy. The purpose was to serve a heuristic function by encouraging courts to look beyond "efficiency," to emphasize the fairness of trying individual traditional cases in traditional ways. The combination of "necessary" with "superior" is awkward, however, seeming to require denial of certification for want of necessity, even though a class action might seem superior. In informational discussion with the Standing Committee in January, 1996, moreover, some concern was expressed about the tangled history of "necessary" parties in Rule 19. The present draft suggests elimination of "necessary" from the required (b)(3) findings, and substitution of a new subparagrah (A) that requires

consideration of the need for certification as one factor bearing on the findings of predominance and superiority.

Another of the November changes led to alternative provisions requiring consideration of the probable outcome on the merits as part of the required (b)(3) findings. Increasing concerns have been expressed about the impact of this requirement. One concern arises from the prospect that a prediction of the merits must be supported by extensive discovery, protracting the certification determination and adding great expense. Another concern arises from the effects of the finding; however tentatively and subordinately it may be expressed, the prediction of the merits may affect all future proceedings in the case and may have real-world consequences as well. Impact on market evaluation of a company's stock was one frequently offered illustration. Various responses are suggested by the new drafts — to require a finding of probable merit only if requested by a party opposing class certification; to eliminate the requirement that there be a finding, but to leave the probable outcome on the merits as one of the factors bearing on predominance and superiority; to consider probable outcome on the merits only as part of an evaluation of the value of "probable class relief"; or to adhere to present practice that, at least nominally, prohibits consideration of the merits in determining whether to certify a class.

The November changes also included in the (b)(3) factors consideration whether the public interest and private benefits of probable relief to individual class members justify the burdens of the litigation. Class actions have become an important element of private attorney-general enforcement of many statutes. In considering the problem of class actions that yield little benefit to class members, the problem is cynicism about the process that generates such remedies as "coupons" that may provide more benefit to the defendants and class lawyers than to class members. Yet there may be indirect benefits to the public at large in deterring wrongdoing, and in some cases it may be desirable to force disgorgement of wrongful profits without regard to individual benefits. The question is in part whether it is wise to rely on private enforcement through Rule 23 rather than specific Congressionally mandated private enforcement devices — and whether the question is different as to statutes enacted before Rule 23 enforcement had become well recognized than as to more recent statutes.

Settlement classes were discussed extensively in November, but without reaching even tentative conclusions that could be embodied in a revised draft. One of the most difficult questions is whether it is possible to provide meaningful guidance on the use of "futures" classes of people who have not yet instituted litigation, may not realize they have been injured, and indeed may not yet have experienced any of the latent injuries that eventually will arise from past events. Classes of future claimants can achieve orderly systems for administering remedies that avoid the risk that present

claimants will deplete or exhaust defense resources — including liability insurance — and preempt any effective remedy for the future claimants. There are serious questions that remain to be resolved, however, and that will be addressed in actions now pending on appeal.

Rule 23(f): Interlocutory Appeals

Specific discussion of the multiple drafts provided in the agenda turned first to the interlocutory appeal provision in the "minimum changes" draft, Rule 23(f). This provision has endured with no meaningful changes through several drafts, and has encountered little meaningful opposition. Initial concerns about expanding the opportunities for discretionary interlocutory appeals have tended to fade on close study of the limits built into the draft.

The most commonly expressed reservations were revisited. Courts of appeals have actively used mandamus review in several recent cases, providing the needed safety valve for improvident class certifications. If an explicit interlocutory appeal provision is added, every case will generate an attempted appeal. A heavy burden will be placed on appellate courts. The cost and delay will be substantial. No lawyer worthy of pursuing a class action will let pass an opportunity to appeal.

The common responses also were revisited. The extraordinary writs should not be subject to the pressures generated by Rule 23 certification decisions. Mandamus should remain a special instrument. The burden of applications for permissive appeals under § 1292(b) is not heavy; court of appeals screening procedures are effective. Motions for leave to appeal will be handled in the same way as other motions. And early review is desirable.

It was noted that the Appellate Rules Advisory Committee is engaged in drafting an Appellate Rule that would implement proposed Civil Rule 23(f). The initial proposal would have amended Appellate Rule 5.1 to include Rule 23(f) appeals as well as appeals from district court review of final magistrate-judge decisions. On consideration, the Appellate Rules Committee determined that it should attempt to collapse present Rule 5.1 into Rule 5, so that there will be one single Appellate Rule that includes all varieties of appeals by permission, present and perhaps future. It is hoped that the product will be available for consideration by the Standing Committee at the same time as Rule 23(f).

One modest drafting change was suggested. The most recent draft refers to appeal from an order "granting or denying a request for class action certification." Deletion of "a request for" was suggested on the ground that it might be redundant, or alternatively might effect an unwise restriction by failing to provide for appeal in the particularly sensitive situation in which a trial court has acted on its own motion to grant or deny class certification. The deletion was approved unanimously.

As revised, new subdivision (f) was approved unanimously.

Benefits and Burdens of Class Action

The next portion of the minimum changes draft to be discussed was (b)(3) subparagraph (F). This draft simplifies the draft that emerged from the November meeting. The November meeting generated a subparagraph (G): "whether the public interest in — and the private benefits of — the probable relief to individual class members justify the burdens of the litigation[.]" The minimum changes draft renumbers this factor as subparagraph F, and eliminates any explicit reference to the public interest: "whether the probable relief to individual class members justifies the costs and burdens of class litigation." In this form, the factor emphasizes the importance of the relief to individual class members — even a significant aggregate sum, when divided among a large number of plaintiffs, may provide such trivial benefit that the justification for class litigation must be on grounds other than the benefits to individual class members.

The origin of the probable relief factor lies in concern that Rule 23(b)(3) is an aggregation device that, separate from the special concerns reflected in (b)(1) and (b)(2) class actions, should focus on the individual claims being aggregated. The traditional focus and justification for individual private litigation is individual remedial benefit. Most private wrongs go without redress. Class treatment can provide meaningful redress for wrongs that otherwise would not be righted, and the value of the individual relief can be important. But class actions should not stray far from this source of legitimacy. Public enforcement concerns should enter primarily when Congress creates explicit private enforcement procedures. As the note to one of the drafts articulated this view, "we should not establish a roving Rule 23 commission that authorizes class counsel to enforce the law against private wrongdoers." Focus should hold steady on the objective cash value and subjective intrinsic value of the relief available to actual class members.

The "corrective justice" and "deterrent" elements of small-claims class actions were noted repeatedly as a supplement to the focus on private remedies. It was urged that consideration of the value of probable relief to individual class members does not foreclose consideration of these elements as well. But it also was urged that indeed this factor should focus only on the value of private relief. Any other view would put courts in the position of weighing the public importance of different statutory policies, and perhaps the relative importance of "minor" or "technical" violations as compared to flagrant or intentional violations.

Discussion immediately turned to the two central elements of the formulation. How is a court to predict the probable relief? And what are the costs and benefits invoked?

One suggestion was that attention should focus in part on a

determination whether the motivating force of the class action is a desire for attorney fees.

"Probable relief" in the (b)(3) context is damages. The example that was used in much of the ensuing discussion was an overcharge of a 2¢ a month imposed by a telephone company for 12 months on 2,000,000 customers. The aggregate damages of $480,000 are not trivial. But it is not clear that such a class should be certified.

Discussion also wove around the question whether assessment of "probable relief" includes a prediction whether the class claim will prevail on the merits. In the November discussion, the probable relief factor was held separate from consideration of the merits. The calculation was to be made on the assumption that the class position would prevail on the merits. If direct consideration of the probable outcome on the merits is eliminated, however, it is possible to incorporate a prediction of the outcome on the merits in measuring the "probable relief." Language reflecting that possibility is included in the note that accompanies the draft that eliminates the more direct references to outcome on the merits.

Consideration of the substantive merits of the underlying claims through this factor, not as an independent matter, led to the oft-discussed fear that consideration of the merits would lead to expanded discovery surrounding the certification decision. The comparison to preliminary injunction proceedings was noted – they may entail much or little discovery – but found not helpful because of the special factors that affect preliminary injunction decisions. A preliminary injunction decision may be converted to trial on the merits when circumstances permit full information to be assembled and presented before the need to restrain. It may rest on a small fraction of the information needed for trial on the merits. The driving force is the need to preserve the capacity to grant effective relief on the merits, not the calculus of class certification.

It also was asked whether the present rule that certification decisions must be made without reference to the merits is, in practice, a fiction. Explicit recognition of what many feel is a common practice, left unspoken because consideration of the merits is supposed to be forbidden, might lead to wiser reliance on the probable merits.

One effort to bring this role of the merits to a point was made by asking whether the rule should refer to the probable value of the "requested" or "demanded" relief, so as to focus only on the relief, not the merits. This suggestion was quickly rejected.

Alternatives to considering the merits at the certification stage were suggested. One was to require particularized pleading of the elements of each claim offered for class treatment.

Cases with multiple claims were discussed. If one version of a class claim would afford substantial relief, that should be sufficient at least for initial certification. Recognizing that the question of class definition is interdependent with the questions posed by multiple claims, it was understood that the probable relief on all claims suitable to a single class could appropriately be considered and weighed against the costs and burdens entailed by class treatment. At least conceptually, it may be that certification is proper as to some class claims but not another claim that would add greater costs and burdens than the probable relief on that claim.

The problem of weighing returned, with the question whether individual claims averaging a few hundred dollars would justify class treatment. It was noted that the median individual recovery ranges reported by the Federal Judicial Center study ran from something more than $300 to something more than $500. What is to be weighed against the predicted recovery? "Every possible argument will be made." Class proponents will argue public enforcement values.

John Frank addressed the Committee, urging that trivial claims class actions are a major problem, providing token recoveries for class members and big rewards for attorneys. "This Committee is not the avenging angel of social policy." Congress can create enforcement remedies, some administrative, some judicial, pursued by public or private enforcers.

Further Committee discussion suggested, first, that class actions are not filed on claims that, as pleaded at the outset, would yield only trivial relief. The Federal Judicial Center Study, covering two years in four districts, found 9 cases out of 150 certified classes in which the individual recoveries were less than $100; only 3 of them involved individual recoveries less than $25, with the lowest figure $16. But it was responded that very small claim cases do in fact exist. At least in some parts of the country, very small claims classes are filed in state courts and removed. These cases require enormous administrative work. And they breed cynicism about the courts.

The question of claim size also led to the question whether the initial certification decision should be subject to review as progress in the case provides clearer evidence of the probable relief. Initially plausible demands for significant relief may become increasingly implausible as a case progresses. It was agreed that if there is quick and undemanding certification, the certification decision should be open to reconsideration and subclassing or decertification when it appears that the probable relief fails to justify the remaining costs and burdens of class treatment.

A motion to adhere to the language of the "minimum change" draft passed by vote of 9 to 3. The question whether subparagraph (F) should include consideration of the merits in assessing the

probable value of individual relief was discussed further during the later deliberations that voted to discard the explicit consideration of probable merits that was adopted by the November draft.

Need For Class Action

The November 1995 draft added a requirement to subdivision (b)(3) that a class action be "necessary" as well as superior for the fair and efficient adjudication of the controversy. For the reasons noted in the introduction, this concept has been difficult to explain. The draft considered at this meeting suggested replacement of the "necessary" finding by adding a new subparagraph (A) and rewording subparagraph (B). Proposed subparagraph (A) would add as a factor in determining superiority "the need for class certification to accomplish effective enforcement of individual claims." Proposed subparagraph (B) would refer to "the practical ability of individual class members to pursue their claims without class certification and their interests in maintaining or defending separate actions."

The first question was whether factor A is antithetical to factor F as just approved. Factor A suggests that class certification is necessary if claims are too small to support individual enforcement. Factor F suggests that class certification is undesirable if claims are too small. The answer was that the two provisions are complementary. Factor A cuts in two directions. If individual class member claims are so substantial as to support individual litigation, certification may be inappropriate. If class member claims are too small to support individual litigation, certification may be needed to provide meaningful individual relief. But if the individual relief that can be afforded by a class action does not justify the costs and burdens of class litigation, certification should be denied.

The relationship between (A) and (B) also was questioned; in many ways, they seem redundant of each other. The emphasis on the need for class certification for effective enforcement, however, can go beyond the practical ability of individual class members to pursue their claims without certification. Separate actions will not be brought by all members of a class who seem practically able to do so, whether because individual actions in fact are not practicable or because of inertia. Even if separate actions are brought, they may not prove as effective as a class action that pools resources to mount a more effective showing. Class actions also may prove more "effective" for reasons that are more questionable, such as pressure to settle even weak claims that are aggregated into the class. These values of class actions were defended as the heart of (b)(3), the touchstone purpose of aggregation. But it was noted that small-claims (b)(3) class actions have fared quite well since 1966 without any explicit element like proposed factor (A).

The distinction between practical individual enforcement and

efficient class enforcement in some ways reflects the distinction between opt-in and opt-out classes. Even with individually substantial claims, there is little reason to believe that the number of participating class members will be the same if the class is certified only for those who opt in as if the class is certified for all but those who opt out. (b)(3) exerts a pressure toward compulsory joinder by requiring an election to opt out of the class. Factors (A) and (B), together with factor (C), allow explicit consideration of the desirability of this inertial pressure to remain in a class for group litigation.

A motion to delete proposed factor (A) passed, 8 to 5. A motion to separate proposed factor (B) into two parts passed unanimously. As restructured, factors (A) and (B) would read: "(A) the practical ability of individual class members to pursue their claims without class certification; (B) class members' interests in maintaining or defending separate actions;".

The discussion noted that the practical ability to pursue individual actions remains a two-edged factor. It weighs in favor of class certification, all else remaining equal, if individual actions are not practicable. It weighs against class certification, all else remaining equal, if individual actions are practicable.

Another drafting change from present factor (B) also was noted. The 1966 rule refers to the interest "in individually controlling" separate actions. The proposed language refers to the interest in maintaining or defending separate actions. This language better reflects the full range of alternatives that must be considered. An alternative to a proposed class action may be a different class action, or a number of different class actions. Other alternatives may include intervention in pending actions, actions initially framed by voluntary joinder, consolidation of individual actions — including consolidation for pretrial purposes by the Judicial Panel on Multidistrict Litigation or transfers from separate districts for consolidated trial in a single court or limited number of courts, and stand-alone individual actions. Individual members of a proposed class may not "control" many of these alternatives in any meaningful sense, but the alternatives must be considered nonetheless.

Melvin Weiss then addressed the Committee. He has been litigating class actions from a time before adoption of the 1966 amendments. Plaintiff class lawyers were taught then that they were to play the role of private attorney general. That role is confirmed by the adoption of (b)(3) classes. The size of individual class member recoveries was not thought important. The need for private-attorney-general classes is growing. Government enforcement resources are shrinking absolutely, and are shrinking even more in relation to the level of conduct that needs to be corrected. Telemarketing fraud abounds. 900 telephone numers are an illustration. Suppose most members of a class are hit with $10

or $20 charges for calls to a 900 number, with only a few whose bills run much higher. The government may eventually put a stop to a particular operation, but that provides no redress for the victims. Class-action lawyers do that. It is hard work. It is risky work. Of course class counsel deserve to be paid. If the Committee wants to say that a $2 individual recovery is trivial, it should say so. The matter should not be left to open-ended discretion and open hostility to class enforcement. In one action, the class won $60,000,000 of free long-distance telephone services; this is a "coupon" settlement, but provides a real benefit to class members. Class-action attorneys protect victims. Some even are forced to borrow to finance a class action. These social services should be recognized and appreciated. It would be ironic to cut back on class actions at a time when the rest of the world is admiring American experience and seeking to emulate it.

Peter Lockwood addressed the Committee, observing that factors (A) and (F) do not provide any standards. (A) seems to say the porridge is too hot, (F) that the porridge is too cold, and the whole rule seems to say that courts should seek a nice serving temperature. It is difficult to suppose that a Committee Note could say that a $200 individual recovery is sufficient to justify a class action. This proposal is dangerously close to the limits of the Enabling Act, trespassing on substantive grounds. The purpose of Rule 23 is to enforce small claims that are legally justified. There cannot be any effective appellate review of trial-court application of these discretionary factors. Anecdotal views of frivolous suits, settled by supine defendants, do not justify an unguided discretion to reject class certification. Factor (F) should be reconsidered.

Beverly Moore observed that factor (F) allows refusal to certify a class if individual claims are small, even though aggregate class relief would be substantial and the costs of administration are low. But certification should remain available if in fact efficient administration is possible. If a defendant has a continuing relationship with class members, for example, it may be possible to effect individual notice at very low cost by including it with a regular monthly mailing. Distribution of individual recoveries may be accomplished in a similar manner. Note should be made of this possibility.

Committee discussions returned to the relationships between factor (A), the practical ability of class members to pursue individual actions, and factor (F), the value of the probable relief to individual members. It was noted that factor (F) involves balancing the complexity of the litigation and the costs of administration in relation to individual benefits. Even the 24¢ individual recovery might qualify for class treatment if it is possible to resolve the merits and administer the remedy at low cost. The practical ability factor encourages certification of small-claims classes, just as the probable individual relief factor at times will limit certification of small-claims classes. If it

is apparent at the time of certification that the individual value of the probable class relief is small, the certification decision must weigh the costs and burdens of a class proceeding. There is no specific dollar threshold. Individual recoveries of $50 in a "laydown" or summary judgment case may easily justify certification. Claims for $200 or $300 may not justify certification in a setting that requires resolution of very complex fact issues or difficult and uncertain law issues. This approach means that an initial decision to grant certification, relying on substantial apparent value or apparent ease of resolution and administration of the remedy, remains constantly open to reconsideration and decertification if the probable relief diminishes or the burdens of resolution and administration increase.

Prediction of the Merits

The November 1995 draft added a requirement that in certifying a (b)(3) class the court make a finding on the probable outcome on the merits. Two alternatives were carried forward. One would require only a showing that the class claims, issues, or defenses are not insubstantial on the merits. The other would adopt a balancing test, requiring a finding that the prospect of success on the merits is sufficient to justify the costs and burdens imposed by certification. Either required finding would be bolstered by a separate factor requiring consideration of the probable success on the merits of the class claims, issues, or defenses. Many observers, representing both plaintiff and defendant interests, reacted to these alternatives with the concerns noted during the first parts of this meeting. These concerns were addressed in the most recent draft by limiting the requirement to cases in which an evaluation of the probable merits is requested by a party opposing class certification.

It was urged that some form of explicit consideration of the probable merits should be retained as part of a (b)(3) certification decision. A preliminary injunction decision requires consideration of the probable merits in addition to the impact on the parties of granting or denying injunctive relief. The public interest often is considered as well. There is a substantial body of learning surrounding this practice in the preliminary injunction setting that can illuminate the class-action setting. It is appropriate to require a forecast of the ultimate judgment before unleashing a class action. There is much at stake; in some cases, the very existence of a defendant is in jeopardy. The prospect that defendants may not want preliminary inquiry into the merits of a plaintiff class claim can be met by requiring the proponent of certification to make a demonstration on the merits, but allowing the opponent of certification to waive the requirement.

Further support for required consideration of the merits was found by John Frank in recent cases, such as In re Rhone-Poulenc Rorer Inc., 7th Cir.1995, 51 F.3d 1293, which emphasized the fact

that plaintiffs had lost 12 of the 13 individual actions that had been pursued to judgment at the time of the class certification. The coercive settlement pressure arising from certification even in face of such litigation results also was emphasized by the court. He urged that it is a false terror to be concerned that stock market disaster will follow a finding of sufficient probable success to warrant certification. We should find a way to junk bad cases early.

Discussion of the Rhone-Poulenc decision led to the observation that the defendants had just now offered $600,000,000 to settle all of the pending individual actions all around the country. This offer shows that the class claims were far from weak. Courts may go too fast about the task if consideration of the probable merits is approved.

Discovery concerns continued to be expressed. Consideration of the merits will lead to merits discovery as part of the certification process, and it will be difficult to limit discovery in ways that do not defeat the desire to avoid the burdens that would flow from actual certification.

Beyond the difficulties engendered by probable success predictions, the Federal Judicial Center study shows that ample protection is provided by motions to dismiss or for summary judgment. Consideration of factor (F), the individual value of probable class relief, will further aid in avoiding trivial actions. If there is any need for added protection, it can be met by making it clear that a court can act on Rule 12 and 56 motions before deciding whether to certify a class.

Without formal motion, it was concluded that the Committee had decided by acquiescence to delete the November draft provisions requiring a finding of probable merit and including probable success on the merits as a factor pertinent to the (b)(3) certification decision.

Attention then turned to the alternative of incorporating consideration of the probable outcome on the merits in the factor (F) balancing of the individual value of probable class relief against the costs and burdens of class litigation. The Committee materials included the suggestion that this result might be achieved by including in the Committee Note to factor (F) language something like this: "In an appropriate case, assessment of the probable relief to individual class members can go beyond consideration of the relief likely to be awarded should the class win a complete victory. The probability of class success also can be considered if there are strong reasons to doubt success. It is appropriate to consider the probability of success only if the appraisal can be made without extended proceedings and without prejudicing subsequent proceedings. This factor should not become the occasion for extensive discovery that otherwise would not be justified at this stage of the litigation. Neither should reliance on this factor be expressed in terms that threaten to increase the

influence that a certification decision inevitably has on other pretrial proceedings, trial, or settlement."

Support was expressed for this approach, with the reservation that the draft focused only on the negative. It should be integrated with the statement, agreed upon earlier, that certification may be justified for small claims when there is a very strong prospect of success. Further support was found in the continuing concern that aggregation of large numbers of individually weak claims can create a coercive pressure to settle. Certification often is a major event, even a critical event.

Consideration of the merits in this fashion also was supported on the ground that the certification decision in a (b)(3) proceeding must look ahead to the ways in which the case probably will be tried. The predominance of common issues and the superiority of class treatment depend heavily on the trial that will follow.

This "commentary-in-the-Note" strategy was opposed on the ground that it would whittle down the trial judge's discretion. Even without any discussion in the Note, lawyers and judges will seize on the idea that the value of probable relief depends not only on the amount that will be awarded upon success on the merits, but also upon the probability of success. Factor (F) can be used in this way, and can be found to support departure from the Eisen rule that forbids consideration of probable merits at the certification stage.

Opposition also was expressed on the ground that the initial discussion of factor (F) had assumed that it focused solely on the amount of probable relief, not the probability of defeat on the merits. The problems persist whatever the level of emphasis in the text of the Rule or the Note. Consideration of the merits will entail discovery on the merits, and an expression evaluating the probable merits for certification purposes will carry forward to affect all subsequent stages of the litigation. Even if the Note were to say that this process should not justify any discovery on the merits, nefarious results would remain.

Consideration of the merits, moreover, suggests that certification can be denied because of doubts on the merits even though the case cannot be dismissed under Rule 12 or resolved by summary judgment. Courts in fact require particularized pleading of class claims at a level that supports vigorous use of Rule 12.

It also was suggested that the proposed Note language is not a "soft" compromise of a difficult debate. The Committee should decide what it wants to do, and be explicit in the text of the Rule.

Sheila Birnbaum urged that the suggested Note is a balanced attempt to go beyond the limits of Rules 12 and 56, in a way that focuses on the extraordinary case. There should not be discovery,

but the merits should be open to consideration with factor (F).

Beverly Moore suggested that every defense lawyer will want to get into the merits at the certification stage in every case. The Draft Note reflects empirically invalid assumptions that there are many frivolous cases and coercive settlements. That is not so.

Peter Lockwood observed that the draft Note fragment can only address cases that cannot be resolved by summary judgment. He asked how is a court to determine that a case that is strong enough to go to trial on a Rule 56 measure still is not strong enough to certify.

Robert Heim, who had initially supported consideration of the merits, but has moved away from the November 1995 draft proposals, supported the proposed Note on factor (F). The concern with discovery is overstated; there is substantial discovery on certification issues now. And there are cases that are very weak. Judges have felt hamstrung by the Eisen prohibition of merits review. The draft authorizes a "preliminary peek."

Alfred Cortese also supported the proposed note. Some claims justifiably earn certification under (b)(3) because they have merit but cannot practicably be enforced individually. Others should be weeded out.

The proposition that the draft Note would merely open a small door for consideration of the merits was doubted. Once the door is open, legions will march through.

A motion to reject the draft Note discussion of incorporation of the merits in the factor (F) determination was adopted, 8 votes to 5.

A motion was made to say nothing about consideration of the merits in conjunction with the factor (F) determination. It was suggested that the Note has to say something, because in the face of silence many courts will read factor (F) to support consideration of the probable result on the merits. "Probable relief" intrinsically includes the probability of any relief. The motion to say nothing was adopted, 7 votes to 6.

Settlement Classes

The November draft included in subdivision (b)(3) a new factor (H) that included as a matter pertinent to the predominance and superiority findings:

> **(H)** the opportunity to settle on a class basis claims that could not be litigated on a class basis or could not be litigated by [or against?] a class as comprehensive as the settlement class * * *

Discussion began with the question whether this factor should be added. It was recalled that the November meeting discussed settlement classes without reaching any conclusions. There are a

wide variety of settlement classes. It seemed to be the consensus in November that not enough is known to support intelligent rulemaking with respect to futures classes. The use of settlement classes under subdivision (b)(1) also seems too complicated for wise rulemaking. But for (b)(3) classes, the Third Circuit decision in the General Motors pickup truck litigation has stirred the question whether a class can be certified only on the hypothesis that certification of that class is appropriate for litigation. Many believe that the Third Circuit opinion permits application of the subdivision (a) prerequisites and the subdivision (b)(3) factors in a way that permits certification of a class for settlement purposes even though the same class would not be certified for trial. Others are uncertain. Settlement classes have been found useful by many courts. The practice has evolved from initial hesitancy to regular adoption as a routine practice. They have worked not only in the exotic cases that attract widespread attention, but also in smaller-scale cases such as a class of 1,200 homeowners seeking post-hurricane insurance benefits. The class probably could not have been certified for trial because there were many individual questions. A class that could not be certified for litigation because of choice-of-law problems, general problems of manageability, the need to explore many individual issues, or the like, may profitably be certified for settlement. Subdivision (H) is the law everywhere, with the possible exception of the Third Circuit. But if Rule 23 remains silent, other courts may be troubled by the uncertainties engendered by some readings of the Third Circuit opinion. On the other hand, it may be argued that courts are in the business of trying cases, not mediating settlements. To certify for settlement a class that the court would not take to litigation is to take courts into the claims-administration business. Just what is properly the stuff of judicial business remains open to dispute.

The first response was that settlement classes are extremely important, for plaintiffs and defendants alike, but that it may not be appropriate to adopt a rule that does not provide a list of factors to help the trial judge. Many settlements, moreover, are important because they provide a means of dealing with future claimants. In some situations settlement may not be possible unless all claimants, present and future, are included. In others, failure to provide for future claimants may mean that by the time future claims ripen there will be no assets left to respond in judgment. Futures classes would be left in the wilderness by this draft.

The next response was an observation by John Frank that settlement classes have been the most offensive part of the current class-action process. They offer a bribe to plaintiffs' counsel to take a dive and sell res judicata. As a moral matter, do we want this in the judicial system? If so, settlement classes should at most be allowed only if the same class would be certified for litigation. And it should be made clear that all requirements of

the rule apply to futures classes. There also should be provision for increased judicial scrutiny of any proposed settlement. Professor Jack Coffey's views on this subject are sound. The often-decried "coupon" remedies all have been settlement classes.

The choice was put as a minimalist choice between doing nothing or taking a modest first step. Factor (H) does not speak to the futures settlements now pending on appeal in the Third and Fifth Circuits. It only says that the fact that a case cannot be tried as a class need not defeat certification for settlement.

Another option was offered, suggesting that perhaps subdivision (e) should be amended to include the list of factors for reviewing settlements recommended by Judge Schwarzer in his Cornell Law Review article. Subdivision (e) also might provide that closer scrutiny is required if a class is certified at the same time as a proposed settlement is presented. The Committee has never explored this prospect beyond preliminary observations. Nor has it considered the question whether independent counsel might be appointed to assist in evaluation of a proposed settlement.

Opposition to factor (H) was expressed on the ground that it might encourage judges to certify classes simply in the hope that a settlement would clear the docket. It is unsavory to certify a class that cannot ultimately be tried. How can we receive and certify a class that would not be tried? A related fear was that the factor would encourage certification of litigation classes in hopes that the certification would spur settlement.

Support for settlement classes was expressed on the ground that settlement can avoid choice-of-law problems that defeat certification of a broad class. Article III requirements and personal jurisdiction standards still must be met. A settlement class can make all the difference in resolving massive disputes. The pending silicone gel breast implant cases and the Georgine asbestos settlements come to mind. These settlement classes also can avoid problems of individual causation that would defeat any attempt at class-based litigation. Certification of a (b)(3) settlement class permits dissatisfied class members to opt out.

The view was suggested that cases that rest on a settlement reached before certification are so different that they should be addressed in a separate rule, perhaps as a new Rule 23.3.

It was suggested that perhaps settlement classes should be put in subdivision (e) by a provision allowing the court to waive the requirements of (b)(3) for purposes of settlement. The response was that the proposal is not that the requirements of (b)(3) be waived, but that these requirements be applied with recognition of the differences presented by the settlement context.

Article III and personal jurisdiction questions were addressed briefly. There is a live controversy between individual class members and the party opposing the class; the only question is how

many of these live controversies can be resolved by class treatment. Personal jurisdiction concerns are mollified by the facts of notice and opportunity to opt out. In federal courts, moreover, all class members ordinarily will have sufficient contact with the United States to satisfy all due process requirements.

The opportunity to opt out of a (b)(3) class was again stressed as an important factor in the settlement-class equation. Class members will opt out if the settlement represents a bargain to sell res judicata on terms favorable to the defendant. If class members choose not to opt out, having notice of the class and the settlement, they are not hurt. If Rule 23(b)(3) is to be used for mass torts, the choice well may lie between permitting settlement classes and adopting the creative devices that have been used by some courts to substitute for litigated resolution of the required elements of individual claims. The Fifth Circuit decision in In re Fibreboard deals with the difficulties of these devices.

Further support for settlement classes was expressed with the view that most settlement classes "are not fixes. There are legitimate uses." Clients are better off, particularly when the defendants have insurance. Settlement also has the advantage of treating alike people who, although similarly situated, would be treated differently in separate actions. Choice-of-law, differences in local courts and procedure, problems of proving individual causation, and the like ensure disparate treatment if class disposition is not available.

Thomas Willging reminded the Committee of the information provided by the Federal Judicial Center study. Of 150 certified classes in the study, 60 were certified only for settlement. 30 of these 60 had consent to a settlement at the time of certification. 25, "mostly (b)(3) classes," did not, and indeed in 8 of these 25 there was opposition to certification. All of the 25 had at least 2 months between the motion and certification.

A motion was made that Rule (b)(3) should not speak in any way to settlement classes. The motion was defeated by vote of 5 for and 8 against.

Turning to the question of what should be said about settlement clases, the suggestion was that a means should be found to say that the court should apply all the prerequisites of subdivision (a) and the requirements of (b)(3) in light of the knowledge that the case was being certified for settlement, not trial. An alternative suggestion was that subdivision (e) be amended to provide that a trial court may, if the parties consent, certify a settlement class even though a class action might not be superior or manageable for litigation.

The next suggestion was that a new subdivision (b)(4) be adopted, providing that if the parties consent a settlement class can be certified even though the (b)(3) requirements are not met. This suggestion met the response that (b)(3) is the right location

if settlement bears on application of the predominance and superiority requirements.

Further discussion of the (b)(4) alternative generated several draft proposals. One would have added a new clause in subdivision (b)(3), at the end of the first sentence: "provided, however, that if certification is requested by the parties to a proposed settlement for settlement purposes only, the settlement may be considered in making these findings of predominance and superiority." It was concluded, however, that the prerequisites of subdivision (a) and the requirements of (b)(3) could more clearly be invoked by adoption of a specific settlement class provision as a new subdivision (b)(4). After various drafting alternatives were considered, discussion focused on a draft reading:

> **(4)** the parties to a settlement request certification under subdivision (b)(3) for purposes of the settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial.

As a separate paragraph of subdivision (b), paragraph (4) is controlled directly by subdivision (a). Subdivision (a) also is invoked by the first paragraph of subdivision (b), which repeats the requirement that the prerequisites of subdivision (a) must be satisfied. In addition, the provision for "certification under subdivision (b)(3)" means that the predominance and superiority requirements of subdivision (b)(3) must be satisfied, following consideration of the pertinent factors described in (b)(3).

The phrase allowing certification even though the requirements of subdivision (b)(3) might not be met for purposes of trial is intended to make it clear that the prerequisites of (a) and the requirements of (b)(3) must be applied from the perspective of settlement, not trial.

A suggestion to delete the words "for purposes of trial" was rejected as inconsistent with the need to make clear the differences between settlement classes and litigation classes.

The description of "parties to a settlement" is intended to require that there be a complete settlement agreement at the time class certification is requested. It was argued that provision should be made for a "conditional" settlement class certification, to be made in hopes that a settlement might be reached but acknowledging that the class must be decertified if settlement is not reached. This argument was rejected on at least two grounds. The first was that no prudent lawyer would suggest certification of a settlement class unless agreement had already been reached; if there seem to be cases in which certification is ordered before a settlement is presented before approval, it is either because of bad lawyering or because the parties have chosen not to present an agreement actually reached. The second was that there are undue risks that certification of a settlement class before agreement is reached may lead to coercive pressures to settle, reinforced by the

threat of taking an untriable class to trial.

A motion to adopt the proposed subdivision (b)(4) was approved unanimously.

A later motion to reconsider proposed (b)(4) to add "proposed," so that it would recognize a request for certification by the parties to "a proposed settlement." It was objected that this change would encourage certifications that could coerce settlement, based in part on the fear that the certification might be carried forward to trial of an unmanageable class. Certification for settlement purposes should not be available merely because the parties "have an idea about a settlement." The motion failed with 2 supporting votes and 11 opposing votes.

Subdivision (e)

The earlier discussions of subdivision (e) were revived with a suggestion that the special master provision in (e)(3) of the November draft should be adopted. The biggest problem with settlements is that they sidestep the adversary process, depriving the court of the reliable information needed to evaluate a settlement. The idea of the draft provision is to ensure independent review. There is evidence that some state-court judges are simply rubber-stamping class settlements. Some means of independent investigation should be required at least for settlement classes. Adversary process is provided only if there are objectors.

It was objected that this seemingly benign provision could have unintended adverse consequences. There is a problem, but this solution may make things worse. If someone else is appointed to investigate the settlement, responsibility may transfer from the judge to the adjunct. The parties, indeed, may agree on the master, who may provide a less probing inquiry than the court would provide. It is better to leave the responsibility squarely on the judge, who will respond with careful inquiry.

It was suggested that instead of incorporation in subdivision (e), the use of special masters might be noted in the Note to the settlement class provisions of new subdivision (b)(4).

Sheila Birnbaum observed that substantial protection is provided by the requirement of notice of settlement. The parties want to ensure that the notice is sufficiently strong to protect the settlement judgment against collateral attack. At the stage of settlement, it is the defendant who pays for the notice; cost is not an obstacle to effective notice.

The key is adequate class representation. Special masters, or for that matter the class guardians who were suggested in earlier discussion, are no better assurance than direct supervision of the named class representatives. The problem, moreover, arises with other class actions. Classes certified for litigation under subdivisions (b)(1), (2), or (3) may settle after certification.

The certification itself may result from stipulation.

John Frank spoke in favor of proposed (e)(3) as "better than a band-aid." It would provide some added protection against the fear of class sell-out settlements.

H. Thomas Wells, Jr., suggested that present subdivision (e) settlement procedure is adequate. If there are problems, they arise from inadequate implementation of the procedure.

It is possible to appoint a guardian ad litem for the class, and appointments have been made when the need arises. Settlement classes can come into being quickly, usually after little discovery. They are "packaged." It is hard for a judge to be an independent examiner. There ought to be an independent voice. But the "guardian" label should be avoided, because many collateral consequences are likely to flow from the label.

Adoption of the draft paragraph (e)(3) was opposed on the ground that courts now have power to rely on masters or magistrate judges, or to appoint guardians or other independent representatives to investigate a settlement. It may be appropriate to comment on these matters in the Note to new subdivision (b)(4), but there is no need for an independent provision.

A motion to add proposed paragraph (e)(3) failed, 5 for and 8 against.

It was observed that hearings are held on subdivision (e) approval motions, and provide the best means of review. There is no explicit hearing requirement in subdivision (e), however. It was moved that an explicit hearing requirement be added. The rule would read: "A class action shall not be dismissed or compromised without hearing and the approval of the court, after notice of the proposed dismissal or compromise ~~shall be~~ has been given * * *." The motion passed with 9 supporting votes.

Maturity

It was moved that subdivision (b)(3) factor C be amended as proposed in the drafts, adding "maturity" of "related" litigation "involving class members." The reasons for adding the maturity factor are those discussed in November, and reflected in the draft Note. The motion carried unanimously.

Subdivision (c)(1)

Subdivision (c)(1) now requires that the determination whether to certify a class must be made "as soon as practicable" after commencement of the action. The draft completely revises (c)(1). The question whether the "as soon as practicable" requirement should be deleted flowed into the question whether it is desirable to propose every possible improvement in Rule 23 at one time. The proposals already adopted will require extensive consideration and will draw much comment during the succeeding steps of the Enabling Act process. There is much to be said for not making the process

more complicated than necessary to advance the most important changes. On the other hand, it is not likely that Rule 23 will be revisited for at least another ten years. For the last many months, it has been tacitly assumed that if a few substantial changes are proposed, the many other changes in the draft would fall by the way. We must be careful about the number of changes proposed.

A motion was made to revise subdivision (c)(1) to require determination whether to certify a class "when practicable" after commencement of the action. Substitution of the full draft revision was suggested as an alternative, but put aside because the changes were more stylistic than substantive. The motion was adopted by consensus. It was pointed out that the substitution of "when practicable" would serve the same function as the proposal to add a new subdivision (d)(1) expressly permitting decision of motions to dismiss or for summary judgment before the certification question is addressed. The Note to revised (c)(1) can point out that the revision removes any support for the minority view that the "as soon as practicable" requirement defeats pre-certification action on such motions.

Subdivision (b)(2)

The draft would revise subdivision (b)(2) to resolve the ambiguity that has led some courts to rule that it does not authorize certification of a defendant class. The motion failed by 2 votes for and 11 votes against.

Subdivision (c)(2): (b)(3) Class Notice

The November draft includes at lines 156 to 161 a provision that would authorize sampling notice in a (b)(3) class if the cost of individual notice is excessive in relation to the generally small value of individual members' claims. A motion to adopt this provision was resisted on the ground that it is inconsistent with the new (b)(3) factor (F) that allows refusal to certify a class when the probable value of individual relief does not justify the costs and burdens of class litigation. It was responded that to the contrary, this notice provision will implement the purposes of factor (F) by reducing the costs and burdens of certification, making it feasible to enforce claims that otherwise might not justify class litigation. Some concerns were expressed about the requirements of due process. The motion failed for want of a second.

It was agreed that the proposed revisions of Rule 23 agreed upon at this meeting should be submitted to the Standing Committee with a recommendation for publication for public comment.

New Business

The American College of Trial Lawyers Federal Rules of Civil Procedure Committee has recommended that the Committee take up the question whether the scope of discovery authorized by Rule 26(b)(1)

should be restricted. The recommendation is supported by a detailed chronology of past Committee consideration of the many problems that surround the scope and practice of discovery. This topic will be on the agenda for the fall meeting. Earlier discussion of the proposal to amend Rule 26(c) emphasized the early and recent concerns that have tied the scope of discovery to protective-order practice. The Committee has continually sought to sidestep the fundamental question by attempting more modest approaches. The 1993 adoption of mandatory disclosure in Rule 26(a) is the most recent example. The time has come to consider the central questions once again. And thanks are due to the American College of Trial Lawyers for the careful supporting work they have provided.

Standing Committee Self-Study

The most recent draft Self-Study prepared by the Standing Committee self-study subcommittee was included in the agenda, along with a set of questions framed by the Reporter for this Committee. Professor Coquillette, as Reporter of the Standing Committee, suggested that the several advisory committees need not be concerned that the self-study will stimulate a response that must be anticipated by advisory committee deliberations and advice. This Committee took no action with respect to the draft self-study.

Admiralty Rules

Proposals to amend Supplemental Admiralty Rules B, C, and E were added to the agenda at the last minute. It was concluded that better advance preparation will be required to support informed consideration of these proposals. They are carried forward to the fall agenda.

Next Meeting

It was agreed that the next meeting of the Committee will be held on October 14 and 15.

Judge Higginbotham, as chair, closed the meeting by noting deep appreciation and thanks to John Rabiej and Mark Shapiro for their continuing and excellent support of the Committee. He also expressed thanks to all Committee members for sustained, diligent, and successful work.

Respectfully submitted,

Edward H. Cooper, Reporter

Item 11

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

TO: The Committee on Rules of Practice and Procedure

FROM: Daniel R. Coquillette, Reporter

RE: Self-Study (Report of the Subcommittee on Long Range Planning.)

DATE: May 10, 1996

At the Committee's meeting on January 12-13, 1996, the Hon. Frank H. Easterbrook presented the Final Report of the Subcommittee on Long Range Planning, including the Subcommittee's A Self-Study of Federal Judicial Rulemaking prepared by himself and Professor Thomas E. Baker (the "Self-Study"). After discussion, a motion was made and passed as amended that: 1) the Subcommittee report be "received" by the Committee, 2) that the report be published as "received" and 3) that the Subcommittee be discharged. There was an expression of thanks to Judge Easterbrook and Professor Baker for their hard work.

On request of the Hon. Thomas S. Ellis, III, The Hon. Alicemarie H. Stotler, Chair, stated that the Committee would examine the document again at the June, 1996 meeting. Members should read the last draft carefully, and submit to the Reporter any last comments before final action at the June, 1996 meeting. See the Memorandum of February 20, 1996 from the Chair to the Committee soliciting comments. Helpful comments were received from the Chair and from Professor Edward Cooper, Reporter, Civil Rules Advisory Committee. These have been circulated. No further comments were received from members of the Committee.

RECOMMENDATION

On close examination, eight of the sixteen recommendations of the Self-Study have already been implemented, or are no longer necessary due to other changes, including the outcome of a meeting with the Chief Justice on December 13, 1995. (See "Discussion," below.) Five more are within the special authority of the Chair of the Committee, who has taken careful note of the recommendations made. (See Recommendations 4, 5, 6, and 11). This leaves just three recommendations. Recommendations 8 and 10 express a concern about "the effects of creating local options in the national rules." Recommendation 16 suggests a change in the rule making process to a biennial cycle "as the norm." These three recommendations can be acted upon at any time by motion of a member of the Committee, and will

certainly be reexamined in the context of the pending 1996 Rand Study and the termination of the Civil Justice Reform Act at the end of this year.

The Self-Study has already proved most useful as a source of insight to both the Chair and Committee in making decisions. Like any good planning document, it is already being passed by events. Under these circumstances, there is no point in formally debating the document or adopting any specific recommendation. The Self-Study should be "received" as voted on January 13, 1996, with special gratitude expressed to Judge Easterbrook and Professor Baker.

DISCUSSION

Recommendations 1, 3, 7, 9, 12, 13, 14, and 15 all concern matters on which action has already been taken, or are currently unnecessary due to other changes. Recommendation 1 and 9 suggests recommendations to the Chief Justice as to the "personal and professional diversity" of appointments to the Advisory and Standing Committees. These concerns have been brought to the Chief Justice's attention. Recommendation 3 concerns the need for longer terms for Chairs. This was discussed with the Chief Justice on December 13, 1995.

Recommendation 7 concerns the effective use of data gathered by the Civil Justice Reform Act of 1990. This is already a matter of high urgency to the Chair and Reporter, and will be discussed at length when the Rand Report is in hand later this year. Recommendations 12 and 13 suggest monitoring the growing demands on the Reporter and continuing the practice of appointing liaison members from the Standing Committee to the Advisory Committees. Both are being done.

Recommendation 14 suggests that the Committee "should continue to improve the style of new and amended rules, and should use its experience to decide whether to revise each set of federal rules fully." All new rules are being amended pursuant to the new style guidelines and under the oversight of the style Subcommittee. The issue of full restyling of complete sets of federal rules was discussed at length with the Chief Justice on December 13, 1995. He agreed that the Federal Rules of Appellate Procedure should be released for public comment in a completely restyled format, and suggested that restylization of other complete sets of federal rules should be held pending experience with the Appellate Rules. This is being done.

Recommendation 15 was to "abolish the Subcommittee on Long Range Planning" and to reassign "issues regarding long range planning" to the Reporter. This was done on January 13, 1996.

Recommendations 2, 4, 5, 6 and 11 are within the power of the Chair of the Committee to implement at anytime, and she has taken careful note of them. Recommendation 2 suggests orientation meetings with new members. This has already been implemented by the Standing Committee, and has been recommended to the Advisory Committees: Recommendation 4 suggests using Advisory Committee Reporters to circulate pertinent articles and organizing in-house

seminars. This is also being encouraged. Recommendations 5 and 6 suggest the use of electronic technology to improve the work of the Committees and the better use and development of available data. This is under continuous study, in consultation with the Administrative Office. Recommendation 11 suggests that "the Standing Committee ..., must be mindful that the primary responsibility for drafting rules changes is assigned to the Advisory Committee" and that "substantial changes" by the Standing Committee be returned to the Advisory Committee for "further consideration." This is the present policy of the Chair.

All that remains are Recommendations 8 and 10, concerning the "effect of creating local options in the national rules" and Recommendation 16, suggesting a change in the rulemaking cycle to a "biennial cycle" as "the norm." As indicated above under "Recommendation," these suggestions can be brought forward by motion of any member of the Committee in the context of specific rule changes. A more general discussion is also certain to result this year on the release of the 1996 Rand Study and the termination of the Civil Justice Reform Act of 1990.

In short, the Self-Study has been a most useful project. It is best "received" as an on-going resource for the Committee, rather than "accepted" as a fixed, rigidly applied policy. Special gratitude should be extended to Judge Easterbrook and to Professor Baker for their hard work and wisdom.