COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

File Copy

Washington, D.C.
June 7-8, 2000
Volume I

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JUNE 7-8, 2000

1. Opening Remarks of the Chair

   A. Report on the Judicial Conference session

   B. Supreme Court approval of proposed rule amendments

2. **ACTION** — Approval of Minutes

3. Report of the Administrative Office

   - **ACTION** — Proposal linking courts' Internet web sites containing local rules with "Federal Rulemaking" web site and encouraging courts that do not have an existing web site to post their local rules on one

4. Report of the Federal Judicial Center

5. Report of the Advisory Committee on Appellate Rules

   A. **ACTION** — Proposed amendments to Rules 4, 5(c), 21, 25, 26(c), 26.1, 36, and 45 for approval to be published for comment (publication of proposed amendments to Rules 1, 5, 15, 24, 26, 27, 28, 31, 32, 41, and 44 and revision of Form 6 approved at January 2000 meeting)

   B. Minutes and other informational items

6. Report of the Advisory Committee on Bankruptcy Rules

   A. **ACTION** — Proposed amendments to Rules 1007, 2002, 3016, 3017, 3020, 9006, 9020, and 9022 and Official Form 7 for approval and transmission to the Judicial Conference

   B. **ACTION** — Proposed amendments to Rules 1004, 1004.1, 2014, 2015, 4004, 9014, and 9027 and Official Form 1 for approval to be published for comment

   C. Minutes and other informational items

7. Report of the Advisory Committee on Civil Rules

   A. **ACTION** — Proposed amendments to Rules 5, 6, 65, 77, 81, and 82, and abrogation of Copyright Rules for approval and transmission to the Judicial Conference

B. **ACTION** — Proposed amendments to Rules 54, 58, and 81(a)(2) and new Rule 7.1 for approval to be published for comment

C. Minutes and informational items

8. Report of the Advisory Committee on Criminal Rules

A. **ACTION** — Comprehensive "style" revision of Rules 32 through 60 for approval to be published for comment in August (publication of revised Rules 1 through 31 approved at January 2000 meeting)

B. **ACTION** — Proposed "substantive" amendments to Rules 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41, and 43, which deal with revisions that were considered before the "style" project started, and new Rule 12.4 for approval to be published for comment

C. **ACTION** — Proposed amendments to Rules 1, 2, 3, 6, 8, 9, and 10 Governing Section 2254 Proceedings and Rules 2, 3, 8, 9, and 10 Governing Section 2255 Proceedings

D. Minutes and other informational items

9. Report of the Advisory Committee on Evidence Rules

10. Status Report of Subcommittee on Attorney Conduct Rules

11. Disclosure of Financial Interests

A. **ACTION** — Proposed new Civil Rule 7.1 and Criminal Rule 12.4 and amendments to Appellate Rule 26.1 for approval to be published for comment

B. Alternative language recommended by Committee of Codes of Conduct and FJC report on local rules governing financial disclosure

12. Report of Technology Subcommittee

13. Status Report of Local Rules Project

14. Comments on Proposed New Statistical System

15. Long Range Planning

16. Next Meeting: January 4-5, 2001, in Tucson, Arizona; June 14-15, 2001 (tentative dates)

JUDICIAL CONFERENCE RULES COMMITTEES

Chairs

Honorable Anthony J. Scirica
United States Circuit Judge
22614 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia, Pennsylvania 19106

Honorable Will L. Garwood
United States Circuit Judge
903 San Jacinto Boulevard
Suite 300
Austin, Texas 78701

Honorable Adrian G. Duplantier
United States District Judge
United States Courthouse
500 Camp Street
New Orleans, Louisiana 70130

Honorable Paul V. Niemeyer
United States Circuit Judge
United States Courthouse
101 West Lombard Street
Baltimore, Maryland 21201

Honorable W. Eugene Davis
United States Circuit Judge
800 Lafayette Street, Suite 5100
Lafayette, Louisiana 70501

Honorable Milton I. Shadur
United States District Judge
United States District Court
219 South Dearborn Street, Room 2388
Chicago, Illinois 60604

Reporters

Prof. Daniel R. Coquillette
Boston College Law School
885 Centre Street
Newton Centre, MA 02159

Prof. Patrick J. Schiltz
Notre Dame Law School
325 Law Building
Post Office Box R
Notre Dame, IN 46556-0780

Prof. Jeffrey W. Morris
University of Dayton
School of Law
300 College Park
Dayton, Ohio 45469-2772

Prof. Edward H. Cooper
University of Michigan
Law School
312 Hutchins Hall
Ann Arbor, MI 48109-1215

Prof. David A. Schlueter
St. Mary's University
School of Law
One Camino Santa Maria
San Antonio, Texas 78228-8602

Prof. Daniel J. Capra
Fordham University
School of Law
140 West 62nd Street
New York, New York 10023

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

(Standing Committee)

Chair:

Honorable Anthony J. Scirica
United States Circuit Judge
22614 United States Courthouse
Independence Mall West, 601 Market Street
Philadelphia, Pennsylvania 19106

Members:

Honorable Phyllis A. Kravitch
United States Circuit Judge
Elbert P. Tuttle Court of Appeals Building
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Honorable A. Wallace Tashima
United States Circuit Judge
Richard H. Chambers Court of Appeals Building
125 South Grand Avenue
Pasadena, California 91105-1652

Honorable Michael Boudin
United States Circuit Judge
United States Court of Appeals
7710 United States Courthouse
One Courthouse Way
Boston, Massachusetts 02210-3002

Honorable Frank W. Bullock, Jr.
United States District Court
Post Office Box 3223
Greensboro, North Carolina 27402

Honorable J. Garvan Murtha
Chief Judge, United States District Court
Post Office Box 760
Brattleboro, Vermont 05302-0760

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (CONTD.)

Honorable E. Norman Veasey
Chief Justice, Supreme Court of Delaware
Carvel State Office Building
820 North French Street, 11th Floor
Wilmington, Delaware 19801

Professor Geoffrey C. Hazard, Jr.
University of Pennsylvania Law School
3400 Chestnut Street
Philadelphia, Pennsylvania 19104

Gene W. Lafitte, Esquire
Liskow & Lewis
50th Floor, One Shell Square
701 Poydras Street
New Orleans, Louisiana 70139

Patrick F. McCartan, Esquire
Jones, Day, Reavis & Pogue
North Point, 901 Lakeside Avenue
Cleveland, Ohio 44114

Charles J. Cooper, Esquire
Cooper, Carvin & Rosenthal
1500 K Street, N.W., Suite 200
Washington, DC 20005

David M. Bernick, Esquire
Kirkland & Ellis
200 East Randolph Drive, 59th Floor
Chicago, Illinois 60601

Deputy Attorney General (ex officio)
Honorable Eric H. Holder, Jr.
4111 U.S. Department of Justice
10th & Constitution Avenue, N.W.
Washington, D.C. 20530
ATTN: James E. Castello
Associate Deputy Attorney General

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (CONTD.)

Reporter:

Professor Daniel R. Coquillette
Boston College Law School
885 Centre Street
Newton Centre, Massachusetts 02159

Consultants:

Joseph F. Spaniol, Jr., Esquire
5602 Ontario Circle
Bethesda, Maryland 20816-2461

Professor Mary P. Squiers
P.O. Box 920046
Needham, Massachusetts 02492

Professor R. Joseph Kimble
Thomas M. Cooley Law School
217 South Capitol Avenue
P.O. Box 13038
Lansing, Michigan 48901

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Washington, D.C. 20544

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

SUBCOMMITTEES

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[Vacant]
Professor Geoffrey C. Hazard, Jr.
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Joseph F. Spaniol, Jr., Esquire, Consultant

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Judge Jerry E. Smith (Evidence)
Professor Daniel J. Capra (Evidence)

ADVISORY COMMITTEE ON APPELLATE RULES

Chair:

Honorable Will L. Garwood
United States Circuit Judge
903 San Jacinto Boulevard
Suite 300
Austin, Texas 78701

Members:

Honorable Diana Gribbon Motz
United States Circuit Judge
920 United States Courthouse
101 West Lombard Street
Baltimore, Maryland 21201

Honorable Samuel A. Alito, Jr.
United States Circuit Judge
United States Court of Appeals
357 United States Post Office
and Courthouse
Post Office Box 999
Newark, New Jersey 07101-0999

Honorable Stanwood R. Duval, Jr.
United States District Court
C-368 United States Courthouse
500 Camp Street
New Orleans, Louisiana 70130

Honorable Pascal F. Calogero, Jr.
Chief Justice
Supreme Court of Louisiana
Supreme Court Building
301 Loyola Avenue
New Orleans, Louisiana 70112

Honorable John Charles Thomas
Hunton & Williams
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074

ADVISORY COMMITTEE ON APPELLATE RULES (CONTD.)

Professor Carol Ann Mooney
Vice President and Associate Provost
University of Notre Dame
237 Hayes-Healy Center
Notre Dame, Indiana 46556

W. Thomas McGough, Jr., Esquire
Reed Smith Shaw & McClay LLP
435 Sixth Avenue
Pittsburgh, Pennsylvania 15219

Sanford Svetcov, Esquire
Landels, Ripley & Diamond
Hills Plaza
350 The Embarcadero, 6th Floor
San Francisco, California 94105

Honorable Seth P. Waxman
Solicitor General (ex officio)
Douglas Letter, Appellate Litigation Counsel
Civil Division, U.S. Department of Justice
601 D Street, N.W., Room 9106
Washington, D.C. 20530

Reporter:

Professor Patrick J. Schiltz
Notre Dame Law School
325 Law Building
Post Office Box R
Notre Dame, Indiana 46556-0780

Liaison Member:

Honorable Phyllis A. Kravitch
United States Circuit Judge
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Washington, D.C. 20544

ADVISORY COMMITTEE ON BANKRUPTCY RULES

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Honorable Adrian G. Duplantier
United States District Judge
United States Courthouse
500 Camp Street
New Orleans, Louisiana 70130

Members:

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United States District Judge
Everett McKinley Dirksen
United States Courthouse
219 South Dearborn Street
Chicago, Illinois 60604

Honorable Bernice B. Donald
United States District Judge
United States District Court
167 N. Main Street, Suite 341
Memphis, Tennessee 38103

Honorable Norman C. Roettger, Jr.
United States District Judge
United States Courthouse
299 East Broward Boulevard
Fort Lauderdale, Florida 33301

Honorable Ernest G. Torres
United States District Judge
363 John O. Pastore Federal Building
Two Exchange Terrace
Providence, Rhode Island 02903-1779

Honorable A. Jay Cristol
United States Bankruptcy Judge
United States Bankruptcy Court
51 S.W. First Avenue
Chambers, Room 1412
Miami, Florida 33130

ADVISORY COMMITTEE ON BANKRUPTCY RULES (CONTD.)

Honorable Robert J. Kressel
United States Bankruptcy Judge
United States Courthouse, Suite 8W
300 South Fourth Street
Minneapolis, Minnesota 55415

Honorable Donald E. Cordova
United States Bankruptcy Judge
United States Bankruptcy Court
U.S. Custom House
721 19th Street
Denver, Colorado 80202-2508

Honorable James D. Walker, Jr.
United States Bankruptcy Court
433 Cherry Street
Macon, Georgia 31201-7957

Professor Kenneth N. Klee
University of California, Los Angeles
School of Law
Box 951476
Los Angeles, California 90095-1476

Professor Mary Jo Wiggins
University of San Diego
School of Law
5998 Alcala Park
San Diego, California 92110

Professor Alan N. Resnick
Hofstra University School of Law
121 Hofstra University
Hempstead, New York 11549-1210

Leonard M. Rosen, Esquire
Wachtell, Lipton, Rosen & Katz
51 West 52 Street
New York, New York 10019

Eric L. Frank, Esquire
Miller Frank & Miller
21 South 12th Street, Suite 640
Philadelphia, Pennsylvania 19107

ADVISORY COMMITTEE ON BANKRUPTCY RULES (CONTD.)

Howard L. Adelman, Esquire
Adelman, Gettleman, Merens,
Berish & Carter, Ltd.
Suite 1050, 53 West Jackson Boulevard
Chicago, Illinois 60604

Director, Commercial Litigation Branch,
Civil Division, U.S. Dept. of Justice (ex officio)
J. Christopher Kohn, Esquire
P.O. Box 875, Ben Franklin Station
Washington, D.C. 20044-0875

Reporter:

Professor Jeffrey W. Morris
University of Dayton
School of Law
300 College Park
Dayton, Ohio 45469-2772

Liaison Member:

Honorable J. Garvan Murtha
Chief Judge, United States District Court
Post Office Box 760
Brattleboro, Vermont 05302-0760

Bankruptcy Clerk:

Richard G. Heltzel
Clerk, United States Bankruptcy Court
United States Courthouse
501 I Street
Sacramento, California 95814

Representative from Executive Office for United States Trustees:

Kevyn D. Orr, Esquire
Acting Director, Executive Office for
United States Trustees
901 E Street, NW, Suite 700
Washington, D.C. 20530

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Practice and Procedure
Washington, D.C. 20544

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Honorable Paul V. Niemeyer
United States Circuit Judge
United States Courthouse
101 West Lombard Street, Suite 910
Baltimore, Maryland 21201

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United States District Judge
United States Courthouse
501 I Street, 14th floor
Sacramento, California 95814

Honorable Lee H. Rosenthal
United States District Judge
11535 Bob Casey United States Courthouse
515 Rusk Avenue
Houston, Texas 77002

Honorable Richard H. Kyle
United States District Judge
764 Warren E. Burger Federal Building
316 North Robert Street
St. Paul, Minnesota 55101

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United States District Judge
United States District Court
1050 United States Courthouse
500 Pearl Street
New York, New York 10007-1312

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United States District Court
7614 United States Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106-1759

ADVISORY COMMITTEE ON CIVIL RULES (CONTD.)

Honorable John L. Carroll
United States Magistrate Judge
United States District Court
Post Office Box 430
Montgomery, Alabama 36101

Honorable Christine M. Durham
Justice of the Utah Supreme Court
Scott M. Matheson Courthouse
450 S. State Street, P.O. Box 140210
Salt Lake City, Utah 84114-0210

Professor John C. Jeffries, Jr.
University of Virginia School of Law
580 Massie Road
Charlottesville, VA 22903-1789

Mark O. Kasanin, Esquire
McCutchen, Doyle, Brown & Enersen
Three Embarcadero Center
San Francisco, California 94111

Sheila L. Birnbaum, Esquire
Skadden, Arps, Slate, Maegher & Flom LLP
4 Times Square
New York, New York 10036

Andrew M. Scherffius, Esquire
Andrew M. Scherffius, P.C.
400 Colony Square, Suite 1018
1201 Peachtree Street, N.E.
Atlanta, Georgia 30361

Professor Myles V. Lynk
Arizona State University
College of Law
P.O. Box 877906
Tempe, Arizona 85287-7906

ADVISORY COMMITTEE ON CIVIL RULES (CONTD.)

Acting Assistant Attorney General
Civil Division (ex officio)
David W. Ogden
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Liaison Members:

Honorable Adrian G. Duplantier
United States District Court
United States Courthouse
500 Camp Street
New Orleans, Louisiana 70130

Honorable Michael Boudin
United States Circuit Judge
United States Court of Appeals
7710 United States Courthouse
One Courthouse Way
Boston, Massachusetts 02210-3002

Reporter:

Professor Edward H. Cooper
University of Michigan Law School
312 Hutchins Hall
Ann Arbor, Michigan 48109-1215

Consultant:

Professor Richard L. Marcus
Hastings College of the Law
200 McAllister Street
San Francisco, California 94102-4978

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Peter G. McCabe
Secretary, Committee on Rules of
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Washington, D.C. 20544

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800 Lafayette Street, Suite 5100
Lafayette, Louisiana 70501

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United States Circuit Judge
Frank M. Johnson, Jr. Federal Building
and Courthouse
15 Lee Street
Montgomery, Alabama 36104

Honorable David D. Dowd, Jr.
United States Senior District Judge
402 U.S. Courthouse & Federal Building
Two South Main Street
Akron, Ohio 44308

Honorable John M. Roll
United States District Judge
United States District Court
415 James A. Walsh Courthouse
44 East Broadway Boulevard
Tucson, Arizona 85701-1719

Honorable Susan C. Bucklew
United States District Judge
United States District Court
109 United States Courthouse
611 North Florida Avenue
Tampa, Florida 33602

Honorable Paul L. Friedman
United States District Judge
6321 E. Barrett Prettyman
United States Court House
333 Constitution Avenue, N.W.
Washington, DC 20001-2802

ADVISORY COMMITTEE ON CRIMINAL RULES (CONTD.)

Honorable Tommy E. Miller
United States Magistrate Judge
173 Walter E. Hoffman
United States Courthouse
600 Granby Street
Norfolk, Virginia 23510-1915

Honorable Daniel E. Wathen
Chief Justice, Maine Supreme Judicial Court
65 Stone Street
Augusta, Maine 04330

Professor Kate Stith
Yale Law School
Post Office Box 208215
New Haven, Connecticut 06520-8215

Robert C. Josefsberg, Esquire
Meadow, Olin & Perwin, P.A.
City National Bank Building, Suite 800
25 West Flagler Street
Miami, Florida 33130-1780

Darryl W. Jackson, Esquire
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004

Lucien B. Campbell
Federal Public Defender
Western District of Texas
727 E. Durango Boulevard, B-207
San Antonio, Texas 78206-1278

Assistant Attorney General
Criminal Division (ex officio)
Roger A. Pauley, Esquire
Director, Office of Legislation,
U.S. Department of Justice
601 D Street, N.W., Room 6637
Washington, D.C. 20530

ADVISORY COMMITTEE ON CRIMINAL RULES (CONTD.)

Reporter:

Professor David A. Schlueter
St. Mary's University
School of Law
One Camino Santa Maria
San Antonio, Texas 78228-8602

Liaison Member:

Honorable A. Wallace Tashima
United States Circuit Judge
Richard H. Chambers Court of Appeals Building
125 South Grand Avenue
Pasadena, California 91105-1652

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Washington, D.C. 20544

ADVISORY COMMITTEE ON CRIMINAL RULES

SUBCOMMITTEES

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Professor Kate Stith
Robert C. Josefsberg, Esquire
Roger A. Pauley, Esquire

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[Vacant]
Darryl W. Jackson, Esquire
DOJ

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DOJ

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Subcommittee A
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DOJ

Subcommittee B
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Robert C. Josefsberg, Esquire
Lucien B. Campbell, Esquire
DOJ

ADVISORY COMMITTEE ON EVIDENCE RULES

Chair:

Honorable Milton I. Shadur
United States District Judge
United States District Court
219 South Dearborn Street, Room 2388
Chicago, Illinois 60604

Members:

Honorable Jerry E. Smith
United States Circuit Judge
12621 United States Courthouse
515 Rusk Avenue
Houston, Texas 77002-2698

Honorable David C. Norton
United States District Judge
Post Office Box 835
Charleston, South Carolina 29402

Honorable Jeffrey L. Amestoy
Chief Justice, Vermont Supreme Court
109 State Street
Montpelier, Vermont 05609-0801

John M. Kobayashi, Esquire
The Kobayashi Law Firm
1633 Fillmore Street, Suite 2100
Denver, Colorado 80206

David S. Maring, Esquire
Maring Williams Law Office P.C.
P.O. Box 795
Bismarck, North Dakota 58502

Fredric F. Kay, Esquire
Federal Public Defender
97 East Congress
Suite 130
Tucson, Arizona 85701-1724

ADVISORY COMMITTEE ON EVIDENCE RULES (CONTD.)

Assistant Attorney General
Criminal Division (ex officio)
Laird C. Kirkpatrick, Counsel
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 2212
Washington, D.C. 20530-0001

Liaison Members:

Honorable Frank W. Bullock, Jr.
United States District Judge
United States District Court
Post Office Box 3223
Greensboro, North Carolina 27402

Honorable Richard H. Kyle
United States District Judge
764 Warren E. Burger Federal Building
316 North Robert Street
St. Paul, Minnesota 55101

Honorable David D. Dowd, Jr.
United States Senior District Judge
402 U.S. Courthouse & Federal Building
Two South Main Street
Akron, Ohio 44308

Reporter:

Professor Daniel J. Capra
Fordham University School of Law
140 West 62nd Street
New York, New York 10023

Consultant:

Professor Kenneth S. Broun
University of North Carolina
School of Law
CB #3380, Van Hecke-Wettach Hall
Chapel Hill, North Carolina 27599

ADVISORY COMMITTEE ON EVIDENCE RULES (CONTD.)

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Washington, D.C. 20544

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Professor Daniel J. Capra
Professor Kenneth S. Broun, Consultant

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Judge A. Wallace Tashima

Evidence:

Judge Frank W. Bullock, Jr.

Judge Richard H. Kyle

Judge David D. Dowd, Jr.

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Staff:

John K. Rabiej
Chief, Rules Committee
Support Office
Administrative Office of the
United States Courts
Washington, D.C. 20544

Area Code 202
502-1820

FAX-202-502-1755

Mark D. Shapiro
Deputy Chief, Rules Committee
Support Office
Administrative Office of the
United States Courts
Washington, D.C. 20544

Area Code 202
502-1820

FAX-202-502-1755

Judith W. Krivit
Administrative Specialist
Rules Committee Support Office
Administrative Office of the
United States Courts
Washington, D.C. 20544

Area Code 202
502-1820

FAX-202-502-1755

Anne Rustin
Secretary, Rules Committee
Support Office
Administrative Office of the
United States Courts
Washington, D.C. 20544

Area Code 202
502-1820

FAX-202-502-1755

Patricia S. Ketchum
Senior Attorney, Bankruptcy
Judges Division
Administrative Office of the
United States Courts
Washington, D.C. 20544

Area Code 202
502-1900

FAX-202-502-1988

Item IA-D

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
March 14, 2000

****

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

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At its March 14, 2000 session, the Judicial Conference:

Elected to the Board of the Federal Judicial Center Judge Pauline Newman of the Federal Circuit to replace District Judge Thomas F. Hogan; Judge Robert Bryan of the Western District of Washington to replace Chief Judge Jean C. Hamilton of the Eastern District of Missouri; and Judge Jean C. Hamilton to fill the unexpired term of Circuit Judge Robert M. Parker.

Executive Committee

With regard to release of financial disclosure reports:

Rescinded a December 10, 1999 decision of the Committee on Financial Disclosure taken pursuant to its delegated authority to act for the Judicial Conference under the Ethics in Government Act of 1978, as amended, to withhold release of judges' financial disclosure reports where the requester indicates that the reports will be posted on the Internet.

Directed the Committee on Financial Disclosure to exercise its delegated authority as follows:

a. On an interim basis, when the Committee receives a request for a judicial officer's financial disclosure form that may result in the dissemination to the public of that form or the information contained therein, the Committee will invite the judicial officer to review the information contained in his or her form. Where the officer

believes it appropriate, the officer may request redaction of personal and sensitive information that is otherwise confidential and could endanger the officer or other person if obtained by any member of the public hostile to the judicial officer. Upon receipt of a request for redaction, the Committee will, in consultation with the United States Marshals Service, grant or deny the request after determining whether the information sought to be redacted is not otherwise easily available to the public and could, if obtained by a hostile member of the public, endanger the officer or other person; and

b. On a permanent basis, the Committee will implement a procedure requiring judicial officers who believe redactions to be appropriate prior to public dissemination to request such redactions when the annual disclosure form is filed. The Committee will follow the procedures specified above in determining the merits of such requests.

In lieu of a related recommendation by the Committee on Financial Disclosure, instructed the chairs of the Committees on Codes of Conduct, Financial Disclosure, and Security and Facilities to confer expeditiously with a view to proposing as soon as possible to their committees and then to the Judicial Conference legislative amendments to the Ethics in Government Act that accommodate the public's need for information regarding the financial interests of judicial officers and the security of such officers.

Committee on Automation and Technology

Approved the 2000 update to the *Long Range Plan for Information Technology in the Federal Judiciary*.

Committee on the Administration of the Bankruptcy System

Approved the designation of Viera as an additional place of holding bankruptcy court in the Middle District of Florida.

Committee on Court Administration and Case Management

Opposed the "Blind Justice Act of 1999" (S. 1484, 106th Congress), which deals with case assignment procedures, and agreed to notify Congress of its concerns.

Amended the Miscellaneous Fee Schedule for the Courts of Appeals to add a notice of appeal fee as follows:

> Upon the filing of any separate or joint notice of appeal or application for appeal from a Bankruptcy Appellate Panel, or notice of the allowance of an appeal from a Bankruptcy Appellate Panel, or of a writ of certiorari, $5 shall be paid by the appellant or petitioner.

Declined to modify the Judicial Conference's September 1999 action on Civil Justice Reform Act reporting of civil motions pending over six months.

Committee on Criminal Law

Agreed to modify its current policy in order to authorize the judiciary to pursue legislation that would create a new federal criminal offense for harassing or intimidating a federal official, including a judicial officer, with respect to the performance of official duties, to include filing a lien on the real or personal property of that official.

Agreed to support legislation regarding the discretionary conditions of probation in 18 U.S.C. § 3563(b) that would:

a. Correct the cross-references in 18 U.S.C. §§ 3563(a) and 3583(d) to eliminate the anomalous references to certain conditions of supervision created by the Antiterrorism and Effective Death Penalty Act of 1996; and

b. Preserve the cross-reference in 18 U.S.C. § 3583(d) to authorize the discretionary intermittent confinement condition of supervised release, but limit its use to violation proceedings.

With respect to probation and pretrial services officers and officer assistants:

a. Agreed to adopt a workplace drug testing program for probation and pretrial services officers and officer assistants that includes applicant, random, reasonable suspicion, follow-up, and voluntary testing to be implemented by the Director of the Administrative Office; and

b. Agreed to adopt a zero tolerance policy for controlled substance (as defined in the Controlled Substance Act, 21 U.S.C. §§ 811-812) use by probation and pretrial services officers and officer assistants.

Committee on Defender Services

Approved revisions to paragraph 5.01B of the Guidelines for the Administration of the Criminal Justice Act and Related Statutes, Volume VII, *Guide to Judiciary Policies and Procedures*, regarding the disclosure of CJA panel attorney payment information.

Committee on Financial Disclosure

Approved the removal of the requirement for a requester to provide a social security number from paragraph 4.0(b)(1) of the Regulations of the Judicial Conference of the United States on Access to Financial Disclosure Reports Filed by Judges and Judiciary Employees Under the Ethics in Government Act of 1978, as amended.

Committee on the Judicial Branch

With regard to the Thrift Savings Plan (TSP):

a. Endorsed legislation that would amend 5 U.S.C. § 8433 to permit all TSP participants to withdraw their funds without restriction when they reach retirement age; and

b. Endorsed as a fallback position, in the event the proposed amendment to section 8433 is not viable, legislation that would amend 5 U.S.C. § 8440a to repeal the rule requiring judges to separate from the government or elect senior status as a condition precedent to securing TSP funds.

Endorsed legislation that would amend 5 U.S.C § 5551 to restore the previous practice with regard to lump-sum payment of annual leave upon appointment to judicial office, and to limit the deferred payment of lump sums to presidential appointees in categories (x) through (xii) of 5 U.S.C. § 6301(2), not judges in category (xiii).

Endorsed legislation that would amend 28 U.S.C. § 371 related to receipt of military retired pay by Article III judges by repealing subsection (e), retroactive to October 1, 1999, with the understanding that an effective date of fiscal year 2001 may be substituted if the former date would jeopardize enactment of the provision.

With regard to Court of Federal Claims legislation:

a. Agreed to support an amendment that would except retired judges of the Court of Federal Claims who are recalled to perform judicial duties under 28 U.S.C. § 178(d) from the five-year prior enrollment period requirement in order to participate in the Federal Employees Health Benefits Program; and

b. Opposed a proposal that a judge of the Court of Federal Claims shall be deemed a "judge of the United States" for purposes of construing and applying chapter 87 of title 5, United States Code, and to the extent that it would extend the reach of the Federal Employees' Group Life Insurance "fix" to the judges of the Court of Federal Claims.

Committee on the Administration of the Magistrate Judges System

Approved amendments to the ad hoc and extended service recall regulations for magistrate judges.

Approved recommendations for changes in specific magistrate judge positions.

Committee on Security and Facilities

Approved the Five-Year Courthouse Project Plan for fiscal years 2001-2005.

Agreed to seek the following amendment to H.R. 809 (106th Congress), the proposed Federal Protective Service Reform Act, to be inserted as a new section 10 at the end of the bill as follows:

> None of the provisions in this Act shall be construed to interfere with, supercede, or otherwise affect the authority of the United States Marshals Service to provide security for the federal judiciary pursuant to 28 U.S.C. § 566 *et seq.*

Approved the following with regard to space acquisition and renovation alternatives:

a. Courts should advise their judicial councils and the Administrative Office as soon as approached by non-judiciary parties proposing and recommending repair, alteration, or replacement of court facilities;

b. Courts should be advised that no financial commitment to any such proposal can be made by a court or council on behalf of the judiciary due to funding constraints; and

c. The Committee on Security and Facilities should begin development of a program to address the needs of courts that retain current facilities, but whose facilities need repairs or alterations to improve operational functions and/or security.

Amended the *United States Courts Design Guide* to provide that, for new construction or major renovation projects, the ballistic-resistant glazing standards for windows in all courtrooms and chambers will be UL Standard 752, Level IV, unless the United States Marshals Service determines that ballistic-resistant glazing is not needed.

Amended the *United States Courts Design Guide* by striking the word "bookshelves" from the language in Table 5.1 to prevent confusion about the General Services Administration's funding responsibility for fixed bookcases with adjustable bookshelves.

Agreed to recommit to the Security and Facilities Committee a proposed amendment to the *United States Courts Design Guide* dealing with jury boxes in bankruptcy courtrooms so that the Committee may obtain the views of the Committee on the Administration of the Bankruptcy System, provided that while the matter is under reconsideration, a moratorium will be imposed on the design or construction of jury boxes in new or existing bankruptcy courtrooms.

Strongly condemned the unilateral efforts of the Office of Management and Budget to impose a courtroom sharing policy on the judicial branch, as an unwarranted and inappropriate intrusion into the constitutionally mandated independence of the judiciary.

SUPREME COURT OF THE UNITED STATES

APR 17 2000

ORDERED:

1. That the Federal Rules of Bankruptcy Procedure be, and they hereby are, amended by including therein amendments to Bankruptcy Rules 1017, 2002(a), 4003, 4004, and 5003.

[See infra., pp. ___ ___ ___.]

2. That the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 2000, and shall govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Bankruptcy Procedure in accordance with the provisions of Section 2075 of Title 28, United States Code.

SUPREME COURT OF THE UNITED STATES

APR 17 2000

ORDERED:

1. That the Federal Rules of Civil Procedure for the United States District Courts be, and they hereby are, amended by including therein amendments to Civil Rules 4, 5, 12, 14, 26, 30, and 37 and to Rules B, C, and E of the Supplemental Rules for Certain Admiralty and Maritime Claims.

[See infra., pp. ___ ___ ___.]

2. That the foregoing amendments to the Federal Rules of Civil Procedure and the Supplemental Rules for Certain Admiralty and Maritime Claims shall take effect on December 1, 2000, and shall govern all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

SUPREME COURT OF THE UNITED STATES

APR 17 2000

ORDERED:

1. That the Federal Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein amendments to Criminal Rules 7, 31, 32, and 38, and new Rule 32.2.

[See infra., pp. ___ ___ ___.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2000, and shall govern in all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

SUPREME COURT OF THE UNITED STATES

APR 17 2000

ORDERED:

1. That the Federal Rules of Evidence for the United States District Courts be, and they hereby are, amended by including therein amendments to Evidence Rules 103, 404, 701, 702, 703, 803(6), and 902.

[See infra., pp. ___ ___ ___.]

2. That the foregoing amendments to the Federal Rules of Evidence shall take effect on December 1, 2000, and shall govern all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Evidence in accordance with the provisions of Section 2072 of Title 28, United States Code.

Item 2

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 6-7, 2000
Coral Gables, Florida

Draft Minutes

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Coral Gables, Florida on Thursday and Friday, January 6-7, 2000. The following members were present:

Judge Anthony J. Scirica, Chair
David H. Bernick, Esquire
Judge Michael Boudin
Judge Frank W. Bullock, Jr.
Charles J. Cooper, Esquire
Professor Geoffrey C. Hazard, Jr.
Judge Phyllis A. Kravitch
Gene W. Lafitte, Esquire
Judge J. Garvan Murtha
Judge A. Wallace Tashima
Chief Justice E. Norman Veasey
Judge William R. Wilson, Jr.

Patrick F. McCartan was unable to attend the meeting. The Department of Justice was represented by Acting Associate Attorney General Daniel Marcus. Roger A. Pauley, Director of the Office of Policy and Legislation of the Criminal Division, also attended the meeting on behalf of the Department. In addition, the committee's former chair, Judge Alicemarie H. Stotler, and former committee members Judge Morey L. Sear and Sol Schreiber participated in the meeting.

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

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Will L. Garwood, Chair
Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Adrian G. Duplantier, Chair
Professor Jeffrey W. Morris, Reporter

Advisory Committee on Civil Rules —
Judge Paul V. Niemeyer, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge W. Eugene Davis, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules —
Judge Milton I. Shadur, Chair
Professor Daniel J. Capra, Reporter

Also taking part in the meeting were: Joseph F. Spaniol, Jr., consultant to the committee; Professor Mary P. Squiers, Director of the Local Rules Project; and Marie C. Leary of the Research Division of the Federal Judicial Center. Judge Carol Bagley Amon (E.D.N.Y.), chair of the Committee on Codes of Conduct, participated by telephone in the committee's discussion on financial disclosure.

INTRODUCTORY REMARKS

Chief Bankruptcy Judge Robert Mark welcomed the members to the Miami area on behalf of all the federal judges in the Southern District of Florida.

Acknowledgements

Judge Scirica read a resolution approved by the Judicial Conference recognizing Judge Alicemarie Stotler for her outstanding service, first as a member, and then as chair, of the Standing Committee on Rules of Practice and Procedure. Judge Stotler responded that it had been a great honor and privilege to have served the committee, and she expressed her delight that Judge Scirica had been appointed by the Chief Justice as her successor. She said that she missed the work of the committee, and she also missed attending the meetings of the advisory committees.

Judge Stotler emphasized that the rules committees enjoyed substantial credibility among the members of the Judicial Conference because of the thorough and careful work of the advisory committees, the public comment and hearing process, and the independent review given to all proposals by the Standing Committee. As a result, she said, the Conference has given substantial deference to the committees' proposed amendments to the rules.

Judge Stotler said that she was greatly impressed by how much work the Advisory Committee on Appellate Rules had accomplished in preparing a package of proposed amendments to the appellate rules, consisting of various proposals that had been held in abeyance until the restyled body of appellate rules had taken effect. She added that she was

equally impressed by how far the Advisory Committee on Criminal Rules had proceeded with its restyling of the Federal Rules of Criminal Procedure.

Judge Stotler singled out the Rules Committee Support Office of the Administrative Office for special recognition. She stated that the uniform dockets and charts that the office prepares are extremely helpful to the members in monitoring all the various proposals submitted for changes in the rules.

Judge Scirica also presented certificates, signed by Chief Justice Rehnquist and Administrative Office Director Mecham, recognizing Judge Morey L. Sear and Sol Schreiber for their distinguished service to the committee. He thanked both of them personally and gave them the opportunity to say a few words about their service on the committee. Judge Scirica also pointed out that the terms of Judges James A. Parker and William R. Wilson, Jr. had expired, and he said that they would be sorely missed.

Judge Scirica then welcomed the three new members of the committee — Judge Boudin, Judge Murtha, and Mr. Bernick.

September 1999 Judicial Conference Meeting

Judge Scirica reported that all the proposed amendments to the rules submitted to the Judicial Conference at its September 1999 meeting had been approved, except for the cost-bearing provision proposed in amended FED. R. CIV. P. 26(b)(2). He pointed out that most of the amendments had been placed on the Conference's consent calendar and approved automatically. But a few had been placed on the Conference's discussion calendar, including the proposed amendments to FED. R. CIV. P. 26(a)(1) (mandatory disclosure), FED. R. CIV. P. 26(b)(2) (scope of discovery), FED. R. CIV. P. 26(b)(2) (cost bearing), and FED. R. CIV. P. 30(d)(2) (presumptive limits on the time of depositions).

He noted that Conference members had received comments on the merits of the proposals directly from interested parties — some supporting the proposed changes and some opposing them. He said that the authors of the comments essentially repeated the same arguments that they had made during the public comment period, and all the arguments presented had been considered by the advisory committee and the standing committee.

Judge Scirica added that the Attorney General had sent a letter just a few days before the meeting of the Conference in which she reiterated the opposition of the Department of Justice, both to narrowing the scope of discovery under FED. R. CIV. P. 26(b)(2) and imposing a bright line test distinguishing lay testimony from expert testimony under FED. R. EVID. 701. He noted, however, that Rule 701 had not been placed on the discussion calendar of the Conference, and it did not receive the necessary 2/3 vote of the members to add it to the calendar.

Judge Scirica stated that the Chief Justice had been very gracious in allowing him, Judge Niemeyer, and Judge Smith sufficient time to present and defend the proposed amendments. He said that Conference members had asked several pointed questions about the proposed changes in the civil rules and that Judge Niemeyer had responded brilliantly to their concerns.

Judge Scirica noted that the first matter debated by the Conference was the proposed amendments to FED. R. CIV. P. 26(a)(1), which would make a limited amount of initial disclosure mandatory. He explained that the main concern of the members related to the proposed elimination of a local district court's right to opt out of the disclosure requirement. The debate, he said, had been very spirited, and the proposed amendment to Rule 26(a)(1) passed by a divided vote.

Judge Scirica said that the next matter debated was the proposed amendment to FED. R. CIV. P. 26(b)(2), governing the scope of discovery. He noted that a spirited attack was also made against this proposal. The debate was quite lengthy, and this proposed amendment, also, was approved by a divided vote.

Judge Scirica said that the Conference moved on to the proposed amendment to FED. R. CIV. P. 26(b)(2), dealing with cost bearing. Judge Niemeyer explained that the advisory committee believed that trial judges already have implicit authority to order a discovering party to share in the cost of discovery in appropriate circumstances. But the committee wanted to make the authority explicit.

Judge Scirica added that one member of the Conference had made a very thoughtful speech arguing that, while he understood well what the committee was trying to accomplish, the cost-bearing provision would send a wrong signal to the bar and could undermine the credibility of the whole package of civil rule amendments. He added that the cost-bearing provision would offer a target for critics to complain that the amendments would prejudice litigants with limited means. Therefore, Judge Scirica said, the proposed amendment was rejected.

Judge Scirica said that the proposed 7-hour, one-day presumptive limit on depositions, proposed in FED. R. Civ. P. 30(d)(2), was approved by the Conference.

Judge Scirica reported that Judge Smith addressed the Conference in support of the proposed amendments to FED. R. EVID. 702, governing expert testimony. One member of the Conference expressed skepticism about the advisability of codifying an area of the law that he believed to be elaborated adequately in Supreme Court decisions. The member also suggested that the amendment might take away flexibility from trial judges, but Judges Scirica and Niemeyer disagreed with him on this point.

A few weeks after the Conference meeting, it was discovered that one portion of the proposed amendments to FED. R. CIV. P. 26(b)(2) — that of eliminating the authority of a court to limit the number of interrogatories — had, through inadvertence, not formally been approved by the Conference. Therefore, a mail vote was taken after the Conference meeting, and the proposed amendment was approved by a mail vote.

Observations on Judicial Conference Procedures

Judge Scirica emphasized that it was very important for the rules committees to focus specifically on securing the approval of the Judicial Conference for proposed amendments to the rules. He offered two observations on recent Conference actions regarding rules proposals. First, he said, it was essential to present proposed rules amendments to the Conference in a severable manner. A single controversial provision contained in a set of non-severable amendments risks rejection or deferral of the entire package.

Second, he observed, Conference members are influenced by two competing considerations. On the one hand, they appreciate the great time and care that the rules committees take in preparing amendments — such as soliciting public comments, conducting hearings, and subjecting the work of the advisory committees to a second, independent review. As a result of these thorough procedures, Conference members accord substantial deference to the work of the rules committees.

On the other hand, however, Conference members believe that the number and frequency of amendments to the federal rules should be limited. Although they recognize that there are a number of ambiguities and problems in the existing rules, the bar has learned to live with them, and the courts resolve problems through case law. Therefore, Conference members are of the view that amendments should generally be restricted to those matters that cause actual, serious problems in federal practice. In this regard, Judge Scirica pointed out that members of the Conference — particularly the trial judges — were very familiar with the discovery and disclosure provisions of the civil rules and very understanding of the committee's efforts to amend the rules.

Judge Niemeyer added that the focus of the efforts of the advisory committees has generally been on obtaining the approval of the Standing Committee. To that end, the advisory committees prepare detailed memoranda for the Standing Committee, have their chair and reporter explain each individual proposal orally, respond to questions at Standing Committee meetings, and make changes in the proposed rules and committee notes to accommodate concerns of the Standing Committee.

Under Judicial Conference operating procedures, however, members do not normally have access to the detailed written explanations and records prepared by the advisory committees. And they do not normally have the opportunity to engage in extended oral dialogue with advisory committee representatives. Judge Niemeyer said that it takes time to

explain rules changes fully and to respond to concerns of the members. Fortunately, he added, the Chief Justice had been particularly generous at the September 1999 Conference meeting in allowing a good deal of time to present and defend the proposed changes in the civil and evidence rules.

Several participants pointed to a growing, recent tendency for opponents of proposed rule amendments to make direct contact with members of the Judicial Conference or the Supreme Court in an effort to defeat or defer proposed amendments. They said that it is very difficult for the advisory committees to respond quickly or fully to these last-minute objections. Indeed, in many cases the rules committees may not even be aware of the contacts made with members of the Conference or the Court.

Judge Scirica added that he has followed the precedent established by Judge Stotler of sending a cover letter each year to the Supreme Court explaining the proposed changes in the rules. The letter invites the justices to contact him or the chairs of the advisory committees regarding any questions they may have on pending proposals. He added, however, that the justices have not in fact asked for additional explanations.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on June 14-15, 1999.

REPORT OF THE ADMINISTRATIVE OFFICE

Legislative Report

Mr. Rabiej reported that the Administrative Office was monitoring 30 bills pending in Congress that would affect the rules or the rules process. Several of the bills would amend the federal rules directly.

He stated that one bill would amend FED. R. CIV. P. 30(b) and overturn the 1993 amendments that provide flexibility to litigants in the method of recording depositions. He noted that the Congress had been advised several times of the Judicial Conference's objection to the bill.

Mr. Rabiej noted a bill dealing with multi-district, multi-party cases. One part of it would supersede the Supreme Court's decision in *Lexecon v. Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26 (1998), and explicitly authorize a transferee judge in a multi-district litigation panel case to retain cases for trial. The second part of the bill would provide federal jurisdiction over certain single-event mass tort cases. He said that there was general

agreement as to the transferee judge provision, but that the legislation dealing with single-event mass torts was controversial.

Mr. Rabiej reported that a bill had passed the House that would greatly expand federal jurisdiction over class actions. He noted that the Administration was opposed to the legislation, and it had not received a margin of approval in the House sufficient to override a veto. The Judicial Conference, he said, opposed the legislation on the grounds of both federalism and increased workload.

Mr. Rabiej reported that two bills had been introduced in the Senate addressing attorney conduct in the wake of the recent "McDade" legislation, which makes attorneys subject to the discipline rules of the individual states and local federal court rules. One bill, introduced by Senator Hatch, would exempt federal government attorneys from certain state conduct rules. Another, introduced by Senator Leahy, would require the Judicial Conference to make recommendations to the Congress on attorney conduct rules in the federal courts.

Finally, Mr. Rabiej noted that the pending omnibus bankruptcy reform legislation, if enacted, would require major implementation efforts by the Advisory Committee on Bankruptcy Rules. First, a number of provisions in the pending legislation would require specific Judicial Conference action with regard to specific bankruptcy rules and forms. In addition, the breadth of the various substantive changes in the legislation would require the advisory committee to draft many amendments to the rules and create new rules forms to implement the changes.

REPORT OF THE FEDERAL JUDICIAL CENTER

Ms. Leary referred members to the list of pending Federal Judicial Center projects set out as Agenda Item 4. She pointed to a few of the projects that she said would be of particular interest to the rules committees, including preparation of a civil litigation management manual, a study on the use of special masters in the district courts, a template for a deskbook for chief circuit judges, a conference for chief circuit judges and circuit executives on administration, and a guide for judges in handling capital cases. She also noted that the History Office of the Center was about to place on the Internet its comprehensive biographical data base of all federal judges serving since 1789.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Garwood and Professor Schiltz presented the report of the advisory committee, as set forth in Judge Garwood's memorandum and attachments of December 3, 1999. (Agenda Item 5) He said that the advisory committee was seeking authority to publish 21 proposed amendments to 12 rules and one proposed new form.

Judge Garwood pointed out that the Federal Rules of Appellate Procedure had been completely restyled, effective December 1, 1998. He said that the advisory committee had advised the Standing Committee that it would not proceed with any further amendments to the rules until the bar had been given a chance to become familiar with the restyled rules. He added that the proposed amendments being presented at this time had been approved at various meetings of the advisory committee over the past couple of years and then considered anew at the committee's October 1999 meeting.

Judge Garwood added that the advisory committee had considered a proposal to have all local rules take effect on December 1 of each year. But, he said, the proposal apparently conflicts with the Rules Enabling Act, which authorizes the courts to prescribe the date that their local rules will take effect. Accordingly, the proposal has been held in abeyance.

FED. R. APP. P. 1(b)

Professor Schiltz said that the advisory committee recommended deletion of Rule 1(b), which states that the Federal Rules of Appellate Procedure do not extend or limit the jurisdiction of the courts of appeals. This, he said, is no longer true because legislation in 1990 gave the Supreme Court authority to use the rules to define the finality of district court rulings for purposes of 28 U.S.C. § 1291. Additional legislation in 1992 gave the Court authority to authorize interlocutory appeals beyond those already defined in 28 U.S.C. § 1292.

He said that any rules promulgated under these authorities will in fact affect the jurisdiction of the courts of appeals. Therefore, Rule 1(b) is obsolete and needs to be abrogated.

The committee approved the proposed amendment for publication without objection.

FED. R. APP. P. 4(a)(1)

Professor Schiltz stated that the proposed addition to Rule 4(a)(1) dealt with appeals from orders granting or denying an application for a writ of error *coram nobis*. He explained that it would apply when a petitioner has completed his or her prison sentence but is still under some sort of official restraint. He pointed out that there was a split among the circuits as to whether an appeal in such a case is governed by the time limits applicable in civil cases (Rule 4(a)), or by the shorter limits applicable in criminal cases (Rule 4(b)). The advisory committee, he said, saw no reason to require expedited treatment of these cases. Thus, it decided to treat them as civil cases for purposes of Rule 4(a).

Professor Schiltz also pointed out that there was some question as to whether writs of error *coram nobis* still exist. He said that the committee note emphasizes that the advisory committee takes no position on this substantive issue.

The committee approved the proposed amendment for publication without objection.

FED. R. APP. P. 4(a)(5)(ii)

Professor Schiltz said that Rule 4(a)(5)(ii) was being amended because most of the circuits have been following an inconsistent committee note, rather than the language of the rule itself. The rule permits a district court to extend the time to file a notice of appeal if: (1) the party seeking the extension files its motion no later than 30 days after expiration of the original 30 days specified in Rule 4(a); or (2) the party shows either excusable neglect or good cause. Only the First Circuit, he said, follows the rule as written. The other circuits hold that the good cause standard applies only to motions brought before expiration of the original 30 days, while the excusable neglect standard applies only to motions brought after the 30 days.

Professor Schiltz said that the advisory committee would amend the rule to make it clear that either standard — excusable neglect or good cause — may be applied to all extension motions, whether they are filed before or after the original 30 days period. He added that this change would also bring the provision for appeals in civil cases into harmony with the provision governing appeals in criminal cases.

The committee approved the proposed amendment for publication without objection.

FED. R. APP. P. 4(a)(7)

Professor Schiltz reported that proposed amendments to Rule 4(a)(7), dealing with entry of judgment for purpose of appeal, addressed four separate splits among the courts of appeals in interpreting the current rule.

He explained that the basic principle — set forth in FED. R. CIV. P. 54(a) and 58 — is that a judgment that concludes a civil case must be entered on a separate piece of paper, and it is not effective until so entered. This, he explained, is, in essence, a notice provision that lets the parties know that the time for filing a motion or notice of appeal has begun to run. But, he added, the civil rules define "judgment" very broadly to include any order from which an appeal lies. Thus, the question arises as to whether the order granting or denying a post-trial motion must itself be set forth on a separate piece of paper.

The first split among the circuits relates to whether FED. R. APP. P. 4(a)(7) merely incorporates the separate document requirement of the civil rules or imposes its own, independent separate-document requirement. The advisory committee's proposed amendment would make it clear that the requirement for a separate document will be

governed exclusively by the civil rules. Accordingly, judgments and orders need be set forth on separate pieces of paper only when required by FED. R. CIV. P. 54(a) and 58.

As to the second split of opinion, the current rule appears to provide that if a judgment is not entered on a separate document, the parties have no time limit for taking an appeal. This raises a serious practical problem because in many cases a separate document is not in fact entered by the clerk. Thus, there is no cut-off time for filing an appeal. As a result, for example, prisoner cases and other cases that have been disposed of by the district courts without a separate judgment document are still potentially active.

Professor Schiltz noted that the First Circuit has dealt with this particular problem by providing that the parties are deemed to have waived their right to a separate judgment document after three months. He said that the advisory committee liked this approach and had adopted it with modification. Accordingly, the proposed amendment provides that if the clerk does not enter a judgment on a separate document, the rule will deem a separate document to have been entered 150 days after a judgment or order has been entered in the civil docket. This, he explained, effectively gives the parties an outside limit of six months in which to take an appeal, *i.e.,* 150 days plus the original 30 days.

Professor Schiltz noted that the third split among the circuits deals with whether the appellant may waive the separate document requirement, even if the appellee objects. In other words, can the appellee force the appellant to go back to the district court and obtain a separate piece of paper in order to take an appeal? The advisory committee's proposed amendment would codify the Supreme Court's decision in *Bankers Trust Co. v. Mallis,* 435 U.S. 381 (1978), and make it clear that the decision to waive entry of a judgment or order on a separate piece of paper belongs to the appellant alone.

The fourth circuit split is over whether an appellant who waives the requirement of a separate document must appeal within 30 days after entry of the judgment that should have been set forth in a separate document, but was not. Professor Schiltz pointed out that the advisory committee's proposed amendment adopts the view that there is no time limit.

One of the members suggested that the committee note should address specifically the issue of whether the amendment will have retroactive effect. Other members suggested that a transition rule should be considered.

Judge Niemeyer said that the proposed amendments could have broad ramifications. He said that key issues flow from the definition of a judgment — such as when a judgment can be enforced and when it can be appealed. He argued that there is an important linkage between these two purposes. But, he said, the proposed amendments deal only with judgments for purposes of appeal, and not with the validity of judgments for other purposes. As a result, the rule could lead to unintended consequences, since court orders would be

considered judgments for some purposes, but not others. He said that it would be best if these issues were addressed through the civil rules.

Judge Garwood and Professor Schiltz responded that the proposed amendments did not attempt to address the problems of enforcement. These problems, they said, exist already. The rule would provide that after 150 days a separate piece of paper is deemed to have been filed. It is only a timing rule, nothing else.

One of the members pointed out that if a separate piece of paper has not been entered following a trial judge's decision on a matter, the judge may not in fact have wanted to make a final disposition of a case. The judge's action may be ambiguous. He argued that the appellant should be required to return to the district court, to ask the trial judge to make his or her intent clear, and to seek a separate judgment document.

Another member added that the separate document requirement of FED. R. CIV. P. 58 is a sound procedural requirement. The problem, he said, is that the rule is often ignored in practice by lawyers and judges. Therefore, the proposed 150-day rule is a good, practical idea. But, he added, a great many potential complications may arise. Moreover, there are no perfect answers to all the problems that can be foreseen. In essence, he said, the judgment provisions in the civil rules were designed for civil rules purposes. They simply do not interface cleanly with the appellate rules. Accordingly, the Advisory Committee on Civil Rules should take a close look at the problems raised by judgments in civil cases.

Another member pointed out that the proposed amendment to FED. R. APP. P. 4(a)(7) attempts to address finality of a judgment for purposes of filing a notice of appeal. But there are other consequences in the trial court, particularly with regard to post-trial motions. He said that the particular problems that the proposed amendment attempts to address may not be sufficiently urgent or compelling to justify going forward with changes at this point. Moreover, he added, the committee should not publish a rule that solves some problems, but not others. Therefore, he suggested that further study be undertaken to sort out the complex interfaces between the civil and appellate rules.

Judge Scirica asked whether the Advisory Committee on Civil Rules would be amenable to studying FED. R. CIV. P. 58 in light of the foregoing discussions. Judge Niemeyer replied that the advisory committee would be pleased to study the issues and work closely on the matter with the Advisory Committee on Appellate Rules. Yet he questioned whether the civil advisory committee could come to an appropriate resolution of the issues by the time of its April 2000 meeting.

Another member suggested that the Advisory Committee on Civil Rules attempt to identify the various problems raised by the interface of the two sets of rules, either before or after publication of the proposed amendments to FED. R. APP. P. 4(a)(7). Another member recommended that the proposed amendments be published, but that the two advisory

committees begin working together immediately on the problems and perhaps resolve them by the next meeting of the Standing Committee.

Professor Schiltz responded that the issues were so complex that it could take years to resolve all the possible anomalies. In the meantime, he recommended that the proposed amendments be published, for they would resolve real, immediate problems. He emphasized that there were thousands of cases still pending in the district courts that should be closed.

Judge Scirica suggested that the Standing Committee defer taking a vote on Rule 4(a)(7) until after the luncheon intermission, during which he would confer on the matter with Judge Garwood and Judge Niemeyer.

Following the luncheon intermission, Judge Scirica announced that Judge Garwood had agreed to save the amendments to Rule 4((a)(7) for additional discussion at the June 2000 meeting of the Standing Committee.

Judge Scirica pointed out that the proposed amendments would not be published in any event until August 2000. Therefore, there was time for the Advisory Committee on Civil Rules to address the pertinent judgment issues at its April 2000 meeting and report back at the June 2000 Standing Committee meeting. He also suggested that the Standing Committee might appoint an ad hoc subcommittee to consider, as a possible long range project, some of the interfaces among the various sets of federal rules.

FED. R. APP. P. 4(b)(5)

Professor Schiltz pointed out that FED. R. CRIM. P. 35 provides that in a criminal case a court may correct a sentence for mathematical or technical errors, but only if it acts within seven days after imposition of the sentence. He said that all the circuits agree that the district court lacks jurisdiction to correct a sentence after the seventh day has passed.

He added, though, that the circuits disagree as to whether the filing of a motion under FED. R. CRIM. P. 35(c) to correct a sentence tolls the time to appeal the underlying judgment of conviction. FED. R. APP. P. 4(b)(3)(a) specifically lists the motions that toll the time for appeal, but it makes no mention of FED. R. CRIM. P. 35(c)

The proposed amendment would state clearly that a motion to correct a sentence under FED. R. CRIM. P. 35(c) does *not* toll the time for filing a notice of appeal.

The committee approved the proposed amendment for publication without objection.

FED. R. APP. P. 5(c)

Professor Schiltz stated that the proposed amendment to Rule 5(c) would correct a typographical error, occurring during the 1998 restyling of the Federal Rules of Appellate Procedure, that inadvertently narrowed the requirements for the form of a petition for permission to appeal and the answer to a petition or cross-petition for permission to appeal. The cross-reference to Rule 32(a)(1) would be changed to Rule 32(c)(2).

The committee approved the proposed amendment for publication without objection.

FED. R. APP. P. 15(f)

Professor Schiltz reported that the proposed amendment to Rule 15(f) was designed to treat premature petitions seeking review of agency decisions in the same manner as premature petitions appealing trial court decisions. He explained that the filing of post-judgment motions under Rule 4(a)(4)(A) tolls the time to appeal until the court disposes of them. If a notice of appeal is filed while a post-trial motion is pending, the notice is held in abeyance until the court grants or denies the last such remaining motion.

In the context of a review or enforcement of an agency order, however, a notice of appeal filed while there are post-decision proceedings pending in the agency is considered a nullity. The proposed amendment would hold the notice of appeal in abeyance until the agency disposes of the last petition for rehearing, reopening, or reconsideration.

Judge Garwood pointed out that the rule does not specify when, or whether, an agency decision is final or appealable. It simply provides that if a notice of appeal is filed, it is allowed, but held in abeyance.

The committee approved the proposed amendment for publication without objection.

FED. R. APP. P. 24(a)

Professor Schiltz explained that the two proposed amendments to Rule 24(a) would resolve conflicts between the current rule and the Prison Litigation Reform Act.

Rule 24(a)(2) specifies that a litigant need not prepay the filing fee. The Act, however, requires a prisoner to pay filing fees, at least in installments. The proposed amendment would provide that a party may proceed on appeal without prepaying fees, "unless the law requires otherwise."

Rule 24(a)(3) states that permission to proceed *in forma pauperis,* if granted by the district court, continues in the court of appeals without the need for further authorization. The Act, however, provides that a prisoner must seek permission to continue to proceed *in forma pauperis* in the court of appeals. The proposed amendment would allow a party to proceed *in forma pauperis,* "unless the law requires otherwise."

The committee approved the proposed amendment for publication without objection.

FED. R. APP. P. 26(a)(2)

Related Amendments
FED. R. APP. P. 4(a)(4)(A)(vi)
FED. R. APP. P. 27(a)(3)(A)
FED. R. APP. P.27(a)(4)
FED. R. APP. P.41(b)

Professor Schiltz presented a package of amendments dealing with time computation. He explained that the amendments were designed to eliminate a discrepancy between the rules of appellate procedure, on the one hand, and the rules of civil and criminal procedure, on the other.

FED. R. APP. P. 26(a)(2) provides that Saturdays, Sundays, and legal holidays are excluded in computing any period of time specified in the rules that is less than 7 days. The civil rules and criminal rules, however, provide that Saturdays, Sundays, and legal holidays are excluded when the time prescribed or allowed in the rules is less than 11 days.

The proposed amendment would align the appellate rules with the civil and criminal rules and prescribe a period of 11 days. Thus, all 7-day and 10-day deadlines in the Federal Rules of Appellate Procedure would be lengthened as a practical matter. The advisory committee had no concern with this outcome, except in the case of three rules.

First, 27(a)(3)(A) currently give parties 10 days to file a response to a motion. With the proposed change in Rule 26(a)(2), parties in the future would have 14 days to respond, since Saturdays, Sundays, and legal holidays would no longer be excluded. The advisory committee decided that 14 days is too long a period to allow for filing a response to a motion. Accordingly, it would amend Rule 27(a)(3)(A) to reduce the period prescribed in the rule from 10 days to 7 days.

Second, Rule 27(a)(4) currently gives parties 7 days to reply to a response to a motion. Thus, under amended Rule 26(a)(2), they would have at least 9 days to reply. The advisory committee would amend Rule 27(a)(4) to reduce the time from 7 days to 5 days.

Third, Rule 41(b) states that a court's mandate must issue 7 days after the time to file a petition for rehearing expires or 7 days after the court denies a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The advisory committee believes that the 7-day period should remain in effect. Therefore, the proposed amendment would substitute the term "7 calendar days" for "7 days."

Finally, the advisory committee would amend Rule 4(a)(4)(A)(vi) to delete a parenthetical that refers to computing a 10-day period by using the Federal Rules of Civil Procedure. The parenthetical would become superfluous in light of the proposed amendment to FED. R. APP. P. 26(a)(2).

The committee approved the package of proposed amendments on time computation for publication without objection.

FED. R. APP. P. 27(d)(1)(B)

Related Amendments
FED. R. APP. P. 32(a)(2)
FED. R. APP. P. 32(c)(2)(a)

Professor Schiltz reported that the proposed amendments to Rules 27 and 32 would prescribe the color of the cover of certain documents. The current Rule 32 requires that covers of a specified color must be used on briefs and separately bound appendices. The rule, though, does not require covers for other kinds of documents.

The proposed amendment to Rule 32(a)(2) would require that the cover of a supplemental brief be tan. A cover is not required for motions or other papers. The proposed amendments to Rule 27(d)(1)(B) and 32(c)(2)(A) would provide that if a cover is in fact used, it must be white.

The committee approved these proposed amendments for publication without objection.

FED. R. APP. P. 28(j)

Professor Schiltz pointed out that Rule 28(j) allows a party to notify the court by letter of pertinent and significant authorities that come to its attention after its brief has been filed. The letter, however, must provide reasons "without argument." He explained that parties commonly include arguments in their letters, and the distinction between statements and arguments is nearly impossible for clerks' offices to enforce.

Professor Schiltz said that the proposed amendment would delete the prohibition on argument, but it would limit the body of the letter to a maximum of 250 words. The committee note explains that all words found in footnotes count toward the 250 word limit.

The committee approved the proposed amendment for publication without objection.

FED. R. APP. P. 31(b)

Professor Schiltz said that the current Rule 31(b) inadvertently implies that parties who are not represented by counsel need not be served with briefs. The proposed amendment would correct that mistake and require service on unrepresented parties.

The committee approved the proposed amendment for publication without objection.

FED. R. APP. P. 32(a)(7)(C) and FORM 6

Professor Schiltz reported that the proposed new form was a suggested certificate of compliance with the type-volume limitation, typeface requirements, and type style requirements of Rule 32(a)(7). The proposed amendment to Rule 32(a)(7) would provide that parties are not required to use the new form, but if they do use Form 6, the court must accept it.

The committee approved the proposed amendment for publication without objection.

FED. R. APP. P. 32(d)

Professor Schiltz stated that the proposed amendment to Rule 32(d) would add a requirement that papers filed with the court be signed. He explained that the rule was much simpler than FED. R. CIV. P. 11. The advisory committee did not see the need to incorporate into the rule the good faith requirements of the civil rule because the courts of appeals already have authority to sanction attorneys and parties who file papers that contain misleading or frivolous assertions.

The committee approved the proposed amendment for publication without objection.

FED. R. APP. P. 44

Professor Schiltz noted that 28 U.S.C. § 2403(a) provides that when the constitutionality of a federal statute is challenged and the United States is not a party, the court must

notify the Attorney General of the challenge. Under 28 U.S.C. § 2403(b), the court must notify the attorney general of a state when the constitutionality of a state statute is challenged.

Professor Schiltz pointed out that FED. R. APP. P. 44 implements § 2403(a), but not § 2404(b). The advisory committee, accordingly, would add a new Rule 44(b) requiring notice to state attorneys general.

The committee approved the proposed amendment for publication without objection.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Duplantier and Professor Morris presented the report of the advisory committee, as set forth in Judge Duplantier's memorandum and attachments of December 3, 1999. (Agenda Item 6)

Judge Duplantier introduced the advisory committee's new reporter, Professor Jeffrey W. Morris of Dayton University Law School. He pointed out that Professor Alan N. Resnick, after 12 years of service, had relinquished the post of reporter and had been appointed by the Chief Justice as a member of the committee.

Judge Duplantier reported that the advisory committee had no matters to present for action. He noted that the committee had published amendments to eight bankruptcy rules and would consider the public comments at its March 2000 meeting. He added that, to date, the committee had received very few comments and had canceled the scheduled public hearing.

Professor Morris reported that the advisory committee was working with the Advisory Committee on Appellate Rules to devise a procedure for notifying parties in a bankruptcy case that there has been a compromise or settlement of a bankruptcy appeal. He explained that the bankruptcy rules require that the bankruptcy clerk, or some other person as the court may direct, give notice of a compromise or settlement to all creditors. This is sound policy because a compromise or settlement may have an impact on creditors and all other parties in interest. The requirements of the bankruptcy rules, however, may not be heeded when compromises or settlements are reached at the appellate level.

Professor Morris said that the advisory committee was generally of the view that settlements at the appellate level should be handled in the same manner as settlements at the bankruptcy court level. He suggested that a simple reference in the appellate rules to the pertinent bankruptcy rules would probably take care of the problem.

Pending Omnibus Bankruptcy Legislation

Professor Morris reported that the House of Representatives had passed omnibus bankruptcy reform legislation. He said that the breadth of the legislation was substantial, noting that the House bill was 151 pages long. He added that the Senate bill, which was almost as long, had been reported out of committee and was being subjected to a number of floor amendments. He said that a cloture vote was expected in the Senate by the end of January 2000.

Professor Morris pointed out that there were several provisions in the legislation that would direct, in one form or another, the advisory committee, the Judicial Conference, or the Supreme Court on a rules matter. He noted, for example, that both the House and Senate bills proclaim a sense of Congress that FED. R. BANKR. P. 9011 should be amended to bring within its reach the information set forth in the debtor's schedules and statements. He pointed out that another provision, contained in the Senate bill, would authorize the Supreme Court to promulgate a rule establishing a fee schedule for bankruptcy petition preparers.

Professor Morris said that the bills contain significant proposals regarding small business Chapter 11 cases that will require rules changes. The legislation moreover, explicitly requires the advisory committee to approve forms for these cases.

He noted that the pending bills direct the committee to include specific rules dealing with providing notice to governmental units. He pointed out that these proposed statutory provisions reflect the input given to the Congress by affected governmental units. He added, however, that in September 1999 the Judicial Conference had approved proposed amendments to FED. R. BANKR. P. 5003 that would provide better notice to governmental units while imposing less burdensome obligations on the bankruptcy clerks. If approved by the Supreme Court, the amendments would take effect on December 1, 2000.

Professor Morris pointed out that the many substantive changes in the legislation will require the advisory committee to propose new rules and forms. He mentioned, for example, that the bills would impose means-testing requirements for debtors, require them to attend credit counseling and financial management programs, make changes in the way support claims for children and spouses and treated, and create new claims priorities.

Financial Disclosure

Judge Duplantier reported that the advisory committee had considered the reference from the Standing Committee of a proposal to adopt a uniform rule requiring disclosure of financial interests patterned on FED. R. APP. P. 26.1. He said that the advisory committee had concluded that a uniform rule would indeed be appropriate and would operate well in adversary proceedings. But, he added, apart from the context of discrete litigation between disputing parties, it may be difficult to administer a financial disclosure rule in bankruptcy

cases generally because of the volume of creditors in many bankruptcy cases and the difficulty of identifying all pertinent relationships.

Judge Duplantier said that it was his own personal view that financial disclosure was not really a matter for the rules committees at all. He argued that it was an issue of judicial disqualification, not a rule of procedure. Accordingly, it could be handled more effectively by a Judicial Conference resolution and the issuance of an Administrative Office form that parties would be required to file upon entry in a case. He said that this administrative approach could be effectuated very quickly, without waiting the three years or so that it takes for the Rules Enabling Act process to be completed. He added that there was precedent for this approach, since parties are presently required to identify to the court any related litigation or cases in which they are involved.

Judge Scirica agreed that the matter was not strictly a rule of procedure, but he noted that there were significant political considerations to take into account. He said that the matter would be discussed in greater detail later in the meeting, with Judge Amon, chair of the Codes of Conduct Committee, participating by telephone.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Niemeyer and Professor Cooper presented the report of the advisory committee, as set forth in Judge Niemeyer's memorandum and attachments of December 8, 1999. (Agenda Item 7)

Judge Niemeyer reported that the advisory committee's package of amendments to the discovery rules had been approved by the Judicial Conference and transmitted to the Supreme Court.

He noted that the Chief Justice had not acted on the recommendation for appointment of an ad hoc committee to address mass torts. Therefore, the advisory committee will itself take another look at FED. R. CIV. P. 23 to determine whether any further amendments to the class action rule are advisable. Judge Lee Rosenthal would chair an ad hoc subcommittee in this endeavor. The advisory committee would also coordinate its efforts with other committees of the Judicial Conference.

Judge Niemeyer reported that the advisory committee had embarked on a long-term project to develop a special set of simplified rules of procedure that would permit parties in certain cases to have their disputes heard and resolved quickly and cheaply. He added that Professor Cooper had prepared a first draft of such rules for discussion and that Sheila Birnbaum would chair an ad hoc subcommittee to consider them.

Professor Cooper reported that the standing committee at its June 1999 meeting had approved the advisory committee's proposed amendment to FED. R. CIV. P. 5 prohibiting the filing of initial disclosures and discovery materials until they are used in a proceeding (or the court orders otherwise). At the same time, the Standing Committee asked the advisory committee to report back regarding the impact of the amended rule on: (1) defamation privileges under state law; and (2) public access to discovery materials.

Professor Cooper noted that discovery materials are not presently filed in most district courts, even though local rules that bar filing may be invalid. He added that the advisory committee's research had shown that there have been no practical problems and no case law regarding privileges. In particular, there is no indication that privileges have been affected by the fact that materials are filed with the court or not. The advisory committee, thus, concluded that there was no need to consider privilege questions further and no need to change the pending amendment to Rule 5(b).

With regard to public access, the advisory committee had focused its attention on protective orders, but it also explored issues relating to preserving discovery materials and providing access to them. The committee found that there was no indication that public-access problems existed in the districts that currently bar the filing of discovery materials. Accordingly, it concluded that there was no reason to explore these issues further or to amend the national rules to address them.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Davis and Professor Schlueter presented the report of the advisory committee, as set forth in Judge Davis's memorandum and attachments of December 2, 1999. (Agenda Item 8)

Judge Scirica reported, by way of background, that the Standing Committee had been involved since 1991 in a comprehensive project, initiated by Judge Keeton, to clarify and improve the federal rules as a whole. As a result, the Federal Rules of Appellate Procedure were totally restyled effective December 1, 1998. The criminal rules, he said, were next in line for restyling, and a package of restyled rules would be published for public comment in August 2000. No plans, however, had been made for addressing the other sets of rules.

Judge Scirica pointed out that the thrust of the restyling efforts was to improve the language and organization of the rules without making substantive changes. Nevertheless, as part of the review process, the advisory committees inevitably discover ambiguities, anomalies, anachronisms, and mistakes in the rules that require them to recommend changes that are more than purely stylistic. Moreover, the committees, as part of their normal processes, identify substantive changes that should be pursued.

Judge Scirica said that the Advisory Committee on Criminal Rules had accomplished a great deal and had produced an excellent product. He said that it was important to consider the appropriate manner in which to present the proposed changes to the public, since most will be stylistic, but some will be substantive and potentially controversial. He added that the advisory committee had clearly identified and labeled all potentially substantive changes.

Judge Davis reported that the advisory committee was presenting restyled versions of Rules 1-31 to the Standing Committee at the present meeting for approval to publish. Rules 32-60 would be presented for publication at the June 2000 Standing Committee meeting. The entire body of restyled criminal rules would then be published for public comment in August 2000.

Judge Davis explained the process that the advisory committee had followed in restyling the rules. First, he said, the Standing Committee's style committee and style consultant reviewed and rewrote all 60 rules, presenting them to the advisory committee for review in December 1998. The advisory committee then divided itself into two subcommittees, each of which carefully reviewed and edited half the rules, making further changes and improvements. The Department of Justice's representative obtained input from career prosecutors in the Department, and the magistrate judge member of the advisory committee consulted with about 40 magistrate judges during the restyling process. The full advisory committee independently then reviewed all the recommendations of the two subcommittees.

Judge Davis thanked Judge James A. Parker, chairman of the standing committee's style subcommittee. He pointed out that Judge Parker had attended the meetings of the advisory committee, in person or by telephone, and had worked very hard on the restyling of the rules. He also thanked the other members of the style subcommittee, Judge William R. Wilson, Jr., Professor Hazard, and Mr. Spaniol.

Judge Davis pointed out that the advisory committee had focused on a number of key points.

First, it agreed upon standard, uniform terms and phrases, generally following the *Guidelines for Drafting and Editing Court Rules.*

Second, it attempted to avoid any unforseen substantive changes, and it identified clearly in the committee notes any changes that might be considered substantive.

Third, it deleted provisions that were no longer necessary.

Fourth, it reorganized several some of the rules to make them easier to read and apply, and it moved some sections of rules to other locations.

Fifth, it made major substantive changes in a few rules.

In addition to its action on the restyling project, the advisory committee had approved a number of substantive changes over the course of its last several meetings, but held them back in anticipation of including them for publication in the package of restyled rules.

Judge Davis and Professor Schlueter proceeded to described the proposed changes in each of the first 31 rules.

FED. R. CRIM. P. 1

Professor Schlueter pointed out that the current Rule 1 (Scope and Definitions) is only eight lines long and includes a cross reference to Rule 54, which also contains definitions. The advisory committee decided to combine and reorganize Rules 1 and 54. In the process, it deleted a number of provisions in the current rules because they have been superseded or are no longer needed.

He reported that the advisory committee had spent a good deal of time examining the use of the terms "court," "judge," and "magistrate judge." The terms "court" and "judge" in the current rules are confusing, and they are often used interchangeably. The term "magistrate judge," as currently defined in Rule 54, includes not only a United States magistrate judge, but also a district judge, court of appeals judge, Supreme Court justice, and state and local officers who may be authorized to act in a particular case.

As restyled, Rule 1 would define a "magistrate judge" as a United States magistrate judge only. State and local judicial officers are not included in the revised definition. New Rule 1(c) would provide that when the rules authorize a magistrate judge to act, any Article III judge may also act.

The committee approved the proposed revised rule for publication without objection.

FED. R. CRIM. P. 2

Professor Schlueter noted that the title of Rule 2 (Purpose and Construction) was being changed to "Interpretation." He said that the proposed changes in the text of the rule were minor and purely stylistic.

The committee approved the proposed revised rule for publication without objection.

FED. R. CRIM. P. 3

Professor Schlueter pointed out that Rule 3 (Complaint) was the first of several rules dealing with initial proceedings for persons charged with an offense. He said that the restyled rules reflect actual practice by stating a preference for proceeding before a federal judge. Law enforcement authorities, thus, could proceed before a state or local judicial officer if a federal judicial officer were not reasonably available.

The committee approved the proposed revised rule for publication without objection.

FED. R. CRIM. P. 4

Professor Schlueter said that the current Rule 4 (Arrest Warrant or Summons Upon Complaint) provides that if the defendant fails to appear in response to a summons, the court must issue a warrant. The revised rule would provide that a judge in such circumstances may — and upon request of the government must — issue a warrant.

The revised rule would delete the provision in current Rule 4(b) that a finding of probable cause may be based on hearsay evidence. The provision is not needed because the matter is covered in the Federal Rules of Evidence.

The current Rule 4(b)(3) provides that the arresting officer is required to inform the defendant of the offense charged and that a warrant exists only if the officer does not have a copy of the warrant. The revised rule would require the arresting officer in all instances to inform the defendant of the offense charged and of the fact that an arrest warrant exists.

Professor Schlueter reported that Rule 9(c)(1), which specifies the manner of serving a summons on an organization, had been revised and relocated to new Rule 4(c)((3)(C). As amended, the rule would provide that in all cases in which a summons is being served on an organization, a copy of the summons must be mailed to the organization.

A change would also be made in new Rule 4(c)(4). Under the current rule, an unexecuted warrant must be returned to the judicial officer who issued it. Under the amended rule, at the government's request, an unexecuted warrant may be returned and canceled by any magistrate judge.

The committee approved the proposed revised rule for publication without objection.

FED. R. CRIM. P. 5

Professor Schlueter pointed out that the revised Rule 5 (Initial Appearance) expresses a preference for proceeding before a federal judicial officer. Rule 5(a)(1) would require the person making the arrest to bring the defendant "promptly" before a magistrate judge, rather than the "nearest available magistrate judge."

Judge Davis reported that the advisory committee had long been considering a number of proposals to allow video conferencing of initial appearances, many of them requested by judges in courts along the Mexican border. He said that the committee had voted to permit video conferencing of initial appearances if the defendant waives the right to be present in open court. The change is reflected in proposed new Rule 5(d), which gives the court discretion to use, or not to use, video conferencing. He explained that the advisory committee had been persuaded that there was a real need for the provision and that the technology had reached the point where it was reliable. He added that there had been some sentiment on the advisory committee to dispense with the need for the defendant's consent, but the committee decided to proceed cautiously in the matter.

The committee approved the proposed revised rule for publication without objection.

FED. R. CRIM. P. 5.1

Professor Schlueter pointed out that Rule 5.1 currently provides that a magistrate judge may continue a preliminary hearing only with the consent of the defendant. If the defendant does not consent, only a district judge may grant a continuance. This provision, he said, reiterates the limitation on magistrate judge authority set forth in 18 U.S.C. § 3060(c).

Professor Schlueter explained that the advisory committee had recommended a change in the underlying statute upon which the rule is based. But the Standing Committee rejected that approach. Instead, it recommitted the matter to the advisory committee with the suggestion that it amend Rule 5.1 and rely on the supersession clause of the Rules Enabling Act to override the statute.

The advisory committee then considered the matter anew and decided that it was not worth pursuing a change in the rule. The Standing Committee agreed, but the Executive Committee of the Judicial Conference asked the rules committees to proceed with the proposed change in the rule.

Thus, the revised Rule 5.1(c) would allow a magistrate judge to grant a continuance of a preliminary hearing. This will create a conflict with the statute and invoke the supersession clause of the Rules Enabling Act. Nevertheless, the subject matter of the proposal is not at all controversial.

The committee approved the proposed revised rule for publication without objection.

FED. R. CRIM. P. 6

Professor Schlueter said that the proposed changes to Rule 6 (Grand Jury) were non-controversial. The last sentence of current Rule 6(b)(1) would be eliminated. It provides that grand jury challenges must be made before the oath is given to the jurors. The advisory committee, after research, could not discern why the provision was contained in the rule and concluded that it must be an anomaly.

Professor Schlueter pointed out that the last sentence of current Rule 6(e)(2), providing that a knowing violation of Rule 6 may be punished as a contempt of court, had been enacted by Congress. Its location is misplaced, however, since it is contained in a paragraph dealing only with the secrecy of grand jury proceedings. The advisory committee concluded that Congress must have meant the provision to apply to any violation of Rule 6 and, therefore would move it to new paragraph (e)(7).

Professor Schlueter said that Rules 6(e)(3)(D)(iii) and (iv) had been added, at the request of the Department of Justice, to include military officials and Indian tribal officials within the list of people with whom United states attorneys may share grand jury matters.

The committee approved the proposed revised rule for publication without objection.

FED. R. CRIM. P. 7

Professor Schlueter noted that Rule 7 (Indictment and Information) had one minor change. The term "hard labor," found in the current Rule 7(a) would be deleted since it no longer appears in federal statutes.

The committee approved the proposed revised rule for publication without objection.

FED. R. CRIM. P. 8

Professor Schlueter said that there were no substantive changes in revised Rule 8 (Joinder of Offenses or Defendants).

The committee approved the proposed revised rule for publication without objection.

FED. R. CRIM. P. 9

Professor Schlueter pointed to two changes in Rule 9 (Arrest Warrant or Summons on an Indictment or Information). First, revised Rule 9(a) would give a judge discretion whether to issue an arrest warrant when a defendant fails to respond to a summons on a complaint. If, however, the government requests issuance of a warrant, the judge must issue one.

Second, the advisory committee would eliminate from current Rule 9(b)(1) the authority of a court to fix the amount of bail on a warrant. The provision is inconsistent with the Bail Reform Act.

The committee approved the proposed revised rule for publication without objection.

FED. R. CRIM. P. 10

Professor Schlueter pointed out that Rule 10 now provides that an arraignment must be conducted in open court with the presence of the defendant. Amended Rule 10(b) would allow the defendant to waive a personal appearance in writing. Amended Rule 10(c) would allow the arraignment to be conducted by video conferencing upon the defendant's consent. Thus, one new provision would allow the defendant to waive an arraignment entirely, and the second would allow the defendant to waive the right to have the arraignment conducted in open court.

Professor Schlueter reported that some members of the advisory committee would prefer to have every defendant be present in open court for an arraignment and would not personally authorize waivers in their own cases. Nevertheless, they believed that the rule should be published for comment.

One participant argued that he would be willing to publish a rule that dispensed with the requirement that the defendant consent to video conferencing an arraignment. He said that video conferencing should be encouraged because the technology is very good and the procedure saves considerable travel time and expenses. Mr. Rabiej responded that the advisory committee had published the proposed amendment several years ago without a requirement of consent. The public defenders objected to it because it would deprive them of an opportunity to meet with their clients in person and would shift operating costs from the marshals to the defenders.

Another participant suggested that the advisory committee include language in the publication expressly inviting public comment on whether the consent of the defendant should be required. Judge Davis agreed to bring the suggestion to the attention of the advisory committee.

The committee approved the proposed revised rule for publication without objection.

FED. R. CRIM. P. 11

Judge Davis reported that Rule 11 (Pleas) had been reorganized and its provisions placed in logical order. He pointed out that the list of matters of which the court must inform the defendant would be expanded to include fines and special assessments. He noted that this change would reflect the existing case law.

Judge Davis noted that revised Rule 11(c) would add to the list of plea agreement options an agreement by the government that it will not bring, or will move to dismiss, other charges. He explained that this is common practice for the government.

Judge Davis pointed out that revised Rule 11(e) had been relocated from Rule 32. It would provide that the defendant may not withdraw a plea after the court imposes sentence.

The committee approved the proposed revised rule for publication without objection.

FED. R. CRIM. P. 12

Judge Davis reported that the advisory committee had decided not to retain the provision in current Rule 12 (Pleadings and Pretrial Motions) referring to the abolition of all other pleas, demurrers, and motions to quash. It is no longer necessary.

Judge Davis said that the current Rule 12(c) authorizes the court to set a time for making motions, unless otherwise provided by local rule. The advisory committee would delete the local rule exception because judges should be encouraged to set deadlines for motions.

The committee approved the proposed revised rule for publication without objection.

FED. R. CRIM. P. 12.1

Judge Davis said that two changes would be made in Rule 12.1 (Notice of Alibi Defense). First subdivisions (d) and (e) would be reversed in order to improve the organization of the rule. Second, the amended rule would add a new requirement that the parties, in providing the names and addresses of alibi and rebuttal witnesses, also provide the phone numbers of those witnesses.

The committee approved the proposed revised rule for publication without objection.

FED. R. CRIM. P. 12.2

Judge Davis reported that the advisory committee had made a significant change in Rule 12.2 (Notice of Insanity Defense; Mental Examination). The committee would allow the government to have a psychiatric examination of a defendant in a capital case if the defendant gives notice of an intention to use a psychiatric defense at the sentencing proceeding. The current rule requires a defendant to provide notice to the government if he or she intends to offer expert mental condition testimony only as to the question of guilt. Revised Rule 12.2(b) would expand that requirement to the sentencing phase in a capital case.

Revised Rule 12.2(c)(4) deals with admission of a defendant's statements made in the course of an examination. It would provide that the admissibility of the defendant's statements in a capital sentencing proceeding would be triggered only by the defendant's introduction of expert evidence.

Revised Rule 12.2(d) would provide that the sanction for a defendant not giving notice or failing to submit for an examination is exclusion of the defendant's own witnesses. Judge Davis noted that this result is consistent with current case law.

The committee approved the proposed revised rule for publication without objection.

FED. R. CRIM. P. 12.3

Judge Davis pointed out that the proposed change in revised Rule 12.3 (Notice of Public Authority Defense) was parallel to a proposed change in Rule 12.1, dealing with alibi defenses. It would require parties to provide the telephone numbers of any witnesses disclosed under the rule.

The committee approved the proposed revised rule for publication without objection.

FED. R. CRIM. P. 13

Judge Davis said that only stylistic changes had been made in revised Rule 13 (Joint Trial of Separate Cases).

The committee approved the proposed revised rule for publication without objection.

FED. R. CRIM. P. 14

Judge Davis said that only stylistic changes had been made in revised Rule 14 (Relief from Prejudicial Joinder).

The committee approved the proposed revised rule for publication without objection.

FED. R. CRIM. P. 15

Professor Schlueter noted three changes in revised Rule 15 (Depositions).

First, the word "data" would be added to the list of items that the court may require the deponent to produce at a deposition. Professor Schlueter pointed out that the same change was also being made in revised Rule 17(c), dealing with subpoenas.

Second, revised Rule 15(d) would broaden the government's responsibility to pay for depositions when the defendant is unable to bear the expenses.

Third, revised Rule 15(f), governing use of depositions as evidence, had been reorganized. Professor Schlueter pointed out that there may be no need for the provision at all, and the advisory committee might recommend at the June 2000 Standing Committee meeting that it be dropped. Nevertheless, Professor Schlueter asked the committee to approve the rule for publication as written, subject to any further recommendations that the advisory committee might make in June.

The committee approved the proposed revised rule for publication without objection.

FED. R. CRIM. P. 16

Professor Schlueter reported that Rule 16 (Discovery and Inspection) had been completely reorganized. The only change that might be considered substantive, he said, was occurred in Rule 16(b)(1)(A)(ii), where the reference to items that the defendant "intends to introduce as evidence" would be replaced by items that the defendant "intends to use."

One participant suggested that the heading of paragraph (b)(1), "discloseable information" was inelegant and should be reconsidered.

The committee approved the proposed revised rule for publication without objection.

FED. R. CRIM. P. 17

Judge Davis said that there was one change of note in revised Rule 17 (Subpoena). The term "data" would be added to the items that a court may direct a witness to produce.

The committee approved the proposed revised rule for publication without objection.

FED. R. CRIM. P. 17.1

Judge Davis pointed to one change in revised Rule 17.1 (Pretrial Conference). The last sentence of the current rule states that the rule cannot be invoked if a defendant is not represented by counsel. The advisory committee would delete the sentence. Thus, the court may hold a pretrial conference if the defendant is not represented.

The committee approved the proposed revised rule for publication without objection.

FED. R. CRIM. P. 18

Judge Davis reported that there were no changes of substance in revised Rule 18 (Place of Prosecution and Trial).

The committee approved the proposed revised rule for publication without objection.

FED. R. CRIM. P. 19

Judge Davis noted that Rule 19 had already been rescinded.

FED. R. CRIM. P. 20

Judge Davis reported that there were no significant changes in revised Rule 20 (Transfer for Plea and Sentence). A technical change would be made in revised Rule 20(d)(2) to make the clerk's duties parallel in juvenile and non-juvenile cases. In both categories of cases, the clerk must send the file, or a certified copy, to the clerk in the transferee district.

The committee approved the proposed revised rule for publication without objection.

FED. R. CRIM. P. 21 and 22

Judge Davis said that Rule 21 (Transfer for Trial) and Rule 22 (Time to File a Motion to Transfer) had been combined into a new Rule 21 without any substantive changes.

The committee approved the proposed revised rule for publication without objection.

FED. R. CRIM. P. 23

Judge Davis reported that there were no significant changes proposed in Rule 23 (Jury or Nonjury Trial). He pointed out that the term "just cause" had been changed in revised Rule 23(b)(3) to "good cause," in order to conform to the standard terminology used elsewhere in the rules.

The committee approved the proposed revised rule for publication without objection.

FED. R. CRIM. P. 24

Professor Schlueter pointed to two changes in Rule 24 (Trial Jurors). He noted that in Rule 24(a) the advisory committee had removed language from the current rule implying that a defendant, even if represented by counsel, may personally question jurors. He added that the advisory committee believed that the revision reflected current practice, which allows defendants to question jurors only if they proceed *pro se*.

Professor Schlueter reported that a major substantive change was being proposed in Rule 24(c). The revised rule would increase the number of peremptory challenges for the government to the same number allowed the defendant. He pointed out that the number of peremptory challenges had been considered previously by the Standing Committee. In 1991, he said, the committee had authorized publication of a proposed amendment that would have reduced the number of peremptory challenges for the defendant from 10 to 6. The proposal attracted substantial opposition during the public comment period, and it was eventually withdrawn.

Introduced in 1997 a provision in proposed omnibus crime control legislation would have equalized the number of peremptory challenges at 10 for both the defendant and the government. On behalf of the Judicial Conference, the Administrative Office urged the Congress not to amend the statute, but to leave the matter to the rules process. As a result, the advisory committee placed the issue on its agenda, and it voted to approve an amendment to Rule 24 fixing the number of peremptories at 10 for each side. That proposed amendment has been included with the restyled rules package.

Professor Schlueter said that there was some sentiment in the advisory committee for fixing the number of peremptory challenges at 8 per side, rather than 10. Three members of the Standing Committee voiced their agreement with this alternative, and they pointed to the extra costs and court time resulting from allowing 20 peremptory challenges, rather than 16. Other participants had argued that 6 peremptory challenges were sufficient and that there was no compelling reason to make any change in the current rule.

Professor Schlueter said that the advisory committee had been persuaded that the matter should be addressed through the Rules Enabling Act process, rather than direct statutory action. Judge Davis suggested that statutory action was likely at some point, but he added that the advisory committee had been persuaded as a matter of basic policy that there should be equality between the parties in the number of peremptory challenges.

One participant recommended that the committee publish the proposed amendment, increasing the number of peremptory challenges for the government, in order to stimulate public comment on the issue. Others replied, however, that a single controversial provision such as this could endanger approval of the entire package of restyled rules.

One member suggested that Rule 24(b)(1), which refers to peremptory challenges in "a crime punishable by death" be narrowed to apply only in cases when the government actually seeks the death penalty. Judge Davis agreed to make the suggested change. Another participant added that the language of the headings to paragraphs (b)(1), (2), and (3) should be revised to read: "capital cases," "felony cases," and "misdemeanors."

Professor Hazard moved to address the issue of peremptory challenges separately and delete it from the rest of the package of restyled rules.

Judge Scirica said that it was his understanding that the committee at its June 2000 meeting would address the issue of how to package and present the restyled rules for publication. He pointed that inclusion of controversial provisions raises some doubt as to whether the revised rules can truly be called a restyling project. He suggested that the committee defer until June making any decision on whether to include the proposed peremptory challenge amendment in the restyled package or to publish it separately.

Judge Kravitch moved to adopt the proposal of the advisory committee that the number of peremptory challenges be fixed at 10 for each side.

Judge Tashima moved to fix the number of peremptory challenges at 8 per side.

Chief Justice Veasey moved to table the issue until the June 2000 committee meeting.

Professor Hazard moved to approve the restyled version of Rule 24, but without any change in the number of peremptory challenges. He added that the matter could be taken up again at the June meeting. By that time, the advisory committee might undertake additional research, and the staff might get an updated reading on the legislative outlook.

Judge Scirica announced that, by consensus, all motions would be withdrawn.

He called for a vote on approving Rule 24 with no change in the current number of peremptory challenges, but inviting the advisory committee to make further recommendations at the June 2000 meeting.

The committee approved the proposed revised rule, without making any changes in the number of peremptory challenges, for publication without objection.

FED. R. CRIM. P. 25

Professor Schlueter reported that the only notable change in revised Rule 25 (Judge's Disability) is set forth in Rule 25(b)(2). The current rule provides that a successor judge may grant a new trial for reasons that are "appropriate." The revised rule would provide that a new trial may be approved only if "necessary."

The committee approved the proposed revised rule for publication without objection.

FED. R. CRIM. P. 26

Professor Schlueter noted two proposed changes in Rule 26 (Taking Testimony). The rule, he said, is generally parallel to FED. R. CIV. P. 43. The revised criminal rule would adopt a recent change made in the civil rule that had eliminated the word "orally" from the requirement that testimony of witnesses be taken in open court. Thus, there would be no question of precluding a witness who uses sign language.

The revised rule, moreover, would also parallel FED. R. CIV. P. 43 by adding a new subdivision (b), authorizing the court to use contemporaneous video presentation of testimony by a witness at a different location. Professor Schlueter pointed out that Confrontation Clause of the Constitution would be satisfied because the revised rule would require the witness to be "unavailable," as that term is defined in FED. R. EVID. 804(a).

Several members emphasized that video transmission of witness testimony should be used very sparingly and only in instances when there is simply no other practical way to obtain the testimony. Judge Davis pointed out that the trial judge has discretion in all cases to determine whether remote testimony will be allowed.

The committee approved the proposed revised rule for publication without objection.

FED. R. CRIM. P. 26.1

Professor Schlueter reported that no substantive changes had been made in revised Rule 26.1 (Foreign Law Determination).

The committee approved the proposed revised rule for publication without objection.

FED R. CRIM. P. 26.2

Professor Schlueter noted one change in Rule 26.2 (Producing a Witness's Statement). Under revised Rule 26(c)(2), if a court withholds a portion of a statement over the defendant's objection, the court must seal the entire statement as a part of the record in case there is an appeal.

The committee approved the proposed revised rule for publication without objection.

FED. R. CRIM. P. 26.3

Judge Davis reported that there were no changes, other than stylistic, in revised Rule 26.3 (Mistrial).

The committee approved the proposed revised rule for publication without objection.

FED. R. CRIM. P. 27

Judge Davis reported that there were no changes, other than stylistic, in revised Rule 27 (Proof of Official Record).

The committee approved the proposed revised rule for publication without objection.

FED. R. CRIM. P. 28

Judge Davis reported that there were no changes, other than stylistic, in Rule 28 (Interpreters).

The committee approved the proposed revised rule for publication without objection.

FED. R. CRIM. P. 29

Judge Davis pointed to a change in revised Rule 29 (Motion for Judgment of Acquittal). He said that under the current rule, the defendant may move for judgment of acquittal within 7 days after the jury is discharged. Under revised Rule 26(c)(1), the defendant could move within 7 days after a guilty verdict or after the court discharges the jury, whichever is less.

The committee approved the proposed revised rule for publication without objection.

FED. R. CRIM. P. 29.1

Judge Davis reported that there were no changes, other than stylistic, in revised Rule 29.1 (Closing Argument).

The committee approved the proposed revised rule for publication without objection.

FED. R. CRIM. P. 30

Judge Davis pointed out that the advisory committee had improved the language of Rule 30 (Instructions) to clarify what, if anything, an attorney must do to preserve error regarding an instruction or failure to instruct.

The committee approved the proposed revised rule for publication without objection.

FED. R. CRIM. P. 31

Judge Davis reported that there were no changes, other than stylistic, in revised Rule 31 (Jury Verdict).

The committee approved the proposed revised rule for publication without objection.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Scirica welcomed Judge Shadur as the new chairman of the Advisory Committee on Evidence Rules.

Judge Shadur and Professor Capra presented the report of the advisory committee, as set forth in Judge Shadur's memorandum and attachments of December 1, 1999. (Agenda Item 9)

Judge Shadur reported that the advisory committee had completed a review of all the rules of evidence and had made preliminary decisions *not* to amend many of the rules. In addition, he referred the members to the agenda books, in which are listed three long-range projects initiated by the advisory committee. He pointed out that none of the projects is expected to generate proposals for consideration by the standing committee in the near future.

Professor Capra elaborated on the first of these projects. He said that the committee was considering preparing a report or brochure that would inform judges and lawyers of case law under the Federal Rules of Evidence that diverges materially from the text of the rules or the committee notes. He said that there were more than 20 rules where the problem exists. He added that the committee would likely just describe the facts without making judgments or taking positions.

ATTORNEY CONDUCT

Professor Coquillette presented the report of the Subcommittee on Attorney Conduct Rules, as set forth in his memorandum of December 7, 1999. (Agenda Item 10)

Background

He pointed out that the attorney conduct rules project arose largely out of concern over the proliferation of local rules, rather than as a consequence of the dispute between the Department of Justice and the Conference of Chief Justices over regulation of federal attorney conduct. He explained that Congress — during its consideration of the 1988 amendments to the Rules Enabling Act — was displeased that there were thousands of local court rules and that many of them were contrary to statute or the national rules. Congress, he said, was also concerned that local court rulemaking was undermining the national rules process and the authority of Congress.

Professor Coquillette reported that many local federal court rules govern attorney conduct, and they have been criticized by the American Bar Association and state bar authorities for intruding on the traditional role of the states in regulating attorney conduct.

He added that the American Bar Association had also announced a policy of opposing local rules that are not justified by actual and meaningful differences among courts.

Professor Coquillette explained that the Standing Committee had held two invitational conferences with attorney conduct experts and representatives of bar groups. And it had commissioned seven studies of attorney conduct issues. The committee then considered a wide range of rules options for addressing attorney conduct issues in the federal courts, ranging from doing nothing to promulgating a complete set of national attorney conduct rules. In the final analysis, he said, there now appeared to be a consensus that if any action is to be taken, it should consist of: (1) a single, national "dynamic conformity" rule entrusting attorney conduct matters to the states generally; supplemented by (2) a small core of uniform federal rules addressing problems of particular concern to federal courts, judges, and attorneys.

Professor Coquillette reported that the "McDade Amendment" had made federal government attorneys subject by statute to the conduct requirements of the states and those in local federal court rules. But pending legislation, introduced by Senator Hatch, would effectively repeal the McDade Amendment and authorize the Attorney General to prescribe regulations exempting government attorneys from state coverage if a state law or rule is inconsistent with federal law or interferes with effecting federal investigations and policy. Moreover, other pending legislation, introduced by Senator Leahy, would require the Judicial Conference to file a report with Congress within one year recommending a federal rule governing attorney contacts with represented parties.

Proposed Federal Rule of Attorney Conduct 1

Professor Coquillette reported that the Subcommittee on Attorney Conduct Rules had been established in 1999 for two purposes: (1) to see whether the hundreds of inconsistent federal local rules on attorney conduct could be reduced to one or more uniform rules, generally returning most issues to state control; and (2) to address concerns raised in Congress about attorney conduct in the federal courts. He noted that the subcommittee had endorsed a proposed new Federal Rule of Attorney Conduct 1, drafted by Professor Cooper. Essentially, it would leave the regulation of attorney conduct to the states, except for the control of procedure in the federal courts. He pointed out that the subcommittee's draft had been approved with only one dissent. The Department of Justice's representative, he said, had voted against the draft, not because she was opposed to it, but because it did not go far enough to protect federal interests.

Professor Coquillette said that the proposed Federal Rule of Attorney Conduct 1, if promulgated, would supersede or eliminate all local rules on the subject of attorney conduct. But, he cautioned, the subject matter was very controversial, and the rules committees needed to proceed deliberately and slowly. He noted that opposition to the proposal could be

encountered in the Judicial Conference, in Congress, by the Department of Justice, or among bar groups and state court organizations.

Professor Coquillette emphasized that the subcommittee was not asking the Standing Committee to approve Federal Rule of Attorney Conduct 1. Rather, it was simply seeking to inform the committee of the direction in which it was proceeding. The instant proposal, he said, consisted of a single, general rule and did not deal with specific categories of attorney conduct, such as contacts with represented parties. These, he said, could eventually be incorporated in a Federal Rule of Attorney Conduct 2. The proposal, moreover, did not address specific problems of attorney conduct in the bankruptcy courts, which might become the subject of a Federal Rule of Attorney Conduct 3.

Chief Justice Veasey said that the balkanization of federal local rules on attorney conduct needed to be addressed. He pointed out that he had left the subcommittee meeting before the vote was taken to approve Federal Rule of Attorney Conduct 1 and had articulated some concerns with the language of the draft. He said that he favored a single dynamic conformity rule, with no additional federal rules. Chief Justice Veasey also reported that the Conference of Chief Justices has appointed a committee to consider and comment on proposed Federal Rule of Attorney Conduct 1, as well as any other proposals that the Standing Committee might develop.

It was pointed out during the ensuing discussion that the American Bar Association was in the process of revisiting its Model Rules of Professional Conduct, including Rule 4.2, governing attorney contacts with represented parties. It was also noted that a proposal had been presented to the House of Delegates for a new, compromise version of Rule 4.2, but the Department of Justice did not agree to it. As a result, the proposal is apparently no longer alive, although the Ethics 2000 project would likely produce another version of Rule 4.2.

One of the members said that Rule 4.2 of the Model Rules of Professional Conduct raised important concerns for the Department of Justice and government attorneys that needed to be addressed. The central problem, he said, is that federal law enforcement authorities need to communicate directly with people who can supply important information to them as part of a criminal investigation or federal law enforcement action. But, he said, these contacts — which may be with witnesses, employees, or targets of an investigation who are represented by counsel — occur before litigation is actually commenced in a federal court. Thus, they do not constitute procedural problems lying within the appropriate area of concern of the rules process, which begins with the commencement of litigation. He concluded that these issues should be addressed in another forum.

He added that the issue of government attorney contact with represented parties is extremely controversial, pitting law enforcement agencies against both civil liberties lawyers and corporate lawyers. Moreover, legislation is pending in Congress that would address the

issue, and negotiations have been reopened among the Department of Justice and other interested groups.

He agreed with Chief Justice Veasey that the appropriate course of action for the rules committees was to approve a single national rule mandating dynamic conformity with state attorney conduct rules. He said that the proposed Federal Rule of Attorney Conduct 1(a)-(d) was well conceived. He was concerned, however, with proposed subdivision (e), which attempts to provide a safe harbor by allowing an attorney to assert that he or she took a particular action at the direction of a federal judge.

The problem for the Department of Justice and federal attorneys, he said, is that conduct rules vary from state to state. But, he argued, the risks that an attorney might face for following an order of a federal court are truly very small. In essence, they are not sufficient to warrant intruding on state authority.

Professor Cooper explained that proposed Federal Rule of Attorney Conduct 1 would leave enforcement of professional responsibility to the states, but it would also provide two narrow exceptions for federal court action. Subdivision (c) would give federal judges authority to regulate conduct in the cases before them. And subdivision (e) would provide a safe harbor for attorneys who take actions authorized by a federal court. Professor Cooper explained that several types of attorney conduct issues may arise in a federal case, involving such matters as maintaining the confidentiality of information and disqualifying opposing counsel for conflicts of interest. He pointed out, however, that the great bulk of disciplinary actions taken by the state bars involve such serious misconduct as convictions, rather than conflicts and procedural issues.

He said that the need for the safe harbor afforded by subdivision (e) may not be sufficient to outweigh the friction that it might engender with state authorities. One of the members added that state disciplinary bodies simply are too busy to address the kinds of matters contemplated by the exceptions, and they are not interested in pursuing federal prosecutors. Another added that it was just not good policy to authorize a federal judge to immunize a lawyer who has engaged in a violation of state ethical standards because state discipline could upset the federal case.

Mr. Marcus responded that the Department of Justice did not have a problem with the proposed Federal Rule of Attorney Conduct 1. It was hopeful of working out a solution to Rule 4.2 of the Model Rules, which might be incorporated into a Federal Rule of Attorney Conduct 2.

Judge Scirica added that members of the Judicial Conference have shown no indication that they want the judiciary to become involved in the dispute over Rule 4.2. First, he said, they do not see it on the merits as a procedural issue. Second, the House and Senate have very different views regarding the McDade amendment, and the judiciary should not get

caught in the middle of a dispute that does not affect it directly. Judge Scirica pointed out, however, that legislation could be enacted at any time that would call on the rules committees and the Judicial Conference to take action or give advice to Congress.

One of the members pointed out that subdivision (c), which allows the federal courts to enforce all matters of procedure, will be difficult to apply in practice. He warned that there is an immense potential for attorneys to manipulate substance and procedure. The federal courts must be able to regulate the cases and proceedings before them. Therefore, the states, he said, should not be allowed to govern both substance and procedure.

Other members agreed strongly, and they pointed out that 28 U.S.C. § 1654 expressly authorizes federal courts to regulate who may practice before them. They said that there were a number of nuances that needed to be considered further in redrafting Federal Attorney Conduct Rule 1. First, there was the very difficult task of distinguishing between substance and procedure. Second, distinctions may be drawn between a federal court's statutory authority to admit attorneys to practice and its authority to discipline attorneys for specific conduct. Third, the rule provides that professional responsibility will be enforced by the proper state authority, but it also allows a federal court to enforce its procedural rules and orders by all appropriate sanctions.

Some members suggested that the intention of the rule was to have federal judges use state disciplinary processes normally, just as they do today. Federal courts, they said, should not regulate attorney conduct occurring outside the courtroom. But if an attorney's conduct is improper in a case before a federal judge, the judge will insist on disciplining the attorney in that case. Thus, even if a state allows a certain kind of conduct, a federal court should still be allowed to discipline an attorney for conduct occurring in the courtroom or the case. Some members pointed out that it would not be possible to draft a rule that would cover all situations. The problems of conduct and enforcement are simply too complicated to resolve with specificity in a federal rule.

FINANCIAL DISCLOSURE

Judge Scirica reported that articles had appeared in the media criticizing some federal judges for not having disqualified themselves in cases when they had held a stock interest in one of the parties. He said that the reported slip-ups had been purely inadvertent on the part of the judges. Nonetheless, the articles had embarrassed the judges involved and to the federal judiciary as a whole.

Judge Scirica stated that Senator Patrick Leahy, ranking minority member of the Senate Judiciary Committee, had addressed the September 1999 meeting of the Judicial Conference. Senator Leahy told the Conference that the Congress was well aware of the adverse publicity flowing from the recent media exposés, and he urged the judiciary to take

prompt action to address the problems and avoid potential Congressional intervention. Judge Scirica added that Senator Leahy is a man of great integrity and a good friend of the judiciary.

Judge Scirica noted that the judiciary was taking concerted action to reduce the likelihood of future recurrences. Among other things, he said, new computer software programs were being deployed in the courts to compare judges' financial holdings with the names of litigants in their courts' electronic docket systems. He noted, in particular, that Rule 26.1 of the Federal Rules of Appellate Procedure requires each non-governmental, corporate party in an appeal to file a statement with the court identifying all its corporate parents and listing any publicly held company that owns 10% of more of its stock.

Extending Federal Rule of Appellate Procedure 26.1

Judge Scirica reported that the Judicial Conference's Committee on Codes of Conduct, chaired by District Judge Carol Bagley Amon (E.D.N.Y.), had suggested that the rules committees consider amending the civil, criminal, and bankruptcy rules to add requirements similar to FED. R. APP. P. 26.1. He pointed out that Professors Cooper and Coquillette had consulted with the chairs and reporters of the advisory committees and had prepared three alternate versions of a draft new Federal Rule of Civil Procedure 7.1. Copies of the three versions had been circulated to the members of the Standing Committee and to Judge Amon for preliminary review. The proposed new rule, based on FED. R. APP. P. 26.1, would require corporate litigants in civil cases to file a disclosure statement at the time of their first filing or appearance in a case. Its text would be adapted appropriately for use in criminal and bankruptcy cases.

Judge Scirica reported that the Federal Judicial Center, at his request, had conducted an analysis of both the content and the structure of all existing local rules and general orders of the district courts and bankruptcy courts that require parties to disclose corporate affiliations. He noted that this and other research had uncovered wide variance among the trial courts — and among the courts of appeals — as to the type and amount of information that they require parties to disclose.

Judge Scirica noted, however, that Judge Duplantier had stated earlier in the meeting — correctly in his view — that financial disclosure and conflicts of interest were not, strictly speaking, rules matters. National disclosure rules, moreover, would not have averted any of the incidents described by the media.

Nevertheless, he said, a disclosure rule already exists in the Federal Rules of Appellate Procedure. Moreover, both the Codes of Conduct Committee and the Congress were expecting the rules committee to initiate action to address disclosure requirements in the civil, criminal, and bankruptcy rules.

Judge Scirica stated that the advisory committees could approve new rules at their next meetings, which could be considered by the Standing Committee in June 2000 and published for public comment by late summer. At the same time — using the administrative authority of the Director of the Administrative Office — action could proceed to develop a national disclosure form that corporate parties would have to file in district court and bankruptcy court cases. He emphasized that the form could be placed in the courts relatively quickly, well in advance of the time required to promulgate new rules under the Rules Enabling Act process.

Financial Disclosure Form

One of the members suggested that issuance of a Director's form would be sufficient in itself and argued against promulgating any new federal rules. He noted that parties in the district court are required presently to file a cover sheet in civil cases that, among other things, asks them to disclose any related cases in which they are a party. That reporting form, he said, could readily be expanded to include a requirement that they also identify any corporate ownership.

Professor Coquillette said that the Codes of Conduct Committee and the Congress would be pleased if the rules committees simply replicated FED. R. APP. P. 26.1 in the civil, criminal, and bankruptcy rules, even though it would take about three years for new rules to take effect under the Rules Enabling Act process. He recommended that the committee take two simultaneous actions: (1) proceed with the proposed rule amendments; and (2) ask the Judicial Conference to adopt a uniform national disclosure form immediately.

Professor Coquillette pointed out that there was great advantage to having a national form because it could be issued quickly. The Judicial Conference, moreover, would have flexibility to adapt and change the details of the reporting requirements from time to time without having to invoke the lengthy and formal rules amendment process. He said that the Codes of Conduct Committee had the expertise and jurisdiction over the subject matter and should devise the form, assisted as needed by the Administrative Office, the Financial Disclosure Committee, and the rules committees.

Professor Coquillette reported that Professor Cooper had just prepared a revised draft of the proposed new Federal Rule of Civil Procedure 7.1 that would require a corporate party to an action or proceeding in the district court to file two copies of a form that: (1) identifies its parent corporations and companies owning 10% of more of its stock; and (2) provides any additional information required by the Judicial Conference. The form would be filed at a party's first appearance in a case and would have to be updated whenever conditions change.

Professor Coquillette explained that it would be practically impossible to design a form that would disclose all the sorts of information that might trigger the recusal of a judge. The information that FED. R. APP. P. 26.1 requires a party to disclose, he said, is minimal. In

fact, he noted, the 1998 amendments to Rule 26.1 had reduced the amount of information that parties must disclose to the court. The earlier, 1989 version of the rule had required that corporate parties also disclose, not only parents, but also subsidiaries and affiliates.

Professor Coquillette explained that at the time the 1998 amendments were being considered, the chief judges of the respective courts of appeals had indicated that they wanted the parties to disclose additional information, but they could not agree on the details of what information should be required in the national rule . Thus, the Advisory Committee on Appellate Rules adopted minimal disclosure requirements in the 1998 amendments to FED. R. APP. P. 26.1, but it also explicitly encouraged the courts to issue local rules to supplement the nationally required disclosures. As a result, 11 of the 13 courts of appeals currently require some sort of additional disclosure in their local rules.

One of the participants emphasized the need to require the parties to update the information on their disclosure form. He explained that his own court's disclosure rule had been in effect for many years, but the lawyers pay little attention to it. He stressed that recusal is the personal responsibility of the judges themselves, rather than the lawyers. The judges, he said, need a national rule, coupled with effective publicity among the bar, to make it work.

Several members recommended that work begin immediately on a draft rule and form that could be submitted to the Standing Committee for action at its June 2000 meeting. They pointed out that the rules committees needed to work with the Codes of Conduct Committee and the Administrative Office to develop a clear plan of action for consideration at the next meeting of the Judicial Conference.

Telephone Conference with Judge Amon

Judge Amon, chair of the Codes of Conduct Committee, participated in the discussion by telephone. She referred to her letter to Judge Scirica of December 29, 1999, in which she commented on three alternate disclosure proposals that had been sent to her for preliminary consideration. The first would consist of a rule patterned narrowly after FED. R. APP. P. 26.1, with an additional requirement that parties file supplemental disclosures promptly upon any changes in circumstances. The second would require parties to file a disclosure form approved by the Judicial Conference. The third alternative would require parties to file a disclosure form devised by local rule of court.

Judge Amon pointed out that her committee had not yet met, and it had not yet considered the three alternatives. She said, however, that in her own personal view the first of the three alternatives — a rule patterned narrowly after FED. R. APP. P. 26.1 — would satisfy all the objectives of the Codes of Conduct Committee and would be fully sufficient to address the statutory disqualification of a judge.

Judge Scirica and Professor Coquillette informed Judge Amon that the reporters had just drafted a hybrid proposal that would essentially combine the first two alternatives. It would be based on FED. R. APP. P. 26.1, but it would also require the parties to disclose on a form any additional sorts of information required by the Judicial Conference. Professor Coquillette noted that the proposal had the advantage of allowing for immediate action, in that a national form could be brought into effect much faster than a rule change.

Judge Scirica informed Judge Amon that the Standing Committee believed that the Codes of Conduct Committee would be in the best position to determine the content of the disclosure form, but the rules committees would be pleased to assist in any drafting. Professor Coquillette added that the proposed national rules would refer explicitly to the disclosure form, but the form itself could be put into effect well before the rules. It could be made available to every clerk's office and distributed to the bar.

Judge Amon said that the revised proposal sounded feasible and reasonable, and she promised to place it formally before the Codes of Conduct Committee at its meeting the following week. Judge Scirica agreed to complete work on drafting the proposal and to send it to Judge Amon in a few days in time for the meeting of her committee.

Bankruptcy Cases

Professor Morris pointed out that there would be some complications in adapting the rule and form for use in bankruptcy cases. The proposed rule, he said, requires a "party" to disclose specified information to the court. But, he noted, many affected entities in a bankruptcy case may not even be parties. Thus, the Advisory Committee on Bankruptcy Rules will have to consider how to deal with non-parties.

One member added that the sheer number of parties involved in a bankruptcy case will make it very difficult to devise a simple rule to govern bankruptcy. He suggested that consideration be given to some sort of *de minimis* standard. Thus, a different requirement might apply when the number of parties in a case exceeds a certain number. Another member suggested that some obligation might be placed on creditors' committees to filter out conflicts of interest for the court.

Preclusion of Local Rules

Professor Cooper pointed out that one of the key decisions that the committee must make is whether to permit or prohibit the individual courts to supplement the information required on the national form. During the ensuing committee discussion, several members spoke out strongly for establishing a single, national standard, without the opportunity for local court variations. One member stressed that a single mistake by a judge in any district could tarnish the entire judiciary. He added that even though individual courts should not be permitted to change the national disclosure requirements, the attorneys themselves should be

given latitude to submit additional information to the court that they believe might bear on recusal.

Judge Scirica said that there appeared to be a clear consensus on the committee for adopting uniform, national standards for disclosure that would preclude local rules. But, he said, several courts are likely to be comfortable with the expanded disclosure requirements set forth in their current local rules. If they are precluded from obtaining information that they believe is helpful to them for recusal purposes, they will likely oppose the rule. He suggested that it might be advisable to allow some variation among the courts, at least for a while.

Several members pointed out, though, that the local provisions generally add very little of value and that there was no compelling reason to allow local variation in the area of ethics. They added that a judge in an individual case still retains the authority to require additional disclosures. Members also noted that the rules simply cannot insulate judges completely from the requirement of 28 U.S.C. § 455(a) that a judge disqualify himself or herself in any proceeding in which his or her impartiality might be questioned.

Judge Scirica asked for a show of hands in support of the direction in which the committee was heading, *i.e.*, (1) preparing a rule for adoption in the civil, criminal, and bankruptcy rules (with appropriate adjustments for bankruptcy) that would require the disclosures of FED. R. APP. P. 26.1; and (2) requiring a form that contains the Rule 26.1 information and any other disclosures required by the Judicial Conference. This approach was approved without opposition.

Judge Scirica said that the final language of the rule and form and other details could be worked out by the chairs and reporters, Judge Amon, himself, and Administrative Office staff.

LOCAL RULES PROJECT

Professor Squiers presented the report of the local rules project, as set forth in her memorandum of December 5, 1999. (Agenda Item 12)

She provided a brief history of the committees's study of local court rules, dating back to 1986, and gave an overview of the process she was following in conducting a new study of the local rules. She explained that the project will evaluate the existing local rules to determine whether they comply with the Rules Enabling Act, whether they highlight areas that may more appropriately be contained in the national rules, and whether they have successfully operated in particular fields that other courts might wish to emulate. She added that the project would also examine whether and how the judicial councils of the circuits were reviewing existing and proposed local district court rules under 28 U.S.C. § 2071(c).

And, finally, the project would examine the impact of the Civil Justice Reform Act on local rule proliferation.

Professor Squiers reported that she was entering the local rules into a computer data base and would examine and categorize them by topic. She explained that it was still too early in the study to draw conclusions or even have significant insights. But she said that the uniform numbering requirement of the federal rules had made the review process a good deal easier. She also said that it appeared that the number of local rules had increased, particularly regarding discovery and the areas addressed by the Civil Justice Reform Act.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Mr. Laffitte reported that the technology subcommittee had two items on its agenda — the electronic case filing project and electronic evidence.

He said that the subcommittee was monitoring the development of the electronic filing project in five district courts and five bankruptcy courts, with a view towards determining whether any changes might be needed in the federal rules to remove legal impediments to the electronic processing of cases. He noted that public comments were being received on the proposed amendments to authorize service by electronic means on consent of the parties.

Mr. Laffitte reported that the Court Administration and Case Management Committee had formed an ad hoc subcommittee on privacy and access to electronic files, and that he was the liaison from the rules committees to the new subcommittee. He noted that there was a natural tension between the tradition of open court records, on the one hand, and privacy concerns raised by posting on the Internet court files containing sensitive personal, medical, and financial information. He complimented the Office of Judges Programs of the Administrative Office for having prepared excellent documentation on the privacy issues.

Mr. Laffitte also reported that the Federal Judicial Center was in the process of conducting a research project to study evidence of an electronic nature in order to help judges deal with problems of evidence in electronic form. He also noted that the discovery subcommittee of the Advisory Committee on Civil Rules was exploring issues raised by the discovery of information in electronic form.

NEXT COMMITTEE MEETING

Judge Scirica reported that the next committee meeting had been scheduled for January 7 and 8, 2000.

Respectfully submitted,

Peter G. McCabe,
Secretary

Item 3

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 9, 2000

MEMORANDUM TO THE STANDING RULES COMMITTEE

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

The following report briefly describes administrative actions and some major initiatives undertaken by the office to improve its support service to the rules committees.

Internet

The Judicial Conference has prescribed procedures governing the rulemaking process, which require that rules-related materials be made available to the public. Moreover, the Standing Rules Committee and five advisory committees adopted — as part of their self-study plan — a recommendation that the Administrative Office use electronic technologies "to promote rapid dissemination of proposals, receipt of comments, and the work of the rules committees."

The "Rules" area on the Judiciary's Internet web site (http://www.uscourts.gov) has been operational for about six months. The web site contains the work product of the rules committees and information about the rulemaking process. We plan to add to the web site virtually all rules-related reports, minutes, draft rules, memoranda, agenda material, committee membership lists, a schedule of upcoming meetings, brochures, pamphlets, and Federal Judicial Center reports and surveys. Reports on major projects, including class actions, mass tort, and attorney conduct rules will also be included on the web site. Opening the Internet Rules web site completes the first phase of a long-range plan to establish an Internet-based communications model, which will, among other things, allow us to deal directly with the committees' reporters and their work product.

We continue to work with the AO's webmaster to use web technology to post agenda-book materials on the Internet allowing a committee member to retrieve an entire agenda book — or a particular excerpt — electronically in advance of receiving a "hard copy" in the mail. The size of recent agenda books and changes in staffing of the AO's web group has delayed our efforts.

As part of a two-year experiment beginning with the *Request for Comment* published in August 1998, we have received comments on the proposed rules amendments via the Internet.

The Judiciary's web site was redesigned to accommodate the submission of comments. We were concerned initially whether this new means of corresponding would result in a crush of e-mail comments. Although we did receive a total of 3,400 visits to the web site during last year's comment period, we received only 61 comments via the Internet. The pilot project has been a success. Although we occasionally receive comments that are not germane to the proposed amendments, they have not been a burdened our system.

The trial period for the pilot project is nearing expiration. Based on our experiences, we recommend that comments on proposed rule changes be accepted electronically on a permanent basis.

Committee and Subcommittee Meetings

For the six-month period from December 2, 1999, to June 2, 1999, the office staffed 11 meetings, including one Standing Committee meeting, six advisory committee meetings, 3 subcommittee meetings, and two special conferences. The office has arranged and participated in numerous conference calls involving committee chairs, reporters, or subcommittee members.

Several of the meetings were devoted to a comprehensive "style" revision of the Federal Rules of Criminal Procedure. The scope and nature of the work consume much committee and staff preparation and follow-up time. Coordinating comments from subcommittee members, preparing and circulating frequent iterations, and proofreading drafts have challenged our office.

Automation Project (FRED/Documentum)

After three years of testing a new document management software as the agency's prototype (FRED), we were advised that the agency has now determined to develop a different software as its agency-wide document management system — Documentum. The new software was purchased, customized, and installed on our computers beginning in early 1999. Again our office is serving as a prototype for the agency-wide system. The process of implementing the new software, as expected, has slowed our automation efforts, but Documentum is expected to improve our overall technical support and, perhaps, finally provide direct access to documents on the system to the chairs and reporters. Examples of planned enhancements include: reports designed to ensure that data is entered properly and that all comments are acknowledged with appropriate follow-up responses explaining the committee's actions; document routing and workflow designs; enhanced indexing and searching capabilities; and possible remote access to our database. The manual system is being maintained while we complete final testing of the automated system.

Tracking Rule Amendments

The docket sheets of all suggested amendments for Civil, Criminal, and Evidence Rules have been updated to reflect the committees' recent respective actions. Every suggested amendment along with its source and status or disposition is listed. The docket sheets are updated after each committee meeting, and they are included in each agenda book. The time chart showing the status of all rules changes has been updated. It will be distributed at the meeting.

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

Record Keeping

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

All rules-related documents from 1935 through 1992 have been entered on microfiche and indexed. The documents for 1993, 1994, and 1995 have been catalogued and boxed for shipment to the national record center. The process for documents from 1996 will be completed shortly. The microfiche collection continues to prove useful to us and the public in researching prior committee positions.

Manual Tracking

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

State Bar Points-of-Contact

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

The points-of-contact list will again be updated this year in time to include the new names in *The Request for Comment* pamphlet on proposed amendments published in August 2000. Several state bars updated their designated point-of-contact. The process is being repeated every year to ensure that we have an accurate and up-to-date list. Hopefully, the points-of-contact will continue to facilitate submission of comments from these organizations.

Mailing List

The Administrative Office has purchased another automated mailing list system. It will replace several existing systems and will be fully operational soon. It is expected to substantially

reduce the time involved in maintaining and expanding the mailing list. A contractor will be hired to maintain all mailing lists for the Administrative Office. We plan to add the names of attorneys and law professors at a 2:1 ratio to a temporary list every six months until it reaches 2,500 names.

Miscellaneous

On April 17, 2000, the Supreme Court approved the proposed amendments to the Federal Rules of Evidence and Bankruptcy and Civil Procedure, which had been submitted to the Court by the Judicial Conference after its September 1999 meeting. The formatting and proofreading of the proposed rules amendments were extensive.

In February 2000, the Ad Hoc Committee on Attorney Conduct held a conference. Representatives from various organizations, including the ABA, Conference of Chief Justices, and the Department of Justice, discussed proposed FRAC 1. In March 2000, the Civil Rules Committee's Discovery Subcommittee hosted a conference on electronic discovery in San Francisco.

John K. Rabiej

Attachments

AGENDA DOCKETING

ADVISORY COMMITTEE ON CIVIL RULES

Proposal	Source, Date, and Doc #	Status
[Financial disclosure statement] See Rule 7.1	Request by committee on Codes of Conduct 9/23/98	11/98 — Cmte considered 3/99 — Agenda Subcmte rec. Hold until more information available (2) 4/99 — Cmte considered; FJC study initiated 10/99 — Discussed 4/00 — Considered; request for publication **PENDING FURTHER ACTION**
[Copyright Rules of Practice] — Update	Inquiry from West Publishing	4/95 — To be reviewed with additional information at upcoming meetings 11/95 — Considered by cmte 10/96 — Considered by cmte 10/97 — Deferred until spring '98 meeting 3/98 — Deferred until fall '98 meeting 11/98 — Request for publication 1/99 — Stg. Cmte. approves publication for fall 8/99 — Published 4/00 — Cmte approves amendments **PENDING FURTHER ACTION**
[Admiralty Rule B, C, and E] — Amend to conform to Rule C governing attachment in support of an in personam action	Agenda book for the 11/95 meeting	4/95 — Delayed for further consideration 11/95 — Draft presented to cmte 4/96 — Considered by cmte 10/96 — Considered by cmte, assigned to Subcmte. 5/97— Considered by cmte 10/97 — Request for publication and accelerated review by ST Cmte 1/98 — Stg. Com. approves publication at regularly scheduled time 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions 6/99 — Stg approves 9/99 — Jud. Conf. approves and transmits to Sup. Ct 4/00 — Supreme Court approved **PENDING FURTHER ACTION**
[Admiralty Rule-New]— Authorize immediate posting of preemptive bond to prevent vessel seizure	Mag. Judge Roberts 9/30/96 (96-CV-D) #1450	12/24/96— Referred to Admiralty and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Hold until more information available (2) **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[Inconsistent Statute] — 46 U.S.C. § 786 inconsistent with admiralty	Michael Cohen 1/14/97 (97-CV-A) #2182	2/97 — Referred to reporter and chair Supreme Court decision moots issue **COMPLETED**
[Non-applicable Statute]— 46 U.S.C. § 767 Death on the High Seas Act not applicable to any navigable waters in the Panama Canal Zone	Michael Marks Cohen 9/17/97 (97-CV-O)	10/97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Subcmte rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**
[Admiralty Rule C(4) — Amend to satisfy constitutional concerns regarding default in actions *in rem*	Gregory B. Walters, Cir. Exec., for Jud. Council of Ninth Cir. 12/4/97 (97-CV-V)	1/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Hold until more information available (2) **PENDING FURTHER ACTION**
[Simplified Procedures] — federal small claims procedures	Judge Niemeyer 10/00	10/99 — Considered, subcmte appointed 4/00 — Considered
[CV4(c)(1)] — Accelerating 120-day service provision	Joseph W. Skupniewitz	4/94 — Deferred as premature **DEFERRED INDEFINITELY**
[CV4(d)] — To clarify the rule	John J. McCarthy 11/21/97 (97-CV-R)	12/97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Subcmte rec. Accumulate for periodic revision (1) **PENDING FURTHER ACTION**
[CV4(d)(2)] — Waive service of process for actions against the United States	Charles K. Babb 4/22/94	10/94 — Considered and denied 4/95 — Reconsidered but no change in disposition **COMPLETED**
[CV4(e) & (f)] — Foreign defendant may be served pursuant to the laws of the state in which the district court sits	Owen F. Silvions 6/10/94	10/94 — Rules deemed as otherwise provided for and unnecessary 4/95 — Reconsidered and denied **COMPLETED**
[CV4(i)] — Service on government in Bivens suits	DOJ 10/96 (96-CV-B; #1559)	10/96 — Referred to Reporter, Chair, and Agenda Sub cmte. 5/97 — Discussed in reporter's memo. 3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions 6/99 — Standing Cmte approved 9/99 — Judicial Conference approved 4/00 — Supreme Court Approved **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV4(m)] — Extension of time to serve pleading after initial 120 days expires	Judge Edward Becker	4/95 — Considered by cmte **DEFERRED INDEFINITELY**
[CV4]— Inconsistent service of process provision in admiralty statute	Mark Kasanin	10/93 — Considered by cmte 4/94 — Considered by cmte 10/94 — Recommend statutory change 6/96 — Coast Guard Authorization Act of 1996 repeals the nonconforming statutory provision **COMPLETED**
[CV4] — To provide sanction against the willful evasion of service	Judge Joan Humphrey Lefkow 8/12/97 (97-CV-K)	10/97 — Referred to Reporter, Chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Accumulate for periodic revision (1) **PENDING FURTHER ACTION**
[CV5] — Electronic filing		10/93 — Considered by cmte 9/94 — Published for comment 10/94 — Considered 4/95 — Cmte approves amendments with revisions 6/95 — Approved by ST Cmte 9/95 — Approved by Jud Conf 4/96 — Approved by Sup Ct 12/96 — Effective **COMPLETED**
[CV5] — Service by electronic means or by commercial carrier; fax noticing produces substantial cost savings while increasing efficiency and productivity	Michael Kunz, clerk E.D. Pa. and John Frank 7/29/96; 9/10/97 (97-CV-N); William S. Brownell, District Clerks Advisory Group 10/20/97 (97-CV-Q)	4/95 — Declined to act 10/96 — Reconsidered, submitted to Technology Subcommittee 5/97 — Discussed in reporter's memo. 9/97 — Information sent to reporter, chair, and Agenda Sub cmte. 11/98 — Referred to Tech. Subcommittee 3/99 — Agenda Sub cmte. rec. Refer to other cmte (3) 4/99 — Cmte requests publication 6/99 — Stg. Comte approves publication 8/99 — Published for comment 4/00 — Cmte approves amendments **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV5(d)] — Whether local rules against filing of discovery documents should be abrogated or amended to conform to actual practice	Gregory B. Walters, Cir. Exec., for District Local Rules Review Cmte of Jud. Council of Ninth Cir. 12/4/97 (97-CV-V)	1/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/98 — Cmte. approved draft 6/98 — Stg Cmte approves with revision 8/98 — Published for comment 4/99 — Cmte approves amendments 6/99 — Stg. Comte approves 9/99 — Jud. Conf. approves and transmits to Sup. Ct 4/00 — Supreme Court approved **PENDING FURTHER ACTION**
[CV5(d)]— Does non-filing of discovery material affect privilege	St Cmte 6/99	10/99 — Discussed **PENDING FURTHER ACTION**
[CV6] — Modifying mailbox rule	J. Michael Schaefer, Esq. 12/28/98 (99-CV-A)	3/99 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**
[CV6(b)] — Enlargement of Time; deletion of reference to abrogated rule (technical amendment)	Prof. Edward Cooper 10/27/97; Rukesh A. Korde 4/22/99 (99-CV-C)	10/97 — Referred to cmte 3/98 — Cmte approved draft with recommendation to forward directly to the Jud Conf w/o publication 6/98 — Stg Cmte approves 9/98 — Jud. Conf. Approves and transmits to Sup. Ct. 4/99 — Supreme Court approve 12/99 — Effective **COMPLETED**
[CV6(e)] — Time to act after service	ST Cmte 6/94	10/94 — Cmte declined to act **COMPLETED**
[CV6(e)] — Amend the rule to treat service by electronic means the same as service by mail	See Rule 5	4/99 — Cmte requests publication 6/99 — Stg. Comte approves publication 8/99 — Published for comment 4/00 — Cmte approves amendments **PENDING FURTHER ACTION**
[CV7.1] — See Financial Disclosure	Request by Committee on Codes of Conduct 9/23/98	11/98 — Cmte considered 3/99 — Agenda Subcmte rec. Hold until more information available (2) 4/99 — Cmte considered; FJC study initiated 10/99 — Discussed 4/00 — Considered; request for publication **PENDING FURTHER ACTION**

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

Proposal	Source, Date, and Doc #	Status
[CV12] — To conform to *Prison Litigation Act of 1996*	John J. McCarthy 11/21/97 (97-CV-R)	12./97 — Referred to reporter, chair, & Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Ready for full committee consideration (4) **PENDING FURTHER ACTION**
[CV12(a)(3)] —Conforming amendment to Rule 4(i)		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions 6/99 — Stg Comte approves 9/99 — Jud. Conf. approves & transmits to Sup.Ct. **PENDING FURTHER ACTION**
[CV12(b)] — Expansion of conversion of motion to dismiss to summary judgment	Daniel Joseph 5/97 (97-CV-H) #2941	5/97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**
[CV14(a) & (c)] — Conforming amendment to admiralty changes		6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments 6/99 — Stg Comte approves 9/99 — Jud. Conf. approves and transmits to Sup. Ct. 4/00— Supreme Court approved **PENDING FURTHER ACTION**
[CV15(a)] — Amendment may not add new parties or raise events occurring after responsive pleading	Judge John Martin 10/20/94 & Judge Judith Guthrie 10/27/94	4/95 — Delayed for further consideration 11/95 — Considered by cmte and deferred **DEFERRED INDEFINITELY**
[CV 15(c)(3)(B)] —Clarifying extent of knowledge required in identifying a party	Charles E. Frayer, Law student 9/27/98 (98-CV-E)	9/98 — Referred to chair, reporter, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. accumulate for periodic revision (1) **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV23] — Amend class action rule to accommodate demands of mass tort litigation and other problems	Jud Conf on Ad Hoc Communication for Asbestos Litigation 3/91; William Leighton ltr 7/29/94; H.R. 660 introduced by Canady on CV 23 (f)	5/93 — Considered by cmte 6/93 — Submitted for approval for publication; withdrawn 10/93, 4/94, 10/94, 2/95, 4/95, 11/95; studied at meetings. 4/96 — Forwarded to ST Cmte for submission to Jud Conf 6/96 — Approved for publication by ST Cmte 8/96 — Published for comment 10/96 — Discussed by cmte 5/97 — Approved and forwarded changes to (c)(1), and (f); rejected (b)(3)(A) and (B); and deferred other proposals until next meeting 4/97 — Stotler letter to Congressman Canady 6/97 — Changes to 23(f) were approved by ST Cmte; changes to 23(c)(1) were recommitted to advisory cmte 10/97 — Considered by cmte 3/98 — Considered by cmte deferred pending mass torts working group deliberations 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 4/00 — Considered **PENDING FURTHER ACTION**
[CV23] — Standards and guidelines for litigating and settling consumer class actions	Patricia Sturdevant, for National Association for Consumer Advocates 12/10/97 (97-CV-T)	12/97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**
[CV23(e)] — Amend to include specific factors court should consider when approving settlement for monetary damages under 23(b)(3)	Beverly C. Moore, Jr., for Class Action Reports, Inc. 11/25/97 (97-CV-S)	12/ 97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 4/00 — Considered **PENDING FURTHER ACTION**
[CV23(e)] — Require all "side-settlements," including attorney's fee components, to be disclosed and approved by the district court	Brian Wolfman, for Public Citizen Litigation Group 11/23/99 (99-CV-H)	12/99 — Referred to reporter, chair, and Agenda Sub cmte. 4/00 — Referred to Class Action subcomte **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV23(e)] — Preserve right to appeal for *unnamed* class members who do not file motions to intervene; and class members not named plaintiffs have right to appeal judicial approval of proposed dismissal or compromise without first filing motion to intervene	Bill Lockyer, Attorney General, for State of California DOJ 3/29/00 (00-CV-B)	4/00 Referred to reporter, chair, Agenda Subcmte,, and Class Action Subcmte **PENDING FURTHER ACTION**
[CV23(f)] — interlocutory appeal	part of class action project	4/98 — Sup Ct approves 12/98 — Effective **COMPLETED**
[CV26] — Interviewing former employees of a party	John Goetz	4/94 — Declined to act **DEFERRED INDEFINITELY**
[CV26] —Initial disclosure and scope of discovery	Thomas F. Harkins, Jr., Esq. 11/30/94 and American College of Trial Lawyers; Allan Parmelee (97-CV-C) #2768; Joanne Faulkner 3/97 (97-CV-D) #2769	4/95 — Delayed for further consideration 11/95 — Considered by cmte 4/96 — Proposal submitted by American College of Trial Lawyers 10/96 — Considered by cmte; Sub cmte. appointed 1/97 — Sub cmte. held mini-conference in San Francisco 4/97 — Doc. #2768 and 2769 referred to Discovery Sub cmte. 9/97 — Discovery Reform Symposium held at Boston College Law School 10/97 — Alternatives considered by cmte 3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions 6/99 — Stg Comte approves 9/99 — Jud. Conf. approves & transmits to Sup. Ct. 4/00 — Supreme Court approves **PENDING FURTHER ACTION**
[CV26] —Does inadvertent disclosure during discovery waive privilege	Discovery Subcmte	10/99 — Discussed **PENDING FURTHER ACTION**
[CV26] — Presumptive time limits on backward reach of discovery	Al Cortese	10/99 — Removed from agenda **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV26] — Electronic discovery		10/99 — Referred to Subcmte 3/00 — Subcmte met 4/00 — Considered **PENDING FURTHER ACTION**
[CV26(c)] — Factors to be considered regarding a motion to modify or dissolve a protective order	Report of the Federal Courts Study Committee, Professors Marcus and Miller, and Senator Herb Kohl 8/11/94; Judge John Feikens (96-CV-F); S. 225 reintroduced by Sen Kohl	5/93 — Considered by cmte 10/93 — Published for comment 4/94 — Considered by cmte 10/94 — Considered by cmte 1/95— Submitted to Jud Conf 3/95 — Remanded for further consideration by Jud Conf 4/95 — Considered by cmte 9/95 — Republished for public comment 4/96 — Tabled, pending consideration of discovery amendments proposed by the American College of Trial Lawyers 1/97 — S. 225 reintroduced by Sen Kohl 4/97 — Stotler letter to Sen Hatch 10/97 — Considered by Sub cmte. and left for consideration by full cmte 3/98 — Cmte determined no need has been shown to amend **COMPLETED**
[CV26] — Depositions to be held in county where witness resides; better distinction between retained and "treating" experts	Don Boswell 12/6/96 (96-CV-G)	12/96 — Referred to reporter, chair, and Agenda Sub cmte. 5/97 — Reporter recommends that it be considered part of discovery project 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**
[CV30] — Allow use by public of audio tapes in the courtroom	Glendora 9/96/96 (96-CV-H)	12/96 — Sent to reporter and chair 11/98 — rejected by cmte **COMPLETED**
[CV30(b)] — Inconsistency within Rule 30 and between Rules 30 and 45	Judge Janice M. Stewart 12/8/99 (99-CV-J)	12/99 — Referred to reporter, chair, Agenda Sub cmte., and Discovery Sub cmte. 4/00 — Referred to Disc. Subcomte **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV30(b)(1)] — That the deponent seek judicial relief from annoying or oppressive questioning during a deposition	Judge Dennis H. Inman 8/6/97 (97-CV-J)	10/97 — Referred to reporter, chair, and Agenda Sub cmte. 11/98 — rejected by cmte **COMPLETED**
[CV30(d)(2)] — presumptive one day of seven hours for deposition		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions 6/99 — Stg Comte approves 9/99 — Jud. Conf. approves & transmits to Sup. Ct. 4/00 — Supreme Court approves **PENDING FURTHER ACTION**
[CV30(e)] — review of transcript by deponent	Dan Wilen 5/14/99 (99-CV-D)	8/99 — Referred to agenda Subcmte 8/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**
[CV32] — Use of expert witness testimony at subsequent trials without cross examination in mass torts	Honorable Jack Weinstein 7/31/96	7/31/96 — Submitted for consideration 10/96 — Considered by cmte; FJC to conduct study 5/97 — Reporter recommends that it be considered part of discovery project 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**
[CV33 & 34] — require submission of a floppy disc version of document	Jeffrey K. Yencho (7/22/99) 99-CV-E	7/99 — referred to Agenda Subcmte 8/99 — Agenda Sub cmte. rec. Refer to other Sub cmte. (3) **PENDING FURTHER ACTION**
[CV34(b)] — requesting party liable for paying reasonable costs of discovery		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions (moved to Rule 26) 6/99 — Stg Comte approves 9/99 — rejected by Jud. Conf. **COMPLETED**
[CV36(a)] — To not permit false denials, in view of recent Supreme Court decisions	Joanne S. Faulkner, Esq. 3/98 (98-CV-A)	4/98 — Referred to reporter, chair, and Agenda Sub cmte. 11/98 — rejected by cmte **COMPLETED**
[CV37(b)(3)] — Sanctions for Rule 26(f) failure	Prof. Roisman	4/94 — Declined to act **DEFERRED INDEFINITELY**

Proposal	Source, Date, and Doc #	Status
[CV37(c)(1)] — Sanctions for failure to supplement discovery		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments 6/99 — Stg Comte approves 9/99 — Jud. Conf. approves & transmits to Sup. Ct. 4/00 — Supreme Court approves **PENDING FURTHER ACTION**
[CV39(c) and CV16(e)] — Jury may be treated as advisory if the court states such before the beginning of the trial	Daniel O'Callaghan, Esq.	10/94 — Delayed for further study, no pressing need 4/95 — Declined to act **COMPLETED**
[CV40] — precedence given elderly in trial setting	Michael Schaefer 1/19/00; 00-CV-A	2/00 — Referred to chair, reporter, and Agenda Sub cmte. **PENDING FURTHER ACTION**
[CV43] — Strike requirement that testimony must be taken orally	Comments at 4/94 meeting	10/93 — Published 10/94 — Amended and forwarded to ST Cmte 1/95 — ST Cmte approves but defers transmission to Jud Conf 9/95 — Jud Conf approves amendment 4/96 — Supreme Court approved 12/96 — Effective **COMPLETED**
[CV43(f)—Interpreters] — Appointment and compensation of interpreters	Karl L. Mulvaney 5/10/94	4/95 — Delayed for further study and consideration 11/95 — Suspended by advisory cmte pending review of Americans with Disabilities Act by CACM 10/96 — Federal Courts Improvement Act of 1996 provides authority to pay interpreters **COMPLETED**
[CV44] — To delete, as it might overlap with Rules of EV dealing with admissibility of public records	Evidence Rules Committee Meeting 10/20-21/97 (97-CV-U)	1/97 — Referred to chair, reporter, and Agenda Sub cmte. 3/98 — Cmte determined no need to amend **COMPLETED**
[CV45] — Nationwide subpoena		5/93 — Declined to act **COMPLETED**
[CV45] — Notice in lieu of attendance subpoenas	J. Michael Schaefer, Esq. 12/28/98 (99-CV-A)	3/99 — Referred to chair, reporter, and Agenda Sub cmte. 8/99 — Agenda Sub cmte. rec. Remove from agenda 10/99 — Consent calendar removed from agenda **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV45] — Clarifying status of subpoena after expiration date	K. Dino Kostopoulos, Esq. 1/27/99 (99-CV-B)	3/99 — Referred to chair, reporter, and Agenda Sub cmte. 8/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**
[CV45] — Discovering party must specify a date for production far enough in advance to allow the opposing party to file objections to production	Prof. Charles Adams 10/1/98 (98-CV-G)	10/98 — Referred to chair, reporter, Agenda Sub cmte., and Discovery Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**
[CV45(d)] — Re-service of subpoena not necessary if continuance is granted and witness is provided adequate notice	William T. Terrell, Esq. 10/9/98 (98-CV-H)	12/98 — Referred to chair, reporter, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**
[CV47(a)] — Mandatory attorney participation in jury voir dire examination	Francis Fox, Esq.	10/94 — Considered by cmte 4/95 — Approved draft 7/95 — Proposed amendment approved for publication by ST Cmte 9/95 — Published for comment 4/96 — Considered by advisory cmte; recommended increased attention by Fed. Jud. Center at judicial training **COMPLETED**
[CV47(b)] — Eliminate peremptory challenges	Judge Willaim Acker 5/97 (97-CV-F) #2828	6/97 — Referred to reporter, chair, and Agenda Sub cmte. 11/98 — Cmte declined t take action **COMPLETED**
[CV48] — Implementation of a twelve-person jury	Judge Patrick Higginbotham	10/94 — Considered by cmte 7/95 — Proposed amendment approved for publication by ST Cmte 9/95 — Published for comment 4/96 — Forwarded to ST Cmte for submission to Jud Conf 6/96 — ST Cmte approves 9/96 — Jud Conf rejected 10/96 — Cmte's post-mortem discussion **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV50] — Uniform date for filing post trial motion	BK Rules Committee	5/93 —Approved for publication 6/93 — ST Cmte approves publication 4/94 — Approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CV50(b)] — When a motion is timely after a mistrial has been declared	Judge Alicemarie Stotler 8/26/97 (97-CV-M)	8 /97 — Sent to reporter and chair 10/97 — Referred to Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Accumulate for periodic revision (1) **PENDING FURTHER ACTION**
[CV51] — Jury instructions filed before trial	Judge Stotler (96-CV-E) Gregory B. Walters, Cir. Exec., for the Jud. Council of the Ninth Cir. 12/4/97 (97-CV-V)	11/8/96 — Referred to chair 5/97 — Reporter recommends consideration of comprehensive revision 1/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/98 — Cmte considered 11/98 — Cmte considered 3/99 — Agenda Sub cmte. rec. Ready for full Cmte consideration 4/99 — Cmte considered 10/99 — Discussed **PENDING FURTHER ACTION**
[CV52] — Uniform date for filing for filing post trial motion	BK Rules Cmte	5/93 —Approved for publication 6/93 — ST Cmte approves publication 4/94 — Approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CV53] — Provisions regarding pretrial and post-trial masters	Judge Wayne Brazil	5/93 — Considered by cmte 10/93 — Considered by cmte 4/94 — Draft amendments to CV16.1 regarding "pretrial masters" 10/94 — Draft amendments considered 11/98 — Subcmte appointed to study issue 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 10/99 — Discussed (FJC requested to survey courts) 4/00 — Considered **DEFERRED INDEFINITELY**

Proposal	Source, Date, and Doc #	Status
[CV54(d)(2)] — Provisions requiring a judgment be entered on a separate piece of paper	ST Cmte; AP amendment to FRAP 4(a)(7), 1/00	4/00 — Request for publication
[CV56] — To clarify cross-motion for summary judgment	John J. McCarthy 11/21/97	12/97 — Referred to reporter, chair, & Agenda Sub cmte. **PENDING FURTHER ACTION**
[CV56(a)] — Clarification of timing	Scott Cagan 2/97 (97-CV-B) #2475	3/97 — Referred to reporter, chair, and Agenda Sub cmte. 5/97 — Reporter recommends rejection 3/99 — Agenda Sub cmte. rec. Accumulate for periodic revision (1) **PENDING FURTHER ACTION**
[CV56(c)] — Time for service and grounds for summary adjudication	Judge Judith N. Keep 11/21/94	4/95 — Considered by cmte; draft presented 11/95 — Draft presented, reviewed, and set for further discussion 3/99 — Agenda Sub cmte. rec. Accumulate for periodic revision **PENDING FURTHER ACTION**
[CV58] — Provisions stating a judgment is effective only when stated on a separate piece of paper	ST Cmte; AP amendment to FRAP 4(a)(7), 1/00	4/00 — Request for publication —
[CV59] — Uniform date for filing for filing post trial motion	BK Rules Committee	5/93 —Approved for publication 6/93 — ST Cmte approves publication 4/94 — Approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CV60(b)] — Parties are entitled to challenge judgments provided that the prevailing party cites the judgment as evidence	William Leighton 7/20/94	10/94 — Delayed for further study 4/95 — Declined to act **COMPLETED**
[CV62(a)] — Automatic stays	Dep. Assoc. AG, Tim Murphy	4/94 — No action taken **COMPLETED**
[CV64] — Federal prejudgment security	ABA proposal	11/92 — Considered by cmte 5/93 — Considered by cmte 4/94 — Declined to act **DEFERRED INDEFINITELY**

Proposal	Source, Date, and Doc #	Status
[CV65(f)] — rule made applicable to copyright impoundment cases	see request on copyright	11/98 — Request for publication 6/99 — Stg Cmte approves 8/99 — Published for comment 4/00 — Cmte approved **PENDING FURTHER ACTION**
[CV65.1] — To amend to avoid conflict between 31 U.S.C. § 9396 governing the appointment of agents for sureties and the Code of Conduct for Judicial Employees	Judge H. Russel Holland 8/22/97 (97-CV-L)	10/97 — Referred to reporter, chair, and Agenda Sub cmte. 11/98 — Cmte declined to act in light of earlier action taken at March 1998 meeting **COMPLETED**
[CV68] — Party may make a settlement offer that raises the stakes of the offeree who would continue the litigation	Agenda book for 11/92 meeting; Judge Swearingen 10/30/96 (96-CV-C); S. 79 Civil Justice Fairness Act of 1997 and § 3 of H.R. 903	1/21/93 — Unofficial solicitation of public comment 5/93, 10/93, 4/94 — Considered by cmte 4/94 — Federal Judicial Center agrees to study rule 10/94 — Delayed for further consideration 1995 — Federal Judicial Center completes its study **DEFERRED INDEFINITELY** 10/96 — Referred to reporter, chair, and Agenda Sub cmte. (Advised of past comprehensive study of proposal) 1/97 — S. 79 introduced § 303 would amend the rule 4/97 — Stotler letter to Hatch 5/97 — Reporter recommends continued monitoring 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**
[CV73(b)] — Consent of additional parties to magistrate judge jurisdiction	Judge Easterbrook 1/95	4/95 — Initially brought to cmte's attention 11/95 — Delayed for review, no pressing need 10/96 — Considered along with repeal of CV74, 75, and 76 5/97 — Reporter recommends continued monitoring 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**
[CV 74,75, and 76] — Repeal to conform with statute regarding alternative appeal route from magistrate judge decisions	Federal Courts Improvement Act of 1996 (96-CV-A) #1558	10/96 — Recommend repeal rules to conform with statute and transmit to ST Cmte 1/97 — Approved by ST Cmte 3/97 — Approved by Jud Conf 4/97 — Approved by Sup Ct 12/97 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV 77(b)] — Permit use of audiotapes in courtroom	Glendora 9/3/96 (96-CV-H) #1975	12/96 — Referred to reporter and chair 5/97 — Reporter recommends that other Conf. Cmte should handle the issue 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**
[CV77(d)] — Fax noticing to produce substantial cost savings while increasing efficiency and productivity	Michael E. Kunz, Clerk of Court 9/10/97 (97-CV-N)	9/97 — Mailed to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Ready for consideration by full Cmte (4) 4/99 — request publication 8/99 — Published for comment 4/00 — Cmte approves amendments **PENDING FURTHER ACTION**
[CV77(d)] — Facsimile service of notice to counsel	William S. Brownell, District Clerks Advisory Group 10/20/97 (CV-Q)	11/97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Ready for consideration by full Cmte (4) **PENDING FURTHER ACTION**
[CV77.1] — Sealing orders		10/93 — Considered 4/94 — No action taken **DEFERRED INDEFINITELY**
[CV81] — To add injunctions to the rule	John J. McCarthy 11/21/97	12/97 — Referred to reporter, chair, and Agenda Sub cmte. **PENDING FURTHER ACTION**
[CV 81(a)(2)] — Inconsistent time period vs. Habeas Corpus rule 1(b)	Judge Mary Feinberg 1/28/97 (97-CV-E) #2164	2/97 — Referred to reporter, chair, and Agenda Sub cmte 5/97 — Considered and referred to Criminal Rules Cmte for coordinated response 3/99 — Agenda Sub cmte. rec. Hold until more information available (2) **PENDING FURTHER ACTION**
[CV81(a)(1)] — Applicability to D.C. mental health proceedings	Joseph Spaniol, 10/96	10/96 — Cmte considered 5/97 — Reporter recommends consideration as part of a technical amendment package 10/98 — Cmte. includes it in package submitted to Stg. Cmte. for publication 1/99 — Stg. Cmte. approves for publication 8/99 — Published for comment 4/00 — Cmte approved **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV81(a)(1)] — Applicability to copyright proceedings and substitution of notice of removal for petition for removal	see request on copyright	11/98 — Request for publication 1/99 — Stg. Cmte. approves for publication 8/99 — Published for comment 4/00 — Cmte approved **PENDING FURTHER ACTION**
[CV81(a)(2)] — Time to make a return to a petition for habeas corpus	CR cmte 4/00	4/00 — Request for comment **PENDING FURTHER ACTION**
[CV81(c)] — Removal of an action from state courts — technical conforming change deleting "petition"	Joseph D. Cohen 8/31/94	4/95 — Accumulate other technical changes and submit eventually to Congress 11/95 — Reiterated April 1995 decision 5/97 — Reporter recommends that it be included in next technical amendment package 3/99 — Agenda Sub cmte. rec. Accumulate for periodic revision (1) 4/99 — Cmte considered **PENDING FURTHER ACTION**
[CV82] — To delete obsolete citation	Charles D. Cole, Jr., Esq. 11/3/99 (99-CV-G)	12/99 — Referred to reporter, chair, and Agenda Subcommittee 4/00 — Comte approved for transmission without publication **PENDING FURTHER ACTION**
[CV83(a)(1)] — Uniform effective date for local rules and transmission to AO		3/98 — Cmte considered 11/98 — Draft language considered 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**
[CV83] — Negligent failure to comply with procedural rules; local rule uniform numbering		5/93 — Recommend for publication 6/93 — Approved for publication 10/93 — Published for comment 4/94 — Revised and approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CV83(b)] — Authorize Conference to permit local rules inconsistent with national rules on an experimental basis		4/92 — Recommend for publication 6/92 — Withdrawn at Stg. Comte meeting **COMPLETED**
[CV84] — Authorize Conference to amend rules		5/93 — Considered by cmte 4/94 — Recommend no change **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[Recycled Paper and Double-Sided Paper]	Christopher D. Knopf 9/20/95	11/95 — Considered by cmte 6/00 — CACM assigned issue and makes recommendation for Judicial Conference policy **COMPLETED**
[Pro Se Litigants] — To create a committee to consider the promulgation of a specific set of rules governing cases filed by pro se litigants	Judge Anthony J. Battaglia, on behalf of the Federal Magistrate Judge Assn. Rules Cmte, to support proposal by Judge David Piester 7/17/97 (97-CV-I);	7/97 — Mailed to reporter and chair 10/97 — Referred to Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Schedule for further study (3) **PENDING FURTHER ACTION**
[CV Form 1] — Standard form AO 440 should be consistent with summons Form 1	Joseph W. Skupniewitz, Clerk 10/2/98 (98-CV-F)	10/98 — Referred to chair, reporter, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Ready for full Cmte consideration (4) **PENDING FURTHER ACTION**
[CV Form 17] Complaint form for copyright infringement	Professor Edward Cooper 10/27/97	10/97 — Referred to cmte 3/99 — Agenda Sub cmte. rec. Ready for full Cmte consideration (4) **PENDING FURTHER ACTION**
[Adoption of form complaints for prisoner actions]	Iyass Suliman, prisoner 8/3/99 (99-CV-F)	8/99 — Referred to reporter, chair, and Agenda Sub cmte. **PENDING FURTHER ACTION**
[Electronic Filing] — To require clerk's office to date stamp and return papers filed with the court.	John Edward Schomaker, prisoner 11/25/99 (99-CV-I)	12/99 — Referred to reporter, chair, Agenda Sub cmte., and Technology Sub cmte. **PENDING FURTHER ACTION**
[Interrogatories on Disk]	Michelle Ritz 5/13/98 (98-CV-C); see also Jeffrey Yencho suggestion re: Rules 3 and 34 (99-CV-E)	5/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**
[To change standard AO forms 241 and 242 to reflect amendments in the law under the Antiterrorism and Effective Death Penalty Act of 1997]	Judge Harvey E. Schlesinger 8/10/98 (98-CV-D)	8/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**

AGENDA DOCKETING

ADVISORY COMMITTEE ON CRIMINAL RULES

Proposal	Source, Date, and Doc #	Status
[CR 4] — Require arresting officer to notify pretrial services officer, U.S. Marshal, and U.S. Attorney of arrest	Local Rules Project	10/95 — Subc appointed 4/96 — Rejected by subc **COMPLETED**
[CR 5] — Video Teleconferencing of Initial Appearances and Arraignments	Judge Fred Biery 5/98; Judge Durwood Edwards 6/98	5/98 — Referred to chair and reporter for consideration 10/98 — Referred to subcmte 10/99 — Approved for publication by advisory cmte 1/00 — Considered by comte as part of style package 4/00 — Considered; request to publish **PENDING FURTHER ACTION**
[CR 5(a)] — Time limit for hearings involving unlawful flight to avoid prosecution arrests	DOJ 8/91; 8/92	10/92 — Subc appointed 4/93 — Considered 6/93 — Approved for publication 9/93 — Published for public comment 4/94 — Revised and forwarded to ST Cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CR 5.1(d)] — Eliminate consent requirement for magistrate judge consideration	Judge Swearingen 10/28/96 (96-CR-E)	1/97 — Sent to reporter 4/97 — Recommends legislation to ST Cmte 6/97 — Recommitted by ST Cmte 10/97—Adv. Cmte declines to amend provision. 3/98 — Jud Conf instructs rules cmtes to propose amendment 4/98 — Approves amendment, but defers until style project completed 6/98 — Stg Cmte concurs with deferral 6/99 — Considered 10/99 — Approved for publication by advisory cmte 1/00 — Considered by comte 4/00 — Considered; request to publish **PENDING FURTHER ACTION**

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

Proposal	Source, Date, and Doc #	Status
[CR6(f)] — Return by foreperson rather than entire grand jury	DOJ 1/22/97 (97-CR-A)	1/97 — Sent directly to chair 4/97— Draft presented and approved for publication 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Approved by Stg Cmte 9/98 — Approved by Judicial Conference 4/99 — Approved by Sup. Ct. 12/1— Effective **COMPLETED**
[CR7(b)] — Effect of tardy indictment	Congressional constituent 3/21/00 (00-CR-B)	5/00— Referred to chair and reporter **PENDING FURTHER ACTION**
[CR7(c)(2)] — Reflect proposed new Rule 32.2 governing criminal forfeitures		4/97— Draft presented and approved for publication 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of R. 32.2 rejection by Stg. Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference — 1/99— Approved by Stg Cmte 3/99— Approved by Jud Conf 4/00— Approved by Supreme Court **COMPLETED**
[CR 8(c) — Apparent mistake in federal Rules Governing §§ 2255 and 2254	Judge peter C. Dorsey 7/9/97 (97-CR-F)	8/97 — Referred to reporter and chair 10/97— Referred to subcmte for study **PENDING FURTHER ACTION**
[CR 10] — Arraignment of detainees through video teleconferencing; Defendant's presence not required	DOJ 4/92	4/92 — Deferred for further action 10/92 — Subc appointed 4/93 — Considered 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Action deferred, pending outcome of FJC pilot programs 10/94 — Considered 4/98 —Draft amendments considered, but subcmte appointed to further study 10/98 — Considered by cmte; reporter to redraft and submit at next meeting 4/99 — Considered 10/99— Approved for publication by advisory cmte 1/00 — Considered by comte as part of style package 4/00 — Considered; request to publish **PENDING FURTHER ACTION**
[CR 10] — Guilty plea at an arraignment	Judge B. Waugh Crigler 10/94	10/94 — Suggested and briefly considered **DEFERRED INDEFINITELY**

Proposal	Source, Date, and Doc #	Status
[CR 11] — Magistrate judges authorized to hear guilty pleas, and inform accused of possible deportation	James Craven, Esq. 1991	4/92 — Disapproved **COMPLETED**
[CR 11] — Advise defendant of impact of negotiated factual stipulation	David Adair & Toby Slawsky, AO 4/92	10/92 — Motion to amend withdrawn **COMPLETED**
[CR 11(c)] — Advise defendant of any appeal waiver provision which may be contained in plea agreement	Judge Maryanne Trump Barry 7/19/96 (96-CR-A)	10/96 — Considered, draft presented 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to Stg Cmte 6/98 — Approved by Stg Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. 12/99— Effective **COMPLETED**
[CR 11(d)] — Examine defendant's prior discussions with a government attorney	Judge Sidney Fitzwater 11/94 & 3/99	4/95 — Discussed and no motion to amend **COMPLETED** 3/99 — Sent to chair and reporter **PENDING FURTHER ACTION**
[CR 11(e)] — Judge, other than the judge assigned to hear case, may take part in plea discussions	Judge Jensen 4/95	10/95 — Considered 4/96 —Tabled as moot, but continued study by subcmte on other Rule 11 issues **DEFERRED INDEFINITELY**
[CR 11(e)(4) — Binding Plea Agreement (Hyde decision)	Judge George P. Kazen 2/96	4/96 — Considered 10/96 — Considered 4/97 — Deferred until Sup Ct decision **COMPLETED**
[CR 11(e)(1) (A)(B) and (C)] — Sentencing Guidelines effect on particular plea agreements	CR Rules Committee 4/96	4/96 — To be studied by reporter 10/96 — Draft presented and considered 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to Stg Cmte 6/98 — Approved by Stg Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. 12/99 — Effective **COMPLETED**
[CR 11]—Pending legislation regarding victim allocution	Pending legislation 97-98	10/97—Adv Cmte expressed view that it was not opposed to addressing the legislation and decided to keep the subcmte in place to monitor/respond to the legislation. **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 11(e)(6) — Court required to inquire whether the defendant is entitled to an adjustment for acceptance of responsibility	Judge John W. Sedwick 10/98 (98-CR-C)	**PENDING FURTHER ACTION**
[CR 12] — Inconsistent with Constitution	Paul Sauers 8/95	10/95 — Considered and no action taken **COMPLETED**
[CR 12(b)] — Entrapment defense raised as pretrial motion	Judge Manuel L. Real 12/92 & Local Rules Project	4/93 — Denied 10/95 — Subcmte appointed 4/96 — No action taken **COMPLETED**
[CR 12(i)] — Production of statements		7/91 — Approved by ST Cmte for publication 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR12.2]—authority of trial judge to order mental examination.	Presented by Mr. Pauley on behalf of DOJ at 10/97 meeting.	10/97—Adv Cmte voted to consider draft amendment at next meeting. 4/98 — Deferred for further study of constitutional issues 10/98 — Considered draft amendments, continued for further study 4/99 — Considered 10/99 — Considered by comte 1/00 — Considered by comte as part of style package 4/00 — Considered; request to publish **PENDING FURTHER ACTION**
[CR 16] — Disclosure to defense of information relevant to sentencing	John Rabiej 8/93	10/93 — Cmte took no action **COMPLETED**
[CR 16] — Prado Report and allocation of discovery costs	'94 Report of Jud Conf	4/94 — Voted that no amendment be made to the CR rules **COMPLETED**
[CR 16] — Prosecution to inform defense of intent to introduce extrinsic act evidence	CR Rules Committee '94	10/94 — Discussed and declined **COMPLETED**
[CR 16(a)(1)] — Disclosure of experts		7/91 — Approved by for publication by St Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 16(a)(1)(A)] — Disclosure of statements made by organizational defendants	ABA	11/91 — Considered 4/92 — Considered 6/92 — Approved by ST Cmte for publication, but deferred 12/92 — Published 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**
[CR 16(a)(1)(C)] — Government disclosure of materials implicating defendant	Prof. Charles W. Ehrhardt 6/92 & Judge O'Brien	10/92 — Rejected 4/93 — Considered 4/94 — Discussed and no motion to amend **COMPLETED**
[CR 16(a)(1)(E)] — Require defense to disclose information concerning defense expert testimony	Jo Ann Harris, Asst. Atty. Gen., CR Div., DOJ 2/94; clarification of the word "complies" Judge Propst (97-CR-C)	4/94 — Considered 6/94 — Approved for publication by ST Cmte 9/94 — Published for public comment 7/95 — Approved by ST Cmte 9/95 — Rejected by Jud Conf 1/96 — Discussed at ST meeting 4/96 — Reconsidered and voted to resubmit to ST Cmte 6/96 — Approved by ST Cmte 9/96 — Approved by Jud Conf 4/97 — Approved by Sup Ct 12/97 — Effective **COMPLETED** 3/97 — Referred to reporter and chair 10/98 — Incorporated in proposed amendments to Rule 12.2 1/00 — Considered by comte as part of style package 4/00— Comte decided not to take action **COMPLETED**
[CR 16(a) and (b)] — Disclosure of witness names and statements before trial	William R. Wilson, Jr., Esq. 2/92 5/18/99 (99-CR-D)	2/92 — No action 10/92 — Considered and decided to draft amendment 4/93 — Deferred until 10/93 10/93 — Considered 4/94 — Considered 6/94 — Approved for publication by ST Cmte 9/94 — Published for public comment 4/95 — Considered and approved 7/95 — Approved by ST Cmte 9/95 — Rejected by Jud Conf **COMPLETED** 5/99— Sent to chair and reporter **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 16(d)] — Require parties to confer on discovery matters before filing a motion	Local Rules Project & Mag Judge Robert Collings 3/94	10/94 — Deferred 10/95 — Subcmte appointed 4/96 — Rejected by subcmte **COMPLETED**
[CR23(b)] — Permits six-person juries in felony cases	S. 3 introduced by Sen Hatch 1/97	1/97 — Introduced as § 502 of the Omnibus Crime Prevention Act of 1997 10/97—Adv. Cmte voted to oppose the legislation 1/98— ST Cmte expressed grave concern about any such legislation. **COMPLETED**
[CR 24(a)] — Attorney conducted voir dire of prospective jurors	Judge William R. Wilson, Jr. 5/94	10/94 — Considered 4/95 — Considered 6/95 — Approved for publication by ST Cmte 9/95 — Published for public comment 4/96 — Rejected by advisory cmte, but should be subject to continued study and education; FJC to pursue educational programs **COMPLETED**
[CR 24(b)] — Reduce or equalize peremptory challenges in an effort to reduce court costs	Renewed suggestions from judiciary; Judge Acker (97-CR-E); pending legislation S-3.	2/91 — ST Cmte, after publication and comment, rejected CR Cmte 1990 proposal 4/93 — No motion to amend 1/97 — Omnibus Crime Control Act of 1997 (S.3) introduced [Section 501] 6/97 — Stotler letter to Chairman Hatch **COMPLETED** 10/97—Adv. Cmte decided to take no action on proposal to randomly select petit and venire juries and abolish peremptory challenges. 10/97—Adv. Cmte directed reporter to prepare draft amendment equalizing peremptory challenges at 10 per side. 4/98 — Approved by 6 to 5 vote and will be included in style package 10/99 — Rejected inclusion in style package **COMPLETED**
[CR 24(c)] — Alternate jurors to be retained in deliberations	Judge Bruce M. Selya 8/96 (96-CR-C)	10/96 — Considered and agreed to in concept; reporter to draft appropriate implementing language 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to Stg Cmte 6/98 — Approved by Stg Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. **COMPLETED**
[CR 26] — Questioning by jurors	Prof. Stephen Saltzburg	4/93 — Considered and tabled until 4/94 4/94 — Discussed and no action taken **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 26] — Expanding oral testimony, including video transmission	Judge Stotler 10/96	10/96 — Discussed 4/97 — Subcmte will be appointed 10/97—Subcmte recommended amendment. Adv Cmte voted to consider a draft amendment at next meeting. 4/98 — Deferred for further study 10/98 — Cmte approved, but deferred request to publish until spring meeting or included in style package 4/99 — Considered 10/99 — Approved for publication by advisory cmte 1/00 — Considered by comte as part of style package 4/00 — Considered; request to publish **PENDING FURTHER ACTION**
[CR 26] — Court advise defendant of right to testify	Robert Potter	4/95 — Discussed and no motion to amend **COMPLETED**
[CR 26.2] — Production of statements for proceedings under CR 32(e), 32.1(c), 46(i), and Rule 8 of § 2255		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 26.2] — Production of a witness' statement regarding preliminary examinations conducted under CR 5.1	Michael R. Levine, Asst. Fed. Defender 3/95	10/95 — Considered by cmte 4/96 — Draft presented and approved 6/96 — Approved by ST Cmte 8/96 — Published for public comment 4/97— Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Jud Conf approves 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[CR26.2(f)] — Definition of Statement	CR Rules Cmte 4/95	4/95 — Considered 10/95 — Considered and no action to be taken **COMPLETED**
[CR 26.3] — Proceedings for a mistrial		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 29(b)] — Defer ruling on motion for judgment of acquittal until after verdict	DOJ 6/91	11/91 — Considered 4/92 — Forwarded to ST Cmte for public comment 6/92 — Approved for publication, but delayed pending move of RCSO 12/92 — Published for public comment on expedited basis 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**
[CR 30] — Permit or require parties to submit proposed jury instructions before trial	Local Rules Project	10/95 — Subcmte appointed 4/96 — Rejected by subcmte **COMPLETED**
[CR 30] — discretion in timing submission of jury instructions	Judge Stotler 1/15/97 (97-CR-A)	1/97 — Sent directly to chair and reporter 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Deferred for further study 10/98 — Considered by cmte, but deferred pending Civil Rules Cmte action on CV 51 1/00 — Considered by comte as part of style package 4/00 — Considered; request to publish **PENDING FURTHER ACTION**
[CR 31] — Provide for a 5/6 vote on a verdict	Sen. Thurmond, S.1426, 11/95	4/96 — Discussed, rulemaking should handle it **COMPLETED**
[CR 31(d)] — Individual polling of jurors	Judge Brooks Smith	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Approved by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[31(e)] — Reflect proposed new Rule 32.2 governing criminal forfeitures		4/97— Draft presented and approved for publication 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of rejection of R. 32.2 by Stg Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference 1/99— Approved by Stg Cmte 3/99 — Approved by Jud Conf 4/00 — Approved by Supreme Court **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 32] — Amendments to entire rule; victims' allocution during sentencing	Judge Hodges, before 4/92; pending legislation reactivated issue in 1997/98.	10/92 — Forwarded to ST Cmte for public comment 12/92 — Published 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED** 10/97—Adv Cmte expressed view that it was not opposed to addressing the legislation and decided to keep the subcmte in place to monitor/respond to the legislation. **PENDING FURTHER ACTION**
[CR 32]—findings on controverted matters in presentence report		3/00 — considered by subcomte as part of style package 4/00 — Considered; request to publish **PENDING FURTHER ACTION**
[CR 32]—release of presentence and related reports	Request of Criminal Law Committee	10/98 — Reviewed recommendation of subcomm and agreed that no rules necessary **COMPLETED**
[CR 32(c)(5)] — clerk required to file notice of appeal	Clerk, 7th Circuit 4/11/00 (00-CR-A)	3/00 — Sent directly to chair 5/00 — referred to reporter **PENDING FURTHER ACTION**
[CR 32(d)(2) — Forfeiture proceedings and procedures reflect proposed new Rule 32.2 governing criminal forfeitures	Roger Pauley, DOJ, 10/93	4/94 — Considered 6/94 — Approved by ST Cmte for public comment 9/94 — Published for public comment 4/95 — Revised and approved 6/95 — Approved by ST Cmte 9/95 — Approved by Jud Conf 4/96 — Approved by Sup Ct 12/96 — Effective **COMPLETED** 4/97— Draft presented and approved for publication 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of rejection of R. 32.2 by Stg Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference 1/99— Approved by Stg Cmte 3/99 — Approved by Jud Conf 4/00 — Approved by Supreme Ct **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 32(e)] — Delete provision addressing probation and production of statements (later renumbered to CR32(c)(2))	DOJ	7/91 — Approved by ST Cmte for publication 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective **COMPLETED**
[CR 32.1] — Production of statements		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 32.1]— Technical correction of "magistrate" to "magistrate judge."	Rabiej (2/6/98)	2/98—Letter sent advising chair & reporter 4/98 — Approved, but deferred until style project completed 1/00 — considered by comte as part of style package 4/00 — Considered; request to publish **PENDING FURTHER ACTION**
[CR 32.1]—pending victims rights/allocution litigation	Pending litigation 1997/98.	10/97—Adv Cmte expressed view that it was not opposed to addressing the legislation and decided to keep the subcmte in place to monitor/respond to the legislation. **PENDING FURTHER ACTION**
[CR 32.2] — Create forfeiture procedures	John C. Keeney, DOJ, 3/96 (96-CR-D)	10/96 — Draft presented and considered 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Rejected by Stg Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference 1/99 — Approved by Stg Cmte 3/99 — Approved by Jud Conf 4/00 — Approved by Supreme Ct **COMPLETED**
[CR 33] — Time for filing motion for new trial on ground of newly discovered evidence	John C. Keeney, DOJ 9/95	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 35(b)] — Recognize combined pre-sentencing and post-sentencing assistance	Judge T. S. Ellis, III 7/95	10/95 — Draft presented and considered 4/96 — Forwarded to ST Cmte 6/96 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[CR 35(b)] To permit sentence reduction when defendant assists government before or within 1 year after sentence	Judge Ed Carnes 3/99 (99-CR-A); Asst. Attorney Gen./ Crim. Div. 4/99 (99-CR-C)	3/99— Referred to chair and reporter 1/00 — Considered by comte as part of style package **PENDING FURTHER ACTION**
[CR 35(b)] — Recognize assistance in any offense	S.3, Sen Hatch 1/97	1/97 — Introduced as § 602 and 821 of the Omnibus Crime Prevention Act of 1997 6/97 — Stotler letter to Chairman Hatch **COMPLETED**
[CR 35(c)] — Correction of sentence, timing	Jensen, 1994 9th Cir. decision	10/94 — Considered 4/95 — No action pending restylization of CR Rules 4/99 — Considered 4/00— Considered and included in request to publish **PENDING FURTHER ACTION**
[CR 38(e)] — Conforming amendment to CR 32.2		4/97— Draft presented and approved for publication 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of rejection of R. 32.2 by Stg Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference 1/99— Approved by Stg Cmte 3/99 — Approved by Jud Conf 4/00— Approved by Supreme Ct **COMPLETED**
[CR 40] — Commitment to another district (warrant may be produced by facsimile)		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 40] —Treat FAX copies of documents as certified	Mag Judge Wade Hampton 2/93	10/93 — Rejected **COMPLETED**
[CR 40(a)] — Technical amendment conforming with change to CR5	Criminal Rules Cmte 4/94	4/94 — Considered, conforming change no publication necessary 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CR 40(a)] —Proximity of nearest judge for removal proceedings	Mag Judge Robert B. Collings 3/94	10/94 — Considered and deferred further discussion until 4/95 10/96 — Considered and rejected **COMPLETED**
[CR 40(d)] — Conditional release of probationer; magistrate judge sets terms of release of probationer or supervised release	Magistrate Judge Robert B. Collings 11/92	10/92 — Forwarded to ST Cmte for publication 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**
[CR 41] — Search and seizure warrant issued on information sent by facsimile		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 41] — Warrant issued by authority within the district	J.C. Whitaker 3/93	10/93 — Failed for lack of a motion **COMPLETED**
[CR 41(c)(2)(D)] — recording of oral search warrant	J. Dowd 2/98	4/98 — Tabled until study reveals need for change **DEFERRED INDEFINITELY**
[CR 41(c)(1) and (d) — enlarge time period	Judge B. Waugh Crigler 11/98 (98-CR-D)	**PENDING FURTHER ACTION**
[CR 41(d)] — covert entry for purposes of observation only	DOJ 9/2/99	10/99 — Considered 1/00 — Considered by comte as part of style package 4/00 — Considered; request to publish **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 43(b)] —Sentence absent defendant	DOJ 4/92	10/92 — Subcmte appointed 4/93 — Considered 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Deleted video teleconferencing provision & forwarded to ST Cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CR 43(b)] — Arraignment of detainees by video teleconferencing		10/98 — Subcmte appointed 4/99 — Considered 1/00 — Considered by comte as part of style package 4/00— Considered; request to publish **PENDING FURTHER ACTION**
[CR 43(c)(4)] — Defendant need not be present to reduce or change a sentence	John Keeney, DOJ 1/96	4/96 — Considered 6/96 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[CR 43(c)(5) — Defendant to waive personal arraignment on subsequent, superseding indictments and enter plea of not guilty in writing	Judge Joseph G. Scoville, 10/16/97 (97-CR-I) and Mario Cano 97---	10/97 — Referred to reporter and chair 4/98 —Draft amendments considered, subcmte appointed 10/98 — Cmte considered; reporter to submit draft at next meeting 4/00— Considered; request to publish **PENDING FURTHER ACTION**
[CR 46] — Production of statements in release from custody proceedings		6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 46] — Release of persons after arrest for violation of probation or supervised release	Magistrate Judge Robert Collings 3/94	10/94 — Defer consideration of amendment until rule might be amended or restylized 4/00 — Considered; request to publish **PENDING FURTHER ACTION**
[CR 46] — Requirements in AP 9(a) that court state reasons for releasing or detaining defendant in a CR case	11/95 Stotler letter	4/96 — Discussed and no action taken **COMPLETED**
[CR 46 (e)] — Forfeiture of bond	H.R. 2134	4/98 — Opposed amendment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 46(i)] — Typographical error in rule in cross-citation	Jensen	7/91 — Approved for publication by ST Cmte 4/94 — Considered 9/94 — No action taken by Jud Conf because Congress corrected error **COMPLETED**
[CR 47] — Require parties to confer or attempt to confer before any motion is filed	Local Rules Project	10/95 — Subcmte appointed 4/96 — Rejected by subcmte **COMPLETED**
[CR 49] — Double-sided paper	Environmental Defense Fund 12/91	4/92 — Chair informed EDF that matter was being considered by other cmtes in Jud Conf **COMPLETED**
[CR 49(c)] — Fax noticing to produce substantial cost savings while increasing efficiency and productivity	Michael E. Kunz, Clerk of Court 9/10/97 (97-CR-G)	9/97 — Mailed to reporter and chair 4/98 — Referred to Technology Subcmte 4/99 — Considered 4/00— Considered; request to publish **PENDING FURTHER ACTION**
[CR49(c)] — Facsimile service of notice to counsel	William S. Brownell, 10/20/97 (CR-J)	11/97 — Referred to reporter and chair, pending Technology Subcmte study 4/99 — Considered 4/00 — Considered; request to publish **PENDING FURTHER ACTION**
[CR 49(e)] —Delete provision re filing notice of dangerous offender status — conforming amendment	Prof. David Schlueter 4/94	4/94 — Considered 6/94 — ST Cmte approved without publication 9/94 — Jud Conf approved 4/95 — Sup Ct approved 12/95 — Effective **COMPLETED**
[CR53] — Cameras in the courtroom		7/93 — Approved by ST Cmte 10/93 — Published 4/94 — Considered and approved 6/94 — Approved by ST Cmte 9/94 — Rejected by Jud Conf 10/94 — Guidelines discussed by cmte **COMPLETED**
[CR54] — Delete Canal Zone	Roger Pauley, minutes 4/97 mtg	4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to Stg Cmte 6/98 —Approved by Stg Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. 12/99— Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 57] — Local rules technical and conforming amendments & local rule renumbering	ST meeting 1/92	4/92 — Forwarded to ST Cmte for public comment 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Forwarded to ST Cmte 12/95 — Effective **COMPLETED**
[CR 57] — Uniform effective date for local rules	Stg Cmte meeting 12/97	4/98 — Considered an deferred for further study **PENDING FURTHER ACTION**
[CR 58] — Clarify whether forfeiture of collateral amounts to a conviction	Magistrate Judge David G. Lowe 1/95	4/95 — No action **COMPLETED**
[CR 58 (b)(2)] — Consent in magistrate judge trials	Judge Philip Pro 10/24/96 (96- CR-B)	1/97 — Reported out by CR Rules Cmte and approved by ST Cmte for transmission to Jud Conf without publication; consistent with Federal Courts Improvement Act 4/97 — Approved by Sup Ct 12/97 — Effective **COMPLETED**
[CR 59] — Authorize Judicial Conference to correct technical errors with no need for Supreme Court & Congressional action	Report from ST Subcommittee on Style	4/92 — Considered and sent to ST Cmte 6/93 — Approved for publication by ST Cmte 10/93 — Published for public comment 4/94 — Approved as published and forwarded to ST Cmte 6/94 — Rejected by ST Cmte **COMPLETED**
[Megatrials] — Address issue	ABA	11/91 — Agenda 1/92 — ST Cmte, no action taken **COMPLETED**
[Rule 8. Rules Governing §2255] — Production of statements at evidentiary hearing		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[Rules Governing Habeas Corpus Proceedings]— miscellaneous changes to Rule 8 & Rule 4 for §2255 & §2254 proceedings	CV Cmte	10/97 — Subcmte appointed 4/98 — Considered; further study 10/98 — Cmte approved some proposals and deferred others for further consideration 4/00 — Considered; request to publish **PENDING FURTHER ACTION**
[CR8(c)] — Apparent mistakes in Federal Rules Governing § 2255 and § 2254	Judge Peter Dorsey 7/9/97 (97-CR-F)	8/97 — Referred to reporter 10/97 — Referred to subcmte 4/98 — Cmte considered 10/98 — Cmte considered **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[U.S. Attorneys admitted to practice in Federal courts]	DOJ 11/92	4/93 — Considered **COMPLETED**
[Restyling CR Rules]		10/95 — Considered 4/96 — On hold pending consideration of restyled AP Rules published for public comment 4/98 — Advised that Style Subc intends to complete first draft by the end of the year 12/98 — Style subcmte completes its draft 4/99 — Considered Rules 1-9 6/99 — Considered Rules 1-22 4/00— Rules 32-60 approved by comte; request to publish Rules 1-60 **PENDING FURTHER ACTION**

AGENDA DOCKETING

ADVISORY COMMITTEE ON EVIDENCE RULES

Proposal	Source, Date, and Doc #	Status
[EV 101] — Scope		6/92 — Approved by ST Cmte. 9/92 — Approved by Jud. Conf. 4/93 — Approved by Sup. Ct. 12/93 — Effective 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 102 — Purpose and Construction		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 103] — Ruling on EV		9/93 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 103(a)] — When an *in limine* motion must be renewed at trial (earlier proposed amendment would have added a new Rule 103(e))		9/93 — Considered 5/94 — Considered 10/94 — Considered 1/95 — Approved for publication by ST Cmte. 5/95 — Considered. Note revised. 9/95 — Published for public comment 4/96 — Considered 11/96 — Considered. Subcommittee appointed to draft alternative. 4/97 — Draft requested for publication 6/97 — ST Cmte. recommitted to advisory cmte for further study 10/97 — Request to publish revised version 1/98 — Approved for publication by ST Cmte. 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — Stg Comte approved 9/99 — Judicial Conference Approved 4/00 — Approved by Supreme Court **PENDING FURTHER ACTION**

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

Proposal	Source, Date, and Doc #	Status
[EV 401] — Definition of "Relevant Evidence"		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 402] — Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 403] — Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 404] — Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes	Sen. Hatch S.3, § 503 (1/97)(dealing with 404(a)	9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 10/94 — Considered with EV 405 as alternative to EV 413-415 4/97 — Considered 6/97 — Stotler letter to Hatch on S.3 10/97 — Recommend publication 1/98 — Approved for publication by the ST Cmte. 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — Stg Comte approved 9/99 — Judicial Conference Approved 4/00 — Approved by the Supreme Court **PENDING FURTHER ACTION**
[EV 404(b)] — Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes: Other crimes, wrongs, or acts. (Uncharged misconduct could only be admitted if the probative value of the evidence substantially outweighs the prejudicial effect.)	Sen. Hatch S.3, § 713 (1/97)	9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 10/94 — Discussed 11/96 — Considered and rejected any amendment 4/97 — Considered 6/97 — Stotler letter to Hatch on S.3 10/97 — Proposed amendment in the Omnibus Crime Bill rejected **COMPLETED**

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

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

Proposal	Source, Date, and Doc #	Status
[EV 501] — Privileges, extending the same attorney-client privilege to in-house counsel as to outside counsel		11/96 — Decided not to take action 10/97 — Rejected proposed amendment to extend the same privilege to in-house counsel as to outside counsel 10/98 — Subcmte appointed to study the issue **COMPLETED**
[Privileges] — To codify the federal law of privileges	EV Rules Committee (11/96)	11/96 — Denied 10/98 — Cmte. reconsidered and appointed a subcmte to further study the issue 4/99 — Considered pending further study 10/99 — Subcomte established to study 4/00 — Considered **PENDING FURTHER ACTION**
[EV 501] Parent/Child Privilege	Proposed Legislation	4/98 — Considered; draft statement in opposition prepared **COMPLETED**
[EV 601] — General Rule of Competency		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 602] — Lack of Personal Knowledge		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 603] — Oath or Affirmation		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 604] — Interpreters		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 605] — Competency of Judge as Witness		9/93 — Considered 10/94 — Decided not to amend (Comprehensive Review) 1/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 606] — Competency of Juror as Witness		9/93 — Considered 10/94 — Decided not to amend (Comprehensive Review) 1/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 607] —Who May Impeach		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 608] — Evidence of Character and Conduct of Witness		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 608(b)] — Inconsistent rulings on exclusion of extrinsic evidence		10/99 — Considered 4/00 — Considered; amendment to be drafted **PENDING FURTHER ACTION**
[EV 609] — Impeachment by EV of Conviction of Crime. See 404(b)		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Considered 4/97 — Declined to act **COMPLETED**
[EV 609(a) — Amend to include the conjunction "or" in place of "and" to avoid confusion.	Victor Mroczka 4/98 (98-EV-A)	5/98 — Referred to chair and reporter for consideration 10/98 — Cmte declined to act **COMPLETED**
[EV 610] — Religious Beliefs or Opinions		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 611] — Mode and Order of Interrogation and Presentation		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 611(b)] — Provide scope of cross-examination not be limited by subject matter of the direct		4/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Decided not to proceed **COMPLETED**
[EV 612] — Writing Used to Refresh Memory		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 613] — Prior Statements of Witnesses		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 614] — Calling and Interrogation of Witnesses by Court		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 615] — Exclusion of Witnesses. (Statute guarantees victims the right to be present at trial under certain circumstances and places some limits on rule, which requires sequestration of witnesses. Explore relationship between rule and the Victim's Rights and Restitution Act of 1990 and the Victim Rights Clarification Act of 1997 passed in 1996.)	42 U.S.C., § 10606 (1990)	9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Considered 4/97 — Submitted for approval without publication 6/97 — Approved by ST Cmte. 9/97 — Approved by Jud. Conf. 4/98 — Sup Ct approved 12/98 — Effective **COMPLETED**
[EV 615] — Exclusion of Witnesses	Kennedy-Leahy Bill (S. 1081)	10/97 — Response to legislative proposal considered; members asked for any additional comments **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 701] — Opinion testimony by lay witnesses		10/97 — Subcmte. formed to study need for amendment 4/98 — Recommend publication 6/98 — Stg. Cmte approves request to publish 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — Stg Comte approved 9/99 — Judicial Conference Approved 4/00 — Approved by the Supreme Court **PENDING FURTHER ACTION**
[EV 702] — Testimony by Experts	H.R. 903 and S. 79 (1997)	2/91 — Considered by CV Rules Cmte. 5/91 — Considered by CV Rules Cmte. 6/91 — Approved for publication by ST Cmte. 8/91 — Published for public comment by CV Rules Cmte. 4/92 — Considered and revised by CV and CR Rules Cmtes. 6/92 — Considered by ST Cmte. 4/93 — Considered 5/94 — Considered 10/94 — Considered 1/95 — Considered (Contract with America) 4/97 — Considered. Reporter tasked with drafting proposal. 4/97 — Stotler letters to Hatch and Hyde 10/97 — Subcmte. formed to study issue further 4/98 — Recommend publication 6/98 — Stg. Cmte approves request to publish 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — Stg Comte approved 9/99 — Judicial Conference Approved 4/00 — Approved by the Supreme Court **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[EV 703] — Bases of Opinion Testimony by Experts. (Whether rule, which permits an expert to rely on inadmissible evidence, is being used as means of improperly evading hearsay rule.)		4/92 — Considered by CR Rules Cmte. 6/92 — Considered by ST Cmte. 5/94 — Considered 10/94 — Considered 11/96 — Considered 4/97 — Draft proposal considered. 10/97 — Subcmte. formed to study issue further 4/98 — Recommend publication 6/98 — Stg. Cmte approves request to publish 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — Stg Comte approved 9/99 — Judicial Conference Approved 4/00 — Approved by the Supreme Court **PENDING FURTHER ACTION**
[EV 705] — Disclosure of Facts or Data Underlying Expert Opinion		5/91 — Considered by CV Rules Cmte. 6/91 — Approved for publication by ST Cmte. 8/91 — Published for public comment by CV Rules Cmte. 4/92 — Considered by CV and CR Rules Cmtes 6/92 — Approved by ST Cmte. 9/92 — Approved by Jud. Conf. 4/93 — Approved by Sup. Ct. 12/93 — Effective **COMPLETED**
[EV 706] — Court Appointed Experts. (To accommodate some of the concerns expressed by the judges involved in the breast implant litigation, and to determine whether the rule should be amended to permit funding by the government in civil cases.)	Carnegie (2/91)	2/91 — Tabled by CV Rules Cmte. 11/96 — Considered 4/97 — Considered. Deferred until CACM completes their study. **PENDING FURTHER ACTION**
[EV 801(a-c)] — Definitions: Statement; Declarant; Hearsay		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 801(d)(1)] — Definitions: Statements which are not hearsay. Prior statement by witness.		1/95 — Considered and approved for publication 5/95 — Decided not to amend (Comprehensive Review) 9/95 — Published for public comment **COMPLETED**
[EV 801(d)(1)] Hearsay exception for prior consistent statements that would otherwise be admissible to rehabilitate a witness's credibility	Judge Bullock	4/98 — Considered; tabled **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[EV 801(d)(2)] — Definitions: Statements which are not hearsay. Admission by party-opponent. (*Bourjaily*)	Drafted by Prof. David Schlueter, Reporter, 4/92	4/92 — Considered and tabled by CR Rules Cmte 1/95 — Considered by ST Cmte. 5/95 — Considered draft proposed 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 802] — Hearsay Rule		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 803(1)-(5)] — Hearsay Exceptions; Availability of Declarant Immaterial		1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 803(6)] — Hearsay Exceptions; Authentication by Certification (See Rule 902 for parallel change)	Roger Pauley, DOJ 6/93	9/93 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 11/96 — Considered 4/97 — Draft prepared and considered. Subcommittee appointed for further drafting. 10/97 — Draft approved for publication 1/98 — Approved for publication by the ST Cmte. 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved 6/99 — Stg Comte approved 9/99 — Judicial Conference Approved 4/00 — Approved by the Supreme Court **PENDING FURTHER ACTION**
[EV 803(7)-(23)] — Hearsay Exceptions; Availability of Declarant Immaterial		1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 803(8)] — Hearsay Exceptions; Availability of Declarant Immaterial: Public records and reports.		9/93 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered regarding trustworthiness of record 11/96 — Declined to take action regarding admission on behalf of defendant **COMPLETED**
[EV 803(18)] — Should "learned treatises" be received as exhibits	Judge Grady	4/00— Considered; comte decides not to act **COMPLETED**
[EV 803(24)] — Hearsay Exceptions; Residual Exception	EV Rules Committee (5/95)	5/95 — Combined with EV804(b)(5) and transferred to a new Rule 807. 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 803(24)] — Hearsay Exceptions; Residual Exception (Clarify notice requirements and determine whether it is used too broadly to admit dubious evidence)		10/96 — Considered and referred to reporter for study 10/97 — Declined to act **COMPLETED**
[EV 804(a)] — Hearsay Exceptions; Declarant Unavailable: Definition of unavailability	Prof. David Schlueter (4/92); Prof. Stephen Saltzburg (4/92)	4/92 — Considered by CR Rules Cmte. 6/92 — Considered by ST Cmte. for publication 1/95 — Considered and approved for publication 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 804(b)(1)-(4)] — Hearsay Exceptions		10/94 — Considered 1/95 — Considered and approved for publication by ST Cmte. 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 804(b)(3)] — Degree of corroboration regarding declaration against penal interest		10/99 — Considered by cmte 4/00 — Considered; amendment to be drafted **PENDING FURTHER ACTION**

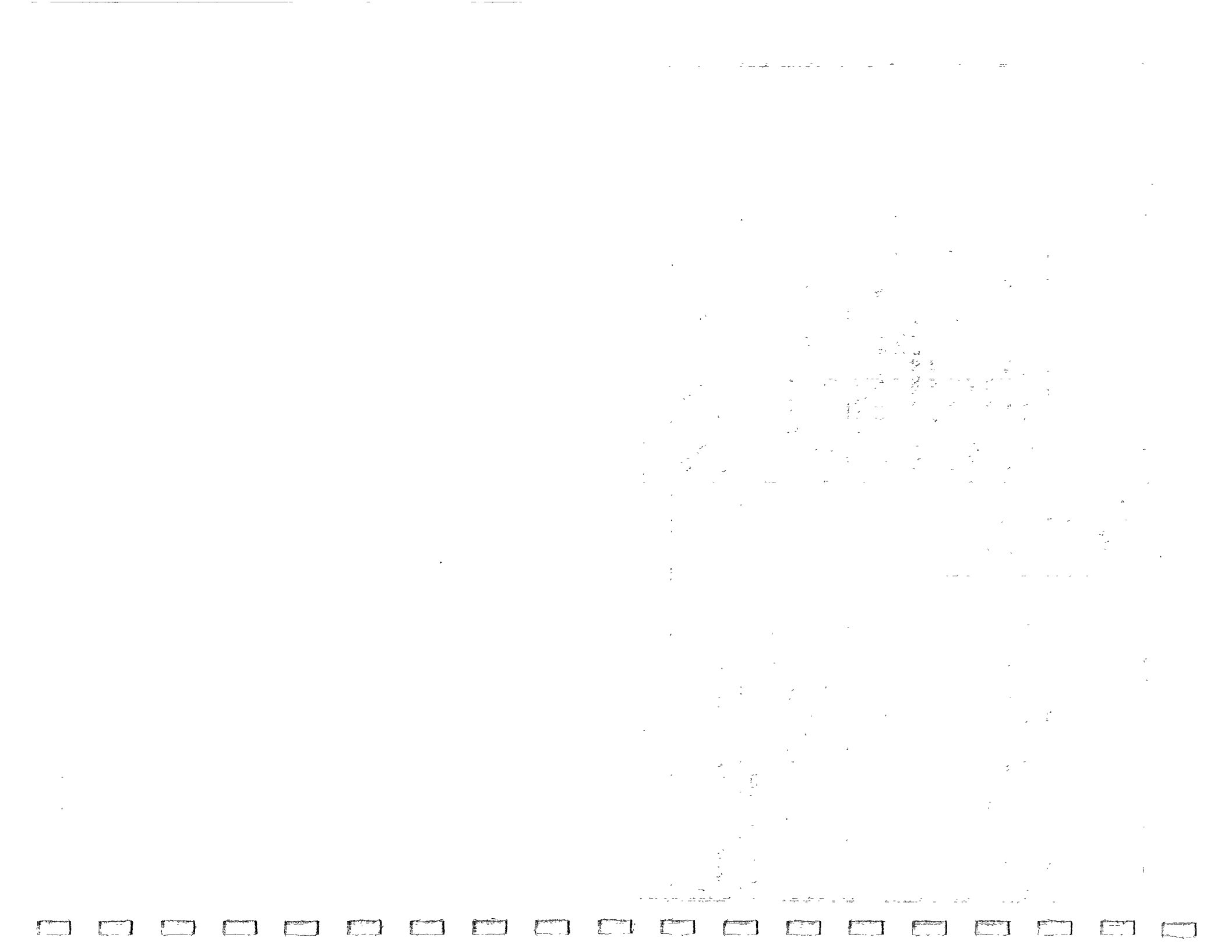
Proposal	Source, Date, and Doc #	Status
[EV 804(b)(5)] — Hearsay Exceptions; Other exceptions		5/95 — Combined with EV804(b)(5) and transferred to a new Rule 807. 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 804(b)(6)] — Hearsay Exceptions; Declarant Unavailable. (To provide that a party forfeits the right to object on hearsay grounds to the admission of a statement made by a declarant whose unavailability as a witness was procured by the party's wrongdoing or acquiescence.)	Prof. David Schlueter (4/92); Prof. Stephen Saltzburg (4/92)	4/92 — Considered by CR Rules Cmte. 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by ST Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 805] — Hearsay Within Hearsay		1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 806] — Attacking and Supporting Credibility of Declarant. (To eliminate a comma that mistakenly appears in the current rule. Technical amendment.)	EV Rules Committee 5/95	5/95 — Decided not to amend 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 806] — To admit extrinsic evidence to impeach the character for veracity of a hearsay declarant		11/96 — Declined to act **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 807] — Other Exceptions. Residual exception. The contents of Rule 803(24) and Rule 804(b)(5) have been combined to form this new rule.	EV Rules Committee 5/95	5/95 — This new rule is a combination of Rules 803(24) and 804(b)(5). 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 10/96 — Expansion considered and rejected 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 807] — Notice of using the provisions	Judge Edward Becker	4/96 — Considered 11/96 — Reported. Declined to act. **COMPLETED**
[EV 901] — Requirement of Authentication or Identification		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 902] — Use of seals	DOJ Committee member	10/99 — Considered 4/00 — Considered; comte decides not to act **COMPLETED**
[EV 902(6)] — Extending applicability to news wire reports	Committee member (10/98)	10/98 — to be considered when and if other changes to the rule are being considered 4/00 — Considered **PENDING FURTHER ACTION**
[EV 902 (11) and (12)] — Self-Authentication of domestic and foreign records (See Rule 803(6) for consistent change)		4/96 — Considered 10/97 — Approved for publication 1/98 — Approved for publication by the ST Cmte. 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — ST Cmte Approved 9/99 — Judicial Conference Approved 4/00 — Approved by the Supreme Court **PENDING FURTHER ACTION**
[EV 903] — Subscribing Witness' Testimony Unnecessary		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 1001] — Definitions		9/93 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1001] — Definitions (Cross references to automation changes)		10/97 — Considered **PENDING FURTHER ACTION**
[EV 1002] — Requirement of Original. Technical and conforming amendments.		9/93 — Considered 10/93 — Published for public comment 4/94 — Recommends Jud. Conf. make technical or conforming amendments 5/95 — Decided not to amend 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1003] — Admissibility of Duplicates		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1004] — Admissibility of Other Evidence of Contents		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1005] — Public Records		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1006] — Summaries		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1007] — Testimony or Written Admission of Party		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1008] — Functions of Court and Jury		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 1101] — Applicability of Rules		6/92 — Approved by ST Cmte. 9/92 — Approved by Jud. Conf. 4/93 — Approved by Sup. Ct. 12/93 — Effective 5/95 — Decided not to amend 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/98 — Considered 10/98 — Reporter submits report; cmte declined to act **COMPLETED**
[EV 1102] — Amendments to permit Jud. Conf. to make technical changes	CR Rules Committee (4/92)	4/92 — Considered by CR Rules Cmte. 6/92 — Considered by ST Cmte. 9/93 — Considered 6/94 — ST Cmte. did not approve 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1103] — Title		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[Admissibility of Videotaped Expert Testimony]	EV Rules Committee (11/96)	11/96 — Denied but will continue to monitor 1/97 — Considered by ST Cmte. **PENDING FURTHER ACTION**
[Attorney-client privilege for in-house counsel]	ABA resolution (8/97)	10/97 — Referred to chair 10/97 — Denied **COMPLETED**
[Automation] — To investigate whether the EV Rules should be amended to accommodate changes in automation and technology	EV Rules Committee (11/96)	11/96 — Considered 4/97 — Considered 4/98 — Considered **PENDING FURTHER ACTION**
[Circuit Splits] — To determine whether the circuit splits warrant amending the EV Rules		11/96 — Considered 4/97 — Considered **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[Obsolete or Inaccurate Rules and Notes] — To identify where the Rules and/or notes are obsolete or inaccurate.	EV Rules Committee (11/96)	5/93 — Considered 9/93 — Considered. Cmte. did not favor updating absent rule change 11/96 — Considered 1/97 — Considered by the ST Cmte. 4/97 — Considered and forwarded to ST Cmte. 10/97 — Referred to FJC 1/98 — ST Cmte. Informed of reference to FJC 6/98 — Reporter's Notes published **COMPLETED**
[Statutes Bearing on Admissibility of EV] — To amend the EV Rules to incorporate by reference all of the statutes identified, outside the EV Rules, which regulate the admissibility of EV proffered in federal court		11/96 — Considered 4/97 — Considered and denied **COMPLETED**
[Sentencing Guidelines] — Applicability of EV Rules		9/93 — Considered 11/96 — Decided to take no action **COMPLETED**



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 12, 2000

MEMORANDUM TO THE STANDING RULES COMMITTEE

SUBJECT: *Local Rules on the Internet* (ACTION)

The Standing Committee is asked to consider a proposal that the Judicial Conference approve linking Internet web sites of courts that contain local rules with the Federal Rulemaking home page maintained by the Administrative Office and encourage those courts that have no Internet web site to establish one, at least one that contains their local rules. The proposal will be considered by the Committee on Court Administration and Case Management (CACM Committee) at its June 26-27 meeting.

I am attaching Judge Scirica's February 23, 2000, letter to Judge Brock Hornby, chair of CACM Committee, asking his committee to support the proposal. I am also attaching a memorandum from the Director referring the issue to Karen Siegel of the Office of Judicial Conference Executive Secretariat for appropriate coordination among the Judicial Conference Committees.

At their spring meetings, each of the advisory rules committees unanimously supported the proposal.

John K. Rabiej

Attachments

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

ANTHONY J. SCIRICA
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

WILL L. GARWOOD
APPELLATE RULES

ADRIAN G. DUPLANTIER
BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

W. EUGENE DAVIS
CRIMINAL RULES

MILTON I. SHADUR
EVIDENCE RULES

February 23, 2000

Honorable D. Brock Hornby
Chair, Committee on Court
Administration and Case Management
156 Federal Street
Portland, ME 04101

Dear Brock:

I write to ask your assistance on a matter dealing with local rules. For many years, the bar has commented about the difficulty in locating and obtaining local rules. These complaints have come not only from national firms and the Department of Justice, but also from local counsel whose practice is mainly in state court. Loose-leaf publications contain the rules, but the publications often are not current. This month, the American Bar Association House of Delegates adopted the recommendation of six of its committees that all local rules of courts "be conveniently and fully accessible to the public in both written and electronic format in a single national location."

We can help the bench and bar by providing a single location for accessing all local rules—an Internet web site. Providing local rules online will ease the burden on clerks of court, and may facilitate the Administrative Office's compliance with its statutory obligations to keep a current record of local rules and orders. *See* 28 U.S.C. § 604(20) (requiring Administrative Office to "periodically compile [local rules of court] so as to provide a current record of such rules and orders"); 28 U.S.C. § 2071(d) (requiring that copies of local rules be furnished "to the Director of the Administrative Office of the United States Courts and made available to the public"). The Rules Committees strongly support the posting of local rules on the Internet.

More than half the courts have established their own web sites (8 courts of appeals, 52 district courts, and 59 bankruptcy courts) containing local rules. We recommend that the existing Federal Judiciary web site (*www.uscourts.gov*), which includes links to the existing web sites of individual courts, be modified to include an additional link to the Judiciary's Federal Rulemaking web page, which contains rules-related materials. We also propose that those courts that have not yet established their

own web sites be encouraged to do so, and to include their current local rules and standing orders on those sites.. (I am told that the administrative burden in setting up a site is low—from two to eight hours.) By providing links from the Federal Judiciary web site to the web sites of individual courts, users can access all local rules from a single location.

Specifically, we recommend: (1) that the appellate, district, and bankruptcy courts be encouraged to post their local rules on an Internet web site; and (2) that the Administrative Office link local rules posted on the Internet to its Federal Judiciary's Federal Rulemaking web page.

I would be grateful if your committee would consider this matter, and if it agrees with the proposal for establishing online access to local rules, support the recommendations.

Please call me if you would like to discuss this matter.

Sincerely,

Tony

Anthony J. Scirica

cc: Abel Mattos
John Rabiej

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

February 25, 2000

MEMORANDUM TO JOHN RABIEJ

SUBJECT: Posting Local Rules on the Internet

I have just received your memorandum of January 27 on the above subject together with a memo from Noel Augustyn to you dated February 8 and your response of February 23 to him. I have carefully read the material.

Because of the great sensitivity in the courts about local rules, I do not wish to unilaterally have the AO post all local rules on a national website. The fact that the American Bar Association might like it and has passed a resolution consistent with your proposal is significant, but I have observed that the Judicial Conference and the judiciary do not always choose to follow the policy recommendations of the ABA which has a special, indeed perhaps a vested interest of its own. Having said that, the proposal may have merit. Therefore, I have asked Karen Siegel to provide me with a recommendation about which committee or committees of the Conference should review the proposal prior to submitting it to the Judicial Conference for its approval.

Because local rules are central to the administration of the local courts, the Committee on Court Administration, I would assume, would have an interest. Probably the Rules Committee should be involved in the process, and likewise the Committee on Automation and Technology.

It was not clear to me from your memoranda whether or not the Rules Committee favors this idea.

As soon as I hear from Karen on a suggested plan of action, we will proceed by consulting the interested people here at the AO first.

Leonidas Ralph Mecham

cc: Pete Lee
Karen Siegel
Peter McCabe
Noel Augustyn



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 10, 2000

MEMORANDUM TO THE STANDING RULES COMMITTEE

SUBJECT: *Legislation Report*

For your information, I have attached a chart showing the status of the rules-related bills introduced in the 106th Congress. Since the committee's January meeting, there has been little action on bills of interest to the rules committees, other than those described below.

Both Houses have passed versions of the comprehensive bankruptcy reform bill, which was reported to the committee in January. I have attached a copy of a letter from the Director to the interested members of Congress providing the views of the Judicial Conference with regard to the pending bankruptcy bills. The rules-related items are discussed on page 7. No formal conferees have been appointed to reconcile the two bills, but it has been reported that staff and the leadership continue to work on a compromise bill.

The Civil Asset Forfeiture Reform Act, H.R. 1658, was passed on April 25, 2000. Pub. L. 106-185. A provision in that law may conflict with the amendments to Rule C(4) of the Supplemental Rules for Certain Admiralty and Maritime Cases approved by the Supreme Court on April 17, 2000, which take effect on December 1, 2000.

The Senate has recently renewed its consideration of S. 934, *Crime Victims' Assistance Act,* and S. J. Res 3 both addressing protection of victims' rights. S. 934 would, among other things, amend several Rules of Criminal Procedure to require that notice of a hearing to enter a plea of guilty or nolo contendere or of a hearing to modify or revoke a sentence be given to victims and that the contents of a victim's impact statement be detailed. S. J. Res 3 proposes a constitutional amendment to achieve the same results. The Judicial Conference has indicated a preference for a legislative approach.

John K. Rabiej

Attachments

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

SENATE BILLS

S. 32 *No title*

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

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

- Introduced by: McCain
- Date Introduced: January 19, 1999
- Status: Referred to Committee on Commerce; Hearings held on February 9, 1999; Committee reported bill favorably on March 3, 1999; Letter from Director opposing class action and special pleading requirements sent on March 24, 1999; Text inserted in H. R. 775 as passed Senate (CR S6998) on 6/15/99
- Provisions affecting rules: federalizing Y2K class actions and heightened pleading requirements

S. 248 Judicial Improvement Act of 1999

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

S. 250 Federal Prosecutor Ethics Act

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

S.353 Class Action Fairness Act of 1999

- Introduced by: Grassley (6 co-sponsors)
- Date Introduced: February 3, 1999
- Status: Referred to the Committee on Judiciary 5/4/99 Subcommittee on Administrative Oversight and the Courts; hearings held on May 4, 1999; Letter sent by Director to Senate Judiciary Committee on October 7, 1999
- Provisions affecting rules:
  - Sec. 2. Provides for notification of the Attorney General & state attorney generals;
  - Sec. 2. Limits on attorney fees
  - Sec. 3. Minimal diversity requirements;
  - Sec. 4. Allows for removal of class actions to federal court; and
  - Sec. 5. Removes judicial discretion from **Civil Rule 11(c)** in all cases.

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

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

S. 625 *Bankruptcy Reform Act of 1999* (See also H.R. 833)

- Introduced by: Grassley (5 co-sponsors)
- Date Introduced: March 16, 1999
- Status: Referred to the Committee on Judiciary; Letter sent by Director to Hatch 3/23/99; Ordered to be reported with amendments favorably Apr 27, 1999; Committee on Judiciary reported to Senate with amendments. (Report No. 106-49 May 11, 1999.) Placed on Senate Legislative Calendar; 11/19/99 Unanimous consent agreement in Senate to vote on cloture motion on Jan. 25 (CR S15061); 2/2/2000 Senate passed companion measure H.R. 833 in lieu of this measure by Yea-Nay Vote. 83 - 14. Letter sent from Director to Grassley
- Provisions affecting rules:
  - ~~Section 702 requires clerks of court to maintain a register of all governmental units to ensure that the appropriate government office receives adequate notice of bankruptcy filings.~~ Deleted from the passed version
  - Sections 102, 221, 319, 421, 433, and 425 would authorize or mandate the initiation of the rulemaking process with respect to separate proposals for rule changes.

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

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

S. 755 No title

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

S. 758 Fairness in Asbestos Compensation Act of 1999

- Introduced by: Ashcroft (28 co-sponsors)
- Date Introduced: March 25, 1999
- Status: Referred to the Committee on Judiciary; 10/5/99 hearing held by sub. Administrative Oversight and the Courts.
- Provisions affecting rules:
  - Section 301 requires the board of the Asbestos Resolution Corporation to establish procedures for ADR;
  - Section 307(j) creates a penalty for an inadequate offer; and
  - Section 402 bars class actions in asbestos cases without the consent of each defendant, and governs removal.

S. 855 Professional Standards for Government Attorneys Act of 1999

- Introduced by: Leahy (0 co-sponsors)
- Date Introduced: April 21, 1999
- Status: Referred to the Committee on Judiciary.
- Provisions affecting rules:
  - Requires the Judicial Conference to submit to the Chief Justice a report that includes recommendations with respect to amending the Federal Rules of Civil and Criminal Procedure to provide for such a uniform national rules governing conduct of government attorneys. Directs the Judicial Conference, in developing recommendations, to consider: (1) the needs and circumstances of multi-forum and multi-jurisdictional litigation; (2) the special needs and interests of the United States in investigating and prosecuting violations of Federal criminal and civil

law; and (3) practices that are approved under Federal statutory or case law or that are otherwise consistent with traditional Federal law enforcement techniques.

S. 899 21st Century Justice Act of 1999

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

S. 934 Crime Victims Assistance Act

- Introduced by: Leahy (10 co-sponsors)
- Date Introduced: April 30, 1999; amendment introduced 4/13/00 (but not acted on)
- Status: Referred to the Committee on Judiciary.
- Provisions affecting rules:
  - Section 121 would amend **Criminal Rule 11** to require the Government to make a reasonable effort to notify the victim of a crime of violence of the time and date of any hearing on entering a plea of guilty or nolo contendere, and the victim's right to attend that hearing. If the victim attends the proceeding, the court shall afford the victim an opportunity to be heard on the plea.
  - Section 122 would amend **Criminal Rule 32** detailing the contents of the Victim Impact Statement; give the victim an opportunity to submit a written or oral statement, or an audio or videotaped statement; require the Government to make a reasonable effort to notify the victim of a crime of violence of the time and date of any sentencing hearing and the victim's right to attend that hearing. If the victim attends the proceeding, the court shall afford the victim an opportunity to be heard.
  - Section 123 would amend **Criminal Rule 32.1** require the Government to make a reasonable effort to notify the victim of a crime of violence of the time and date of any hearing to revoke or modify sentence and the victim's right to attend that

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

- Section 131 would amend **Evidence Rule 615** to allow the victim of a crime of violence to be present unless the court finds the testimony of that person will be materially affected by hearing the testimony of other witnesses or there are too many victims. [Note: It appears the amendments are based on the old version of Evidence Rule 615 (i.e do not account for the 2/98 amendment)]

S. 957 Sunshine in Litigation Act of 1999

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

S. 1360 Secret Service Protection Privilege Act of 1999

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

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

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

S. 1700 "Hunt for the Truth Act" (H.R.3233 Identical bill; and S. 2073)

- Introduced by: Durbin (1 co-sponsors)
- Date Introduced: October 6, 1999
- Status: Referred to the Committee on Judiciary.
- Provisions affecting rules:
  - Section 2 would add new criminal Rule 33.1 allowing a judge upon motion of the defendant to order post-conviction forensic DNA testing if the technology for that type of testing was not available when the defendant was convicted.

S. 2073 Innocence Protection Act of 2000 **(see H.R 3233 and 4167 and S. 1700)**

- Introduced by: Leahy (5 co-sponsors)
- Date Introduced: February 10, 2000
- Status: Referred to the Committee on Judiciary.
- Provisions affecting rules:
  - Section 202 would amend habeas provisions in 2254
  - Possible Criminal Rule 33 implications

HOUSE BILLS

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

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

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

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

H.R. 771 No title

- Introduced by: Coble (16 co-sponsors)
- Date Introduced: February 23, 1999
- Status: Referred to the Committee on Judiciary; 3/11/99 Forwarded by Subcommittee to Full Committee; Letter from Judge Niemeyer to Hyde 3/22/99
- Provisions affecting rules:
  - Amends **Civil Rule 30** to require that depositions be recorded by stenographic or stenomask means unless the court upon motion orders, or the parties stipulate in writing, to the contrary.

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

- Introduced by: Honorable W. Eugene Davis (62 co-sponsors)
- Date Introduced: February 23, 1999; ordered report 5/4/99
- Status: Referred to the Committee on Judiciary; Letter from Director opposing class action and special pleading requirements sent on March 24, 1999; hearing 4/13; Passed by House of Representatives on May 12, 1999; Signed by President on 7/20/99

- Provisions affecting rules:
  - Section 103 establishes special ("fraud-like") pleading requirements
  - Section 404 establishes federal jurisdiction of Y2K class actions over $1 million

H.R. 833 Bankruptcy Reform Act of 1999 (See S. 625)

- Introduced by: Gekas (105 co-sponsors)
- Date Introduced: February 24, 1999
- Status: Referred to the Committee on Judiciary; Forwarded by Subcommittee to Full Committee in the Nature of a Substitute by the Yeas and Nays: 5 - 3; letter sent by Director to Hyde on 3/23/99; Passed(313 - 108) 05/05/99; Read twice in the Senate 5/12/99; letter to conferees sent 3/17/00)
- Provisions affecting rules:
  - Section 802 requires clerks of court to maintain a register of all governmental units to ensure that the appropriate government office receives adequate notice of bankruptcy filings.
  - Sections 102, 403, 607, and 816(e) would authorize or mandate the initiation of the rulemaking process with respect to separate proposals for rule changes.

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

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

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

- Introduced by: Chabot (43 co-sponsors)
- Date Introduced: March 25, 1999
- Status: 3/25/98 Referred to the House Committee on the Judiciary; referred to the Subcommittee on Courts and Intellectual Property 4/7/99; Judicial Conference opposes this proposal
- Provisions affecting rules:
  - Section 1 states the presiding judge of any appellate court or district court may, in his or her discretion, permit the photographing, electronic recording, broadcasting, or televising to the public of court proceedings over which that judge presides; safe guards are provided to obscure the identity of nonparty witnesses; the Judicial Conference is authorized to promulgate advisory guidelines
  - Section 3 provides a 3-year sunset of section 1.

H.R. 1283 Fairness in Asbestos Compensation Act of 1999 (See S. 758)

- Introduced by: Hyde (75 co-sponsors)
- Date Introduced: March 25, 1999
- Status: 3/25/99 Referred to the House Committee on the Judiciary; 3/9/00 Mark-up held; 3/16/00 ordered reported

- Provisions affecting rules:
  - Section 205 eliminates consolidation of cases, including class action filings (court has discretion to consolidate certain cases)

H.R. 1658 Civil Asset Forfeiture Reform Act **(Public Law No: 106-185.)**

- Introduced by: Hyde (59 co-sponsors)
- Date Introduced: May 4, 1999
- Status: 5/4/99 Referred to the House Committee on the Judiciary; Measure passed House on June 24, 1999; received in the Senate June 28, 1999; Passed Senate with an amendment by Unanimous Consent on 3/27/2000;
- Provisions affecting rules
  - Section 2 adds a new section 983(a)(4) to title 18, U.S.C that may conflict with the recently approved amendments to Rule C(4) of the *Supplemental Rules for Certain Admiralty and Maritime Cases*

H.R. 1752 Federal Courts Improvement Act of 1999

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

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

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

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

- Introduced by: Goodlatte (37 co-sponsor)
- Date Introduced: May 19, 1999
- Status: Referred to the Committee on Judiciary; Hearings Held on July 21, 1999, Mark-up held July 27, 1999 and August 3, 1999; Ordered to be Reported (Amended) by the Yeas and Nays: 15 - 12.; letter from Executive Committee generally stating Judiciary's opposition on July 26, 1999; more detailed letter followed on August 23, 1999; 09/23/99 Measure passed House, amended, (222-207) . 11/19/99 Referred to Senate Committee on the Judiciary

- Provisions affecting rules: None directly; general class action considerations; extends minimal diversity to all class actions

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

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

JOINT RESOLUTIONS

S. J. RES. 3; *A joint resolution proposing an amendment to the Constitution of the United States to protect the rights of crime victims.* (See also H.J. Res 64)

- Introduced by: Kyl (33 Co-sponsors) Date Introduced: 1/19/99
- Status: Referred to the Committee on Judiciary; 3/23/99 Referred to Subcommittee on Constitution, Federalism, Property; 3/24/99 Committee on Judiciary, Hearings held; 9/30/99 passed House; 10/4/99 placed on Senate Legislative Calendar; 2/10/00 Judge Sullivan testified before the House Subcommittee on the Constitution urging a statutory approach
- Provisions affecting rules
    - Calls for a Constitutional amendment enumerating victim's rights.

Item 4

Agenda Item IV
Committee on Rules of Practice and Procedure
June 7-8, 2000
Information Item

FEDERAL JUDICIAL CENTER UPDATE

For each Committee meeting, the Federal Judicial Center provides an update on projects related to committee interests. The educational programs listed below make up a small number of the seminars and in-court programs offered in-person or electronically. The research projects described below are a few of the projects undertaken by the Center, many in support of Judicial Conference committees.

I. The Federal Judicial Television Network

As of March 2000, the Administrative Office has installed downlink antennas in more than 270 court locations and antennas have been ordered for some 15 additional locations to complete the network. Center staff manage the FJTN and assist both Center and AO staff to produce the FJTN broadcasts. The Center's program schedule in 2000 will feature a variety of original programs for judges and court staff.

Selected Programs for Judges. Recent Center programs for judges included an update on removal jurisdiction and on bankruptcy law. Programs scheduled or planned for later in 2000 include: handling federal capital cases; the annual review of the Supreme Court's term; orientation for new law clerks (with segments on ethics, writing, and, new this year, federal jurisdiction); and a six-part series on science in the courtroom that will include discussions of *Markman* and *Daubert* hearings. In addition, if major bankruptcy legislation is enacted, the Center will broadcast a program addressing the new legislation.

Selected Programs for court staff. Our schedule of original broadcasts for court staff during the latter half of calendar 2000 includes programs for managers on developing court employee competencies, minimizing the risk of employee violence, and an update on capital case issues for district and appellate staff and law clerks. New editions of the Center's television magazine, *Court to Court* will also air. The June 2000 *Court to Court* features a conversation with AO Associate General Counsel Marilyn Holmes concerning the roles judiciary employees may and may not play in political campaigns.

Programs Broadcast for the Administrative Office. Center staff have worked with AO staff to broadcast videotaped programs on human resources and other operational matters, such as a series of programs on the FERS and civil service retirement systems; programs for judges and court employees on the judiciary personnel systems; and programs on technology and human resources. Center staff members have also helped AO staff develop live interactive educational programs, including Law Day broadcasts in 1999 and 2000 that included participation by high school students around the country.

II. Additional Educational Programs for Court Staff

In addition to the FJTN programs described above, the Center uses local court programs, workshops and seminars, and technology-based formats to provide educational programs for court staff. Examples of some of the programs recently held or scheduled for the coming months include:

- "Shaping the Future" was the theme of the Center's May 2000 biennial National Conference for Chief Probation and Pretrial Services Officers. The conferees reviewed a 100-year time line of legislation, court decisions, and key events in probation and pretrial services history to discern trends that have evolved and to plan for the future. The program featured more than twenty workshops on management and leadership issues, changing staff roles, and other issues.

- release of a web-based program that can be used through a court's home page, to educate court employees, pro se litigants, students, and journalists about court operations and the roles of individuals involved in court proceedings and administration. The program, developed at Chief Judge D. Brock Hornby's (District Court of Maine) suggestion, will also include in-depth descriptions of the stages of criminal, civil, and bankruptcy litigation;

- biennial national conferences for district court clerks, district executives, and chief deputies (October 2000);

- several new in-court packaged training programs: writing skills workshops for all court staff and two programs that will help officers improve skills for supervising offenders and defendants;

- a June executive team development workshop for chief bankruptcy judges and clerks;

- strategic planning programs for executive teams in district courts (July 2000) and bankruptcy courts (August 2000);

- a program on case opening procedures for appellate case managers conducted via an on-line conference and videoconference;

- a combined audio- and on-line conference for bankruptcy chief deputies; and

- the concluding workshop for mid-level managers in the 1998-2000 class of the multi-phased Federal Court Leadership Program.

III. Selected Research Projects and Activities

Special Masters. A subcommittee of the Advisory Committee on Civil Rules asked the Center to conduct an empirical study of the use of special masters in the district courts. An October 1999 report to the committee examined the functions of special masters, with particular attention to problems that have arisen and potential areas for changes in Rule 53. Subsequently, we interviewed selected judges, special masters, and attorneys who had been involved in cases that used special masters and reported those findings at the Advisory Committee's spring meeting. Our report, *Special Masters and Court-Appointed Experts:Incidence and Activity*, will be available later this year.

Notices in Class Action Litigation. The Class Action Subcommittee of the Advisory Committee on Civil Rules has asked the Center to develop model notice forms for consumer, securities, employment, personal injury, and property class actions. The subcommittee's request is an outgrowth of previous Center work on class actions undertaken for the Civil Rules Committee. The current project will identify topics that should be included in class action notices and will explore ways of verifying that such notices satisfy a "plain English" requirement the subcommittee is considering.

Managing Federal Death Penalty Trials. We are nearing completion of a compilation and summary of procedures used in federal death penalty cases, including a description of how these procedures differ from those used in more routine criminal litigation. We have collected jury questionnaires, instructions, verdict forms, scheduling orders, and other materials developed by judges who have handled death penalty cases. Many of these items will be available to the courts in electronic form via the Center's DCN site, and will be revised as the courts' experience with federal death penalty litigation expands. The materials will include a list of all federal judges who have handled federal death penalty cases.

Analysis of Appellate Decisions Involving Title 28 U.S.C. Jurisdictional Issues. The Committee on Federal-State Jurisdiction has asked the Center to help identify needed improvements in federal statutes. The committee is examining a wide range of jurisdictional statutes, including title 28 of the United States Code that may require legislative change. We have been asked to identify instances in which judges have noted in case opinions technical glitches or jurisdictional issues in title 28. Following consultations with the committee's chair, Judge Walter Stapleton (Third Circuit), and Administrative Office staff, we are focusing initially on federal court of appeals decisions rendered during the past year in cases that involved selected chapters of title 28.

Appellate Case Management Manual. The judiciary's Long Range Plan calls for the courts of appeals to exchange information about case management. The Subcommittee on Appellate Case Management of the Court Administration Case Management Committee, in implementing the recommendation, asked the Center to gather and organize information about case management procedures in the courts of appeals. This resulted in the publication *Case Management Procedures in the Federal Courts of Appeal.* Part I

highlights key areas in which variation exists in the operations of the courts of appeals. Part II provides circuit-by-circuit descriptions of how each court of appeals manages its caseload.

Conference for Appellate Chief Judges. At the request of Chief Judge Edward Becker (Third Circuit), the Center, with assistance of the Administrative Office, held a conference for the circuit chief judges in March 2000. The purpose of the conference was to provide a forum for discussion of the circuit chief judges' governance and administrative responsibilities—for example, the composition and role of circuit councils, judicial misconduct and disability, and oversight of the district courts.

Visiting Judges. This summer the Center will publish a new handbook on effective use of visiting judges. This handbook, which arises out of work the Center did for the Judicial Resources Working Group, will update and expand a 1985 Center manual on the use of visiting judges. The appellate template provides a second avenue for distributing information about the appointment of visiting judges.

Electronic Evidence in the Courtroom. The Center is working with the National Institute of Trial Advocacy (NITA) and an advisory group of judges and lawyers on a handbook to help trial judges understand and manage procedural issues that arise from electronic presentation of evidence. Judge Sam Wilson of this committee is a member of the advisory group. The handbook is part of a larger Center research project on the impact of technology on the adversary process.

Item 5A

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

ANTHONY J. SCIRICA
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

WILL L. GARWOOD
APPELLATE RULES

ADRIAN G. DUPLANTIER
BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

W. EUGENE DAVIS
CRIMINAL RULES

MILTON I. SHADUR
EVIDENCE RULES

DATE: May 11, 2000

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

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

I. Introduction

The Advisory Committee on Appellate Rules met on April 13, 2000, in Washington, D.C. At that meeting, the Advisory Committee approved several items for action by the Standing Committee. The Advisory Committee also removed several items from its study agenda. Detailed information about the Advisory Committee's activities can be found in the minutes of the meeting and in the Committee's docket, both of which are attached to this report.

II. Action Items

A. Rules 5(c) and 21(d)

Rule 5 governs petitions for permission to appeal. A typographical error was made in Rule 5(c) during the 1998 restyling of the appellate rules. At its January 2000 meeting, the Standing Committee approved for publication an amendment to Rule 5(c) to correct that error.

A few weeks after the Standing Committee's meeting, the liaison to our committee from the appellate clerks pointed out that the typographical error that appears in Rule 5(c) also appears in Rule 21(d), which governs petitions for extraordinary relief. Also, the liaison pointed out that nothing in Rule 5 or in any other rule imposes any limitation on the length of a petition for permission to appeal. Likewise, nothing in Rule 21 or in any other rule imposes any limitation on the length of a petition for extraordinary relief.

The proposed amendment to Rule 5(c) is identical to the one approved by the Standing Committee in January, except that it adds a page limitation on petitions for permission to appeal (and related papers). The proposed amendment to Rule 21(d) corrects the same typographical error as the proposed amendment to Rule 5(c) and adds a page limitation on petitions for extraordinary relief (and related papers).

Rule 5. Appeal by Permission

(c) Form of Papers; Number of Copies. All papers must conform to Rule ~~32(a)(1)~~ 32(c)(2). Except by the court's permission, a paper must not exceed 20 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 5(b)(1)(E). An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

Committee Note

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

Rule 5(c) has been further amended to limit the length of papers filed under Rule 5.

Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

(d) Form of Papers; Number of Copies. All papers must conform to Rule ~~32(a)(1)~~ 32(c)(2). Except by the court's permission, a paper must not exceed 20 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 21(a)(2)(C). An original and 3 copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

Committee Note

Subdivision (d). A petition for a writ of mandamus or prohibition, an application for another extraordinary writ, and an answer to such a petition or application are all "other papers" for purposes of Rule 32(c)(2), and all of the requirements of Rule 32(a) apply to those papers,

except as provided in Rule 32(c)(2). During the 1998 restyling of the Federal Rules of Appellate Procedure, Rule 21(d) was inadvertently changed to suggest that only the requirements of Rule 32(a)(1) apply to such papers. Rule 21(d) has been amended to correct that error.

Rule 21(d) has been further amended to limit the length of papers filed under Rule 21.

B. Rules 25(c), 25(d), 26(c), 36(b), and 45(c) (Electronic Service Rules)

Rule 25(a)(2)(D) presently authorizes the courts of appeals to permit papers to be *filed* by electronic means. The proposed amendments to Rules 25(c), 25(d), 26(c), 36(b), and 45(c) are intended to permit papers also to be *served* electronically.

Thanks to close cooperation between Profs. Cooper and Schiltz and the willingness of the Civil Rules and Appellate Rules Committees to compromise in order to achieve consistency, the electronic service amendments that the Appellate Rules Committee is proposing are virtually identical in substance to the electronic service amendments that the Civil Rules Committee has approved. Specifically:

- Like new FRCP 5(b)(2)(D), new Rule 25(c) permits electronic service only upon parties who consent in writing.

- As is true under new FRCP 5(b)(2)(D), under new Rule 25(c) a court may not promulgate local rules that forbid electronic service to be used upon consenting parties. Nevertheless, as is true under new FRCP 5(b)(2)(D), under new Rule 25(c) courts will have considerable discretion to use local rules to *regulate* electronic service.

- Under the new civil rules, only "FRCP 5" service may be made electronically; "FRCP 4" service (the service of process that commences a lawsuit) must continue to be made manually. Likewise, under the new appellate rules, the notice of appeal will still have to be served personally or by mail (see Rule 3(d)(1)). Only service that occurs after the notice of appeal has been served may be made electronically.

- Like new FRCP 5(b)(2)(D), new Rule 25(c) provides that electronic service is complete upon "transmission."

- Like new FRCP 5(b)(3), new Rule 25(c) provides that if a party attempting to serve a paper electronically is notified that the transmission was not successful, service has not been completed. Nothing is said, either in new FRCP 5(b) or in new Rule 25(c), about failed service in other contexts (e.g., the return of mailed service as undeliverable).

N.B.: One minor difference between new FRCP 5(b)(3) and new Rule 25(c) is that the latter provides that failed electronic service is ineffective only if the party who attempted the service learns of the failure within three calendar days after transmission. The three calendar day limit was inserted by the Appellate Rules Committee to protect against abuse. Without such a limitation, one party could tell another party 15 minutes before a hearing that an electronic transmission was not received and force postponement of the hearing.

- Like new FRCP 6(e), new Rule 26(c) provides that when a party is required to respond to a paper within a prescribed period of time after that paper is served, three days are added to that prescribed period if the paper was served electronically.

- Like new FRCP 25(b)(2)(D), new Rule 25(b) makes it possible for a court, by local rule, to authorize the clerk to serve papers that have been electronically filed with the court.

- Like new FRCP 77(d), which permits the district court clerk to serve notice of the entry of an order or judgment electronically upon parties who have consented to electronic service, new Rules 36(b) and 45(c) permit the circuit court clerk to use electronic means to serve opinions, judgments, and notices of the entry of orders and judgments upon parties who have consented to such service.

Rule 25. Filing and Service

(c) Manner of Service.

(1) Service may be any of the following:

(A) personal, including delivery to a responsible person at the office of counsel;

(B) by mail~~, or~~ ;

(C) by third-party commercial carrier for delivery within 3 calendar days; ; or

(D) by electronic means, if the party being served consents in writing.

(2) If authorized by local rule, a party may use the court's transmission equipment to make electronic service under Rule 25(c)(1)(D).

(3) When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court.

(4) ~~Personal service includes delivery of the copy to a responsible person at the office of counsel.~~ Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on transmission, unless the party making service is notified within 3 calendar days after transmission that the paper was not received by the party served.

(d) Proof of Service.

(1) A paper presented for filing must contain either of the following:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mailing or e-mail addresses, or the addresses of the places of delivery.

Committee Note

Rule 25(a)(2)(D) presently authorizes the courts of appeals to permit papers to be *filed* by electronic means. Rule 25 has been amended in several respects to permit papers also to be *served* electronically. In addition, Rule 25(c) has been reorganized and subdivided to make it easier to understand.

Subdivision (c)(1)(D). New subdivision (c)(1)(D) has been added to permit service to be made electronically, such as by e-mail or fax. No party may be served electronically, either by the clerk or by another party, unless the party has consented in writing to such service.

A court of appeals may not, by local rule, forbid the use of electronic service on a party that has consented to its use. At the same time, courts have considerable discretion to use local rules to regulate electronic service. Difficult and presently unforeseeable questions are likely to arise as electronic service becomes more common. Courts have the flexibility to use their local rules to address those questions. For example, courts may use local rules to set forth specific procedures that a party must follow before the party will be deemed to have given written consent to electronic service.

Subdivision (c)(2). The courts of appeals are authorized under Rule 25(a)(2)(D) to permit papers to be filed electronically. Technological advances may someday make it possible for a court to forward an electronically filed paper to all parties automatically or semi-automatically. When such court-facilitated service becomes possible, courts may decide to permit parties to use the courts' transmission facilities to serve electronically filed papers on other parties who have consented to such service. Court personnel would use the court's computer system to forward the papers, but the papers would be considered served by the filing parties, just as papers that are carried from one address to another by the United States Postal Service are considered served by the sending parties. New subdivision (c)(2) has been added so that the courts of appeals may use local rules to authorize such use of their transmission facilities, as well as to address the many questions that court-facilitated electronic service is likely to raise.

Subdivision (c)(4). The second sentence of new subdivision (c)(4) has been added to provide that electronic service is complete upon transmission. Transmission occurs when the sender performs the last act that he or she must perform to transmit a paper electronically; typically, it occurs when the sender hits the "send" or "transmit" button on an electronic mail program. There is one exception to the rule that electronic service is complete upon transmission: If the sender is notified within 3 calendar days — by the sender's e-mail program or otherwise — that the paper was not received, service is not complete, and the sender must take additional steps to effect service. A paper has been "received" by the party on which it has been served as long as the party has the ability to retrieve it. A party cannot defeat service by choosing not to access electronic mail on its server.

Subdivision (d)(1)(B)(iii). Subdivision (d)(1)(B)(iii) has been amended to require that, when a paper is served by e-mail, the proof of service of that paper must include the e-mail address to which the paper was transmitted.

Rule 26. Computing and Extending Time

(c) Additional Time after Service. When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

Committee Note

Subdivision (c). Rule 26(c) has been amended to provide that when a paper is served on a party by electronic means, and that party is required or permitted to respond to that paper within a prescribed period, 3 calendar days are added to the prescribed period. Electronic service is usually instantaneous, but sometimes it is not, because of technical problems. Also, if a paper is electronically transmitted to a party on a Friday evening, the party may not realize that he or she has been served until two or three days later. Finally, extending the "three day rule" to electronic service will encourage parties to consent to such service under Rule 25(c).

Rule 36. Entry of Judgment; Notice

(b) Notice. On the date when judgment is entered, the clerk must ~~mail to~~ serve on all parties a copy of the opinion — or the judgment, if no opinion was written — and a notice of the date when the judgment was entered.

Committee Note

Subdivision (b). Subdivision (b) has been amended so that the clerk may use electronic means to serve a copy of the opinion or judgment or to serve notice of the date when judgment was entered upon parties who have consented to such service.

Rule 45. Clerk's Duties

(c) Notice of an Order or Judgment. Upon the entry of an order or judgment, the circuit clerk must immediately serve ~~by mail~~ a notice of entry on each party ~~to the proceeding~~,

. with a copy of any opinion, and must note the ~~mailing~~ date of service on the docket.

Service on a party represented by counsel must be made on counsel.

Committee Note

Subdivision (c). Subdivision (c) has been amended so that the clerk may use electronic means to serve notice of entry of an order or judgment upon parties who have consented to such service.

C. Rule 4(a)(7)

This amendment should be considered in conjunction with the amendments to FRCP 54(a) and 58 that are being proposed by the Civil Rules Committee.

This amendment attempts to resolve four circuit splits. Two circuit splits — which I will describe in a moment — are addressed in new Rule 4(a)(7)(**A**). Two other circuit splits — which are described in the Committee Note — are addressed in new Rule 4(a)(7)(**B**).

A prior version of this amendment was presented to the Standing Committee at its January 2000 meeting. At that meeting, the Standing Committee raised no objection to proposed Rule 4(a)(7)(**B**). Except for minor stylistic changes in the text of the rule and some tightening up of the Committee Note, the proposed Rule 4(a)(7)(B) that appears below is identical to the proposed Rule 4(a)(7)(B) that the Standing Committee considered without objection in January. I will say no more about it.

The concerns of the Standing Committee related solely to proposed Rule 4(a)(7)(**A**). That provision attempted to resolve circuit splits over two issues.

1. The first split that the prior version of Rule 4(a)(7)(A) attempted to resolve related to what we have called the "time bomb" problem. FRCP 58 provides that a "judgment" is not "effective" until it is "set forth on a separate document." According to every circuit except the First Circuit, if a judgment is not entered on a separate document, neither the time to bring post-judgment motions nor the time to appeal ever begins to run. Ignorance of the separate document requirement appears to be widespread; every year, hundreds of cases are terminated with judgments that are not set forth on separate documents. As a result, there are thousands of "time bombs" ticking away in the federal system — that is, long dormant cases that could be appealed at any time.

The version of Rule 4(a)(7)(A) presented to the Standing Committee in January attempted to impose a "cap" on the length of time that litigants would have to appeal a judgment that should have been entered on a separate document but was not. Specifically, the prior version of Rule 4(a)(7)(A) provided that a judgment that had not been set forth on a separate document

would be treated as entered for purposes of the appellate rules — notwithstanding anything to the contrary in the FRCP — 150 days after the judgment was entered in the civil docket. On the 150th day, the time to appeal the judgment would begin to run.

The Standing Committee's main concern about this proposal was that it would decouple the running of the time to bring post-judgment motions from the running of the time to bring appeals. At present, both the time to bring post-judgment motions under the FRCP and the time to bring appeals under FRAP begin to run at the same time — when judgment is set forth on a separate document. But under the proposed amendment to Rule 4(a)(7), if a judgment was supposed to be set forth on a separate document but was not, the time to bring *post-judgment motions* would never begin to run under the FRCP, while the time to *appeal* would begin to run on the 150th day under FRAP.

The Standing Committee was uncomfortable with this decoupling. The Standing Committee also pointed out that this decoupling would create a substantial loophole in the 150 day cap. Under current Rule 4(a)(4)(A), the timely filing of certain post-judgment motions tolls the time to appeal, and, according to the rule, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." Because the timeliness of post-judgment motions would be measured under the FRCP (not FRAP), and because the time to bring a post-judgment motion would not begin to run under the FRCP until the judgment was *actually* set forth on a separate document, a timely post-judgment motion could be filed under the FRCP long after the time to appeal the underlying judgment had theoretically expired under the proposed amendment to Rule 4(a)(7). Such a post-judgment motion would "revive" the time to appeal, and thus defeat the cap.

The Standing Committee asked Judge Niemeyer and Prof. Cooper to work with Prof. Schiltz and me to try to find a solution to the "time bomb" problem that would impose an effective cap and would do so without decoupling the running of the time to bring post-judgment motions from the running of the time to bring appeals. We believe that we have come up with such a solution.

Under our proposal, FRCP 58(b) would provide that, when a judgment must be set forth on a separate document, that judgment will be treated as entered upon the earlier of the following: (1) actual entry on a separate document, or (2) the passage of 60 days after entry in the civil docket. Rule 4(a)(7) would simply provide that a judgment will be treated as entered for purposes of Rule 4 (that is, for purposes of the running of the time to appeal) when it is treated as entered for purposes of FRCP 58 (that is, for purposes of the running of the time to bring post-judgment motions). In this way, a 60 day cap is imposed on judgments that should have been entered on separate documents but were not, and the running of the time to appeal continues to be coupled with the running of the time to bring post-judgment motions.

2. The second issue that the prior version of Rule 4(a)(7)(A) attempted to address related to whether orders that dispose of post-judgment motions must be entered on separate documents. A lot turns on this question.

Under Rule 4(a)(4)(A), the filing of certain post-judgment motions tolls the time to appeal the underlying judgment until the "entry" of the order disposing of the last such remaining motion. If an order disposing of a post-judgment motion is not "entered" until it is set forth on a separate document, then the time to appeal a judgment never begins to run if such an order is not entered on a separate document. It is extremely common for orders that deny post-judgment motions *not* to be set forth on separate documents; in those circuits that hold that orders disposing of post-judgment motions are not entered until set forth on separate documents, the "time bomb" problem is magnified.

Courts have disagreed about the extent to which orders disposing of post-judgment motions must be set forth on separate documents. This disagreement reflects a broader dispute among courts about whether Rule 4(a)(7) independently imposes a separate document requirement (a requirement that is distinct from the separate document requirement that is imposed by FRCP 58) or whether Rule 4(a)(7) instead incorporates the separate document requirement as it exists in the FRCP. Further complicating the matter, courts in the former camp disagree among themselves about the scope of the separate document requirement that they interpret Rule 4(a)(7) as imposing, and courts in the latter camp disagree among themselves about the scope of the separate document requirement imposed by FRCP 58.

The version of Rule 4(a)(7)(A) presented to the Standing Committee in January would have partially solved this problem by making it clear that Rule 4(a)(7) simply incorporates the separate document requirement as it exists in the FRCP, and does not impose a separate document requirement of its own. The Standing Committee supported this proposal, as far as it went. The Standing Committee's concern was that, under the amendment, the law would still be a mess. True, a court trying to determine whether a particular order disposing of a post-judgment motion had to be entered on a separate document would know to look solely to the FRCP (and not to FRAP), but, in trying to figure out whether the FRCP required entry on a separate document, the court would confront an almost impenetrable body of conflicting case law.

Again, Judge Niemeyer, Prof. Cooper, Prof. Schiltz, and I have come up with what we believe to be an effective solution. Under our proposal, FRCP 58(a) would continue to provide that judgments and amended judgments must be entered on separate documents. However, Rule 58(a) would expressly exempt from the separate document requirement all orders disposing of the post-judgment motions that can toll the time to appeal under Rule 4(a)(4)(A) (as well as certain other post-judgment motions). Thus, new FRCP 58(a) would resolve the conflicts over this issue by imposing a uniform national rule, and new Rule 4(a)(7)(A) would make clear that FRAP does not impose a separate document requirement of its own.

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(7) **Entry Defined.**

(A) A judgment or order is entered for purposes of this Rule 4(a) when it is entered ~~in compliance with~~ for purposes of Rules 58(b) ~~and 79(a)~~ of the Federal Rules of Civil Procedure.

(B) A failure to enter a judgment or order on a separate document when required by Rule 58(a)(1) of the Federal Rules of Civil Procedure does not affect the validity of an appeal from that judgment or order.

Committee Note

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

1. The first circuit split addressed by the amendments to Rule 4(a)(7) and Fed. R. Civ. P. 58 concerns the extent to which orders that dispose of post-judgment motions must be entered on separate documents. Under Rule 4(a)(4)(A), the filing of certain post-judgment motions tolls the time to appeal the underlying judgment until the "entry" of the order disposing of the last such remaining motion. Courts have disagreed about whether such an order must be set forth on a separate document before it is treated as "entered." This disagreement reflects a broader dispute among courts about whether Rule 4(a)(7) independently imposes a separate document requirement (a requirement that is distinct from the separate document requirement that is imposed by the Federal Rules of Civil Procedure ("FRCP")) or whether Rule 4(a)(7) instead incorporates the separate document requirement as it exists in the FRCP. Further complicating the matter, courts in the former "camp" disagree among themselves about the scope of the separate document requirement that they interpret Rule 4(a)(7) as imposing, and courts in the latter "camp" disagree among themselves about the scope of the separate document requirement imposed by the FRCP.

Rule 4(a)(7) has been amended to make clear that it simply incorporates the separate document requirement as it exists in Fed. R. Civ. P. 58. Under amended Rule 4(a)(7), a judgment or order is entered for purposes of Rule 4(a) when that judgment or order is entered for

purposes of Fed. R. Civ. P. 58(b). Thus, if a judgment or order is not entered for purposes of Fed. R. Civ. P. 58(b) until it is set forth on a separate document, that judgment or order is also not entered for purposes of Rule 4(a) until it is so set forth. Similarly, if a judgment or order is entered for purposes of Fed. R. Civ. P. 58(b) even though not set forth on a separate document, that judgment or order is also entered for purposes of Rule 4(a).

In conjunction with the amendment to Rule 4(a)(7), Fed. R. Civ. P. 58 has been amended to provide that orders disposing of the post-judgment motions that can toll the time to appeal under Rule 4(a)(4)(A) do not have to be entered on separate documents. *See* Fed. R. Civ. P. 58(a)(1). Rather, such orders are entered for purposes of Fed. R. Civ. P. 58 — and therefore for purposes of Rule 4(a) — when they are entered in the civil docket pursuant to Fed. R. Civ. P. 79(a). *See* Fed. R. Civ. P. 58(b).

2. The second circuit split addressed by the amendments to Rule 4(a)(7) and Fed. R. Civ. P. 58 concerns the following question: When a judgment or order is required to be entered on a separate document under Fed. R. Civ. P. 58 but is not, does the time to appeal the judgment or order ever begin to run? According to every circuit except the First Circuit, the answer is "no." The First Circuit alone holds that parties will be deemed to have waived their right to have a judgment or order entered on a separate document three months after the judgment or order is entered in the civil docket. *See Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 229, 236 (1st Cir. 1992) (en banc). Other circuits have rejected this cap as contrary to the relevant rules. *See, e.g., United States v. Haynes*, 158 F.3d 1327, 1331 (D.C. Cir. 1998); *Hammack v. Baroid Corp.*, 142 F.3d 266, 269-70 (5th Cir. 1998); *Rubin v. Schottenstein, Zox & Dunn*, 110 F.3d 1247, 1253 n.4 (6th Cir. 1997), *vacated on other grounds* 143 F.3d 263 (6th Cir. 1998) (en banc). However, no court has questioned the wisdom of imposing such a cap as a matter of policy.

Fed. R. Civ. P. 58 has been amended to impose such a cap. Under amended Fed. R. Civ. P. 58(b) — and therefore under amended Rule 4(a)(7) — a judgment or order is treated as entered when it is entered in the civil docket pursuant to Fed. R. Civ. P. 79(a). There is one exception: When Fed. R. Civ. P. 58(a)(1) requires the judgment or order to be set forth on a separate document, that judgment or order is not entered until it is so set forth or until the expiration of 60 days after its entry in the civil docket, whichever occurs first. This cap will ensure that parties will not be given forever to appeal a judgment or order that should have been set forth on a separate document but was not.

3. The third circuit split — this split addressed only by the amendment to Rule 4(a)(7) — concerns whether the appellant may waive the separate document requirement over the objection of the appellee. In *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387 (1978) (per curiam), the Supreme Court held that the "parties to an appeal may waive the separate-judgment requirement of Rule 58." Specifically, the Supreme Court held that when a district court enters an order and "clearly evidence[s] its intent that the . . . order . . . represent[s] the final decision in the case," the order is a "final decision" for purposes of 28 U.S.C. § 1291, even if the order has not been entered on a separate document for purposes of Fed. R. Civ. P. 58. *Id.* Thus, the parties can choose to appeal without waiting for the order to be entered on a separate document.

Courts have disagreed about whether the consent of all parties is necessary to waive the separate document requirement. Some circuits permit appellees to object to attempted *Mallis* waivers and to force appellants to return to the trial court, request entry of judgment on a separate document, and appeal a second time. *See, e.g.*, *Selletti v. Carey*, 173 F.3d 104, 109-10 (2d Cir. 1999); *Williams v. Borg*, 139 F.3d 737, 739-40 (9th Cir. 1998); *Silver Star Enters., Inc. v. M/V Saramacca*, 19 F.3d 1008, 1013 (5th Cir. 1994). Other courts disagree and permit *Mallis* waivers even if the appellee objects. *See, e.g.*, *Haynes*, 158 F.3d at 1331; *Miller v. Artistic Cleaners*, 153 F.3d 781, 783-84 (7th Cir. 1998); *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1006 n.8 (3d Cir. 1994).

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

4. The final circuit split addressed by the amendment to Rule 4(a)(7) concerns the question whether an appellant who chooses to waive the separate document requirement must appeal within 30 days (60 days if the government is a party) from the entry in the civil docket of the judgment or order that should have been entered on a separate document but was not. In *Townsend v. Lucas*, 745 F.2d 933 (5th Cir. 1984), the district court dismissed a 28 U.S.C. § 2254 action on May 6, 1983, but failed to enter the judgment on a separate document. The plaintiff appealed on January 10, 1984. The Fifth Circuit dismissed the appeal, reasoning that, if the plaintiff waived the separate document requirement, then his appeal would be from the May 6 order, and if his appeal was from the May 6 order, then it was untimely under Rule 4(a)(1). The Fifth Circuit stressed that the plaintiff could return to the district court, move for entry of judgment on a separate document, and appeal from that judgment within 30 days. *Id.* at 934. Several other cases have embraced the *Townsend* approach. *See, e.g.*, *Armstrong v. Ahitow*, 36 F.3d 574, 575 (7th Cir. 1994) (per curiam); *Hughes v. Halifax County Sch. Bd.*, 823 F.2d 832, 835-36 (4th Cir. 1987); *Harris v. McCarthy*, 790 F.2d 753, 756 n.1 (9th Cir. 1986).

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

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

D. Rule 26.1 (Financial Disclosure)

Like the other advisory committees, the Appellate Rules Committee approved amendments regarding financial disclosure at its spring meeting. At your request, Profs. Cooper, Coquillette, Schiltz, and Schlueter conferred by telephone on May 4 and made a number of changes in the financial disclosure amendments that had been approved by the Appellate, Civil, and Criminal Rules Committees, in order to achieve as much substantive and stylistic consistency as possible. The proposed amendment to Rule 26.1 reproduced below reflects several stylistic changes made as a result of the reporters' conference. I have approved those changes on behalf of the Appellate Rules Committee.

My understanding is that the three sets of financial disclosure amendments differ substantively in only two respects (putting aside differences that are necessary because of the differences between trial courts and appellate courts, or between civil cases and criminal cases):

First, the civil rules provision, unlike the appellate rules provision and the criminal rules provision, explicitly requires the clerk to give financial disclosure information to the judge. The Appellate Rules Committee (and, I'm told, the Criminal Rules Committee) chose not to adopt such a provision. The rules of practice and procedure assume that *everything* filed with a clerk is provided to a judge; the Appellate Rules Committee is afraid of the negative implication that might arise if the rules start specifying that certain information must be given to a judge while remaining silent about other information. That said, such a requirement may be more defensible in the civil (and criminal) rules than in the appellate rules, as in the district courts it is common for cases to be pending longer with more interim judicial actions before final resolution.

Second, the criminal rules provision requires "[a]ny . . . party" to a criminal proceeding to identify "any organizational victims of the criminal activity." The appellate rules provision does not include such a requirement. Putting aside the Fifth Amendment and other problems raised by the specific proposal approved by the Criminal Rules Committee, the Appellate Rules Committee believes that any expansion of disclosure obligations beyond what is presently required by Rule 26.1 should be left to the Judicial Conference, using the authority given to it under the amended rules. In our view, the Standing Committee should focus on extending Rule 26.1 to the other rules of practice and procedure and providing a process for future expansion of disclosure obligations. To try to undertake such an expansion now — especially such a controversial expansion — might imperil the other goals.

Rule 26.1 ~~Corporate~~ Disclosure Statement

(a) Who Must File.

(1) **Nongovernmental corporate party.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that:

(a) identifyingies ~~all its~~ any parent corporations and ~~listing~~ any publicly held ~~company~~ corporation that owns 10% or more of ~~the party's~~ its stock or states that there is no such corporation, and

(b) discloses any additional information that may be required by the Judicial Conference of the United States.

(2) **Other party.** Any other party to a proceeding in a court of appeals must file a statement that discloses any information that may be required by the Judicial Conference of the United States.

(b) Time for Filing; Supplemental Filing. A party must file the Rule 26.1(a) statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. A party must supplement its statement whenever the information that must be disclosed under Rule 26.1(a) changes.

(c) Number of Copies. If the Rule 26.1(a) statement is filed before the principal brief, or if a supplemental statement is filed, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.

Committee Note

Subdivision (a). Rule 26.1(a) presently requires nongovernmental corporate parties to file a "corporate disclosure statement." In that statement, a nongovernmental corporate party is required to identify all of its parent corporations and all publicly held corporations that own 10% or more of its stock. The corporate disclosure statement is intended to assist judges in determining whether they must recuse themselves by reason of "a financial interest in the subject matter in controversy." Code of Judicial Conduct, Canon 3C(1)(c) (1972).

Rule 26.1(a) has been amended to require that nongovernmental corporate parties who currently do not have to file a corporate disclosure statement — that is, nongovernmental corporate parties who do not have any parent corporations and at least 10% of whose stock is not owned by any publicly held corporation — inform the court of that fact. At present, when a corporate disclosure statement is not filed, courts do not know whether it has not been filed because there was nothing to report or because of ignorance of Rule 26.1(a).

Rule 26.1(a) does not require the disclosure of all information that could conceivably be relevant to a judge who is trying to decide whether he or she has a "financial interest" in a case. Experience with divergent disclosure practices and improving technology may provide the foundation for more comprehensive disclosure requirements. The Judicial Conference, supported by the committees that work regularly with the Code of Judicial Conduct and by the Administrative Office of the United States Courts, is in the best position to develop any additional requirements and to adjust those requirements as technological and other developments warrant. Thus, Rule 26.1(a) has been amended to authorize the Judicial Conference to promulgate more detailed financial disclosure requirements — requirements that might apply beyond nongovernmental corporate parties.

As has been true in the past, Rule 26.1(a) does not forbid the promulgation of local rules that require disclosures in addition to those required by Rule 26.1(a) itself. However, along with the authority provided to the Judicial Conference to require additional disclosures is the authority to preempt any local rulemaking on the topic of financial disclosure.

Subdivision (b). Rule 26.1(b) has been amended to require parties to file supplemental disclosure statements whenever there is a change in the information that Rule 26.1(a) requires the parties to disclose. For example, if a publicly held corporation acquires 10% or more of a party's stock after the party has filed its disclosure statement, the party should file a supplemental statement identifying that publicly held corporation.

Subdivision (c). Rule 26.1(c) has been amended to provide that a party who is required to file a supplemental disclosure statement must file an original and 3 copies, unless a local rule or an order entered in a particular case provides otherwise.

III. Information Items

I have only one item of information to share with you: Prof. Schiltz will be leaving Notre Dame Law School this summer to accept an appointment as Associate Dean and Professor of Law at the law school that the University of St. Thomas is opening in Minneapolis (Prof. Schiltz's hometown). Prof. Schiltz will be instrumental in hiring faculty and staff, raising funds, designing the building, putting together the curriculum, and otherwise shaping this new Catholic law school, which will open its doors in August 2001. I am pleased to inform you that Prof. Schiltz will also be continuing to serve as Reporter to the Appellate Rules Committee.

Item 5B

DRAFT

Minutes of Spring 2000 Meeting of
Advisory Committee on Appellate Rules
April 13, 2000
Washington, D.C.

I. Introductions

Judge Will Garwood called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, April 13, 2000, at 8:35 a.m. at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. The following Advisory Committee members were present: Judge Diana Gribbon Motz, Judge Stanwood R. Duval, Jr., Prof. Carol Ann Mooney, Mr. W. Thomas McGough, Jr., and Mr. Sanford Svetcov. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, was present representing the Solicitor General. Also present were Judge Phyllis A. Kravitch, the liaison from the Standing Committee; Prof. Daniel R. Coquillette, the Reporter to the Standing Committee; Mr. Charles R. "Fritz" Fulbruge III, the liaison from the appellate clerks; Mr. John K. Rabiej and Mr. Mark D. Shapiro from the Administrative Office ("A.O."); Ms. Marie C. Leary from the Federal Judicial Center; and Mr. Joseph F. Spaniol, Jr., consultant to the Standing Committee. (Judge Samuel A. Alito, Jr., member of the Advisory Committee, and Prof. Edward H. Cooper, the Reporter to the Civil Rules Committee, joined the meeting later in the day.)

II. Approval of Minutes of October 1999 Meeting

The minutes of the October 1999 meeting were approved.

III. Report on January 2000 Meeting of Standing Committee

Judge Garwood asked the Reporter to describe the Standing Committee's most recent meeting. The Reporter said that the package of amendments approved by this Advisory Committee at its October 1999 meeting had been approved for publication by the Standing Committee, with the sole exception of the proposed amendment to Rule 4(a)(7). The Reporter indicated that he would describe the Standing Committee's concerns about the amendment to Rule 4(a)(7) when the Advisory Committee took up the rule later today. The Reporter said that individual members of the Standing Committee made suggestions with respect to a couple of the other amendments, and that the Reporter would communicate those suggestions to the Advisory Committee next spring, when the Reporter summarized the public comments received on those amendments. Finally, the Reporter informed the Advisory Committee that the Standing Committee was continuing to press all of the advisory committees to draft new rules on the topics of electronic service and financial disclosure.

Judge Garwood then recognized Mr. Rabiej. Mr. Rabiej reported that the Supreme Court approved the amendments to the civil rules, criminal rules, and evidence rules that the Standing Committee and Judicial Conference had approved last year. Mr. Rabiej also described efforts being undertaken by the Judicial Conference and the A.O. to encourage federal courts to post local rules on their websites. According to Mr. Rabiej, the American Bar Association recently approved a resolution urging that all local rules be posted on the Internet. A member moved that this Committee express its support of such efforts. The motion was seconded. The motion carried (unanimously).

IV. Action Items

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

Judge Garwood asked that discussion of this item be postponed until after the arrival of Prof. Cooper.

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

The Reporter introduced the following proposed amendments and Committee Notes:

Rule 3. Appeal as of Right — How Taken

(d) Serving the Notice of Appeal.

(1) The district clerk must serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record — excluding the appellant's — or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant, either by personal service or by mail addressed to the defendant. The clerk must promptly send a copy of the notice of appeal, of the representation statement filed under Rule 12(b), and of the docket entries — and any later docket

entries — to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

Committee Note

Subdivision (d)(1). Rule 12(b) has been amended to require that an attorney file a representation statement with a notice of appeal. Because representation statements will now be filed with the district clerk instead of with the circuit clerk, subdivision (d)(1) has been amended to direct the district clerk to send a copy of the representation statement to the circuit clerk at the same time that the district clerk sends copies of the notice of appeal and docket entries.

Rule 12. Docketing the Appeal; Filing a Representation Statement; Filing the Record

(b) Filing a Representation Statement. ~~Unless the court of appeals designates another time, the attorney who filed the notice of appeal must, within 10 days after filing the notice, file a statement with the circuit clerk naming the parties that the attorney represents on appeal.~~ An attorney who files a notice of appeal must file a representation statement with the district clerk at the same time. In the representation statement, the attorney must identify:

(1) the parties that the attorney represents on appeal;

(2) the parties that are likely to participate in the appeal as appellees; and

(3) by name and last known address, the attorneys who are likely to represent each of the likely appellees.

Committee Note

Subdivision (b). Subdivision (b) has been amended so that representation statements will be more helpful to circuit clerks in the docketing of newly filed appeals.

The representation statements currently required by subdivision (b) have two shortcomings. First, the representation statements contain too little information. An attorney

filing a representation statement is required to identify only the parties that the attorney represents on appeal; the attorney is not required to identify any other party or the attorneys for any other party. Second, the representation statements are filed too late. Under Rule 12(a), circuit clerks are required to docket cases "[u]pon receiving the copy of the notice of appeal and the docket entries from the district clerk under Rule 3(d)." Typically, circuit clerks receive copies of notices of appeals and docket entries within a couple of days after the notices of appeals are filed. Thus, the circuit clerks usually must docket cases before they receive representation statements.

Subdivision (b) has been amended to require that the representation statement be filed with the notice of appeal. (The representation statement, like the notice of appeal, must be filed with the district clerk.) This provision has been placed in Rule 12 — and not in Rule 3 — to make it clear that the representation statement is not part of the notice of appeal. The cases describing certain provisions of Rules 3 and 4 as "mandatory and jurisdictional" — *see, e.g.*, *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315 (1988); *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257, 264 (1978) — do not apply to representation statements.

Subdivision (b) requires the attorney who files the representation statement to identify the "likely" appellees and the attorneys who are "likely" to represent them. This may involve some guesswork on the part of the filing attorney, as in some cases it may not be clear who will participate in the appeal — or who will represent those parties — until the briefs are filed. Nevertheless, such guesswork is unavoidable at the time the appeal is docketed, and the attorney filing the notice of appeal is in a better position to do that guesswork than the circuit clerk.

The appellate clerks have two complaints about Rule 12(b), which requires an attorney who files a notice of appeal to file a representation statement in which he identifies himself and his client. First, the representation statement contains too little information; the attorney for the appellant does not have to identify any other attorneys or any other parties. Second, the representation statement comes too late to help the clerks with docketing. The clerks generally docket appeals within a day or two after they are filed, but the representation statement does not have to be filed until several days later.

At the October 1999 meeting, the Committee discussed an amendment to Rule 3(c) that had been proposed by the clerks and that would require a more complete representation statement to be filed with the notice of appeal. After the Committee balked at putting any such requirement in Rule 3(c) — because of the risk that the rules regarding representation statements would then be deemed "mandatory and jurisdictional," like the other requirements of Rule 3(c) — the Reporter agreed to draft an amendment to Rule 12(b) that would accomplish the clerks' goals. That amendment was now before the Committee.

Mr. Fulbruge informed the Committee that he had circulated the amendment drafted by the Reporter to the appellate clerks and had received nothing but positive comments in response.

Members of the Committee asked Mr. Fulbruge a number of questions about how appeals are docketed. Mr. Fulbruge explained that the problems that had led the clerks to request this amendment are caused to a substantial extent by the antiquated software used in the automatic docketing system. That software requires clerks to identify all of the parties to the appeal — and to classify each of them as either an appellant or appellee — at the time that the case is docketed. Thus, guesswork at the time of docketing is unavoidable. Also, the software makes it difficult to change these designations, once they are entered. For that reason, it is important that the guesswork that occurs at the time of docketing be as accurate as possible. Representation statements that were filed earlier and that contained more information would help the clerks cut down on docketing errors, while not affecting the substantive rights of any party.

Members of the Committee raised several objections to the proposal. First, members were skeptical that the guesswork that clerks would have to do under the proposal would be much more accurate than the guesswork that clerks have to do now. Second, members were concerned about problems that might arise from the new requirements. Appellees might start filing motions to strike inaccurate representation statements or arguing that appellants were foreclosed from making certain arguments on account of what was included in their representation statements. Third, members pointed out that some courts already use their local rules to require parties to provide docketing information that is not required by FRAP; this problem may best be left to such local rules. And finally, members felt that by the time these amendments could take effect, the antiquated software that is creating the problem will likely have been replaced.

A member moved that Rule 12(b) not be changed to require that more information be included in representation statements. The motion was seconded. The motion carried (unanimously).

A member moved that Rule 12(b) be amended to require that representation statements be filed with notices of appeal. The motion died for lack of a second. As a result, no change to Rule 12(b) was approved, and Item No. 97-33 will be removed from the Committee's study agenda, without prejudice to the clerks returning to the Committee in a couple of years if promised improvements in docketing software do not materialize.

C. Item No. 99-03 (electronic service rules)

Judge Garwood welcomed Prof. Cooper to the meeting.

The Reporter introduced the following proposed amendments and Committee Notes:

Rule 25. Filing and Service

(b) Service of All Papers Required. Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel. If authorized by local rule, a party may use the court's transmission facilities to make electronic service under Rule 25(c).

(c) Manner of Service. Service may be personal, by mail, or by third-party commercial carrier for delivery within 3 calendar days, or, if consented to by the party served, by electronic means. When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court. Personal service includes delivery of the copy to a responsible person at the office of counsel. Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on transmission, unless the party making service is notified that the paper was not received.

(d) Proof of Service.

(1) A paper presented for filing must contain either of the following:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mailing or electronic mail addresses or the addresses of the places of delivery.

Committee Note

Rule 25(a)(2)(D) presently authorizes the courts of appeals to permit papers to be *filed* by electronic means. Rule 25 has been amended in several respects to permit papers also to be *served* electronically.

Subdivision (b). The courts of appeals are authorized under Rule 25(a)(2)(D) to permit papers to be filed electronically. Technological advances will soon make it possible for a court to forward an electronically filed paper to all parties with the push of a button. When such court-facilitated service becomes possible, courts may decide to permit parties to use the courts' transmission facilities to serve electronically filed papers on other parties who have consented to such service. Court personnel would use the court's computer system to forward the papers, but the papers would be considered served by the filing parties, just as papers that are carried from one address to another by the United States Postal Service are considered served by the sending parties. Subdivision (b) has been amended so that the courts of appeals may use local rules to authorize such use of their transmission facilities, as well as to address the many questions that court-facilitated electronic service is likely to raise.

Subdivision (c). Subdivision (c) has been amended to permit service to be made electronically. No party may be served electronically, either by the clerk or by another party, unless the party has consented to such service.

A court of appeals may not, by local rule, forbid the use of electronic service on a party that has consented to its use. At the same time, courts have considerable discretion to use local rules to regulate electronic service. Difficult and presently unforeseeable questions are likely to arise as electronic service becomes more common. Courts have the flexibility to use their local rules to address those questions. For example, courts may use local rules to set forth specific procedures that a party must follow before the party will be deemed to have consented to electronic service.

Subdivision (c) has been further amended to provide that electronic service is complete upon transmission. Transmission occurs when the sender performs the last act that he or she must perform to transmit a paper electronically; typically, it occurs when the sender hits the "send" or "transmit" button on an electronic mail program. There is one exception to the rule that electronic service is complete upon transmission: If the sender is actually notified — by the sender's e-mail program or otherwise — that the paper was not received, service is not complete, and the sender must take additional steps to effect service. A paper has been "received" by the party on which it has been served as long as the party has the ability to retrieve it. A party cannot defeat service by choosing not to access electronic mail on its server.

Subdivision (d)(1)(B)(iii). Subdivision (d)(1)(B)(iii) has been amended to require that, when a paper is served electronically, the proof of service of that paper must include the electronic mail address to which the paper was transmitted.

Rule 26. Computing and Extending Time

(c) Additional Time after Service. When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service. A paper served electronically under Rule 25(c) is delivered on transmission.

Committee Note

Subdivision (c). Rule 25(c) has been amended to provide that a paper that is served electronically will be considered *served* on the date of transmission, unless the party making service is notified that the paper was not received. Subdivision (c) has been amended to provide that a paper that has been effectively served by electronic means will also be considered *delivered* on the date of transmission. If a party is required or permitted to act within a prescribed period after a paper is served on that party, the prescribed period will begin running on the date of transmission; three days will not be added to the prescribed period, as typically occurs when service is by mail or by third-party commercial carrier.

Electronic service is treated like personal service, and not like service by mail or commercial carrier, for two reasons. First, electronic service (unlike mail or commercial carrier service) is virtually instantaneous, and a party who has been served electronically (unlike a party who has been served by mail or commercial carrier) has considerable control over when it will learn of that service. Second, extending the "three day rule" to electronic service would discourage its use, as parties would not want their adversaries to have three extra days to respond to a paper that is likely to be received instantaneously.

Rule 36. Entry of Judgment; Notice

(b) Notice. On the date when judgment is entered, the clerk must ~~mail to~~ serve on all parties a copy of the opinion — or the judgment, if no opinion was written — and a notice of the date when the judgment was entered.

Committee Note

Subdivision (b). Subdivision (b) has been amended so that the clerk may use electronic means to serve a copy of the opinion or judgment or to serve notice of the date when judgment was entered upon parties who have consented to such service.

Rule 45. Clerk's Duties

(c) **Notice of an Order or Judgment.** Upon the entry of an order or judgment, the circuit clerk must immediately serve ~~by mail~~ a notice of entry on each party to the proceeding, with a copy of any opinion, and must note the ~~mailing~~ service on the docket. Service on a party represented by counsel must be made on counsel.

Committee Note

Subdivision (c). Subdivision (c) has been amended so that the clerk may use electronic means to serve notice of entry of an order or judgment upon parties who have consented to such service.

The Reporter began by reminding the Committee of the background of these proposed rules. For several years, the rules of practice and procedure — appellate, bankruptcy, civil, and criminal — have permitted the electronic *filing* of papers. The Standing Committee wants the advisory committees to take the next step and draft rules that would permit the electronic *service* of papers.

In February 1999, the Subcommittee on Technology met and made some tentative decisions about how electronic service rules should be drafted. The participants in that meeting agreed that the Civil Rules Committee would take the lead in drafting electronic service rules — and that, after public comment had been received on those rules, the other advisory committees would follow suit. The Civil Rules Committee approved electronic service rules in April 1999, those rules were approved for publication by the Standing Committee in June 1999, and the rules were published for comment in August 1999. Earlier this week, the Civil Rules Committee met, reviewed the public comments, and approved slightly revised electronic service rules. The Standing Committee is expected to give final approval to those rules in June. It is now the responsibility of this Committee — and the other advisory committees — to draft electronic service rules patterned after those approved by the Civil Rules Committee.

The Reporter said that, in almost every respect, the proposed amendments that he had drafted were identical in substance to the proposed amendments that had been approved earlier in the week by the Civil Rules Committee. Specifically:

- Like new FRCP 5(b)(2)(D), new Rule 25(c) permits electronic service only upon parties who consent.

- As is true under new FRCP 5(b)(2)(D), under new Rule 25(c) a court may not promulgate local rules that forbid electronic service to be used upon consenting parties. Nevertheless, as is true under new FRCP 5(b)(2)(D), under new Rule 25(c) courts will have considerable discretion to use local rules to *regulate* electronic service.

- Under the new civil rules, only "FRCP 5" service may be made electronically; "FRCP 4" service (the service of process that commences a lawsuit) must continue to be made manually. Likewise, under the new appellate rules, the notice of appeal will still have to be served personally or by mail (see Rule 3(d)(1)). Only service that occurs after the notice of appeal has been served may be made electronically.

- Like new FRCP 5(b)(2)(D), new Rule 25(c) provides that electronic service is complete upon "transmission."

- Like new FRCP 5(b)(3), new Rule 25(c) explicitly provides in the text of the rule that if a party attempting to serve a paper electronically is notified that the transmission did not go through, service has not been effected. Nothing is said, either in new FRCP 5(b) or in new Rule 25(c), about "bounced" service in other contexts (e.g., the return of mailed service as undeliverable).

- Like new FRCP 25(b)(2)(D), new Rule 25(b) makes it possible for a court, by local rule, to authorize the clerk to serve papers that have been electronically filed with the court.

- Like new FRCP 77(d), which permits the district court clerk to serve notice of the entry of an order or judgment electronically upon parties who have consented to electronic service, new Rules 36(b) and 45(c) permit the circuit court clerk to use electronic means to serve opinions, judgments, and notices of the entry of orders and judgments upon parties who have consented to such service.

The Reporter said that there was only one substantive difference between the rules that he had drafted and the rules that the Civil Rules Committee had approved earlier in the week. The Civil Rules Committee decided that the "three day rule" of FRCP 6(e) *should* apply to electronic service, whereas, consistent with this Committee's prior deliberations, new Rule 26(c) provides that its three day rule does *not* extend to electronic service.

The Reporter said that, to assist this Committee in deciding whether it wanted to make the appellate rules consistent in this respect with the civil rules, the Reporter had drafted the following alternative amendments to Rule 26(c):

Rule 26. Computing and Extending Time

Alternative One:

(c) Additional Time after Service. When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is not served electronically and is delivered on the date of service stated in the proof of service.

Alternative Two:

(c) Additional Time after Service. When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

Committee Note to Either Alternative:

Committee Note

Subdivision (c). Rule 26(c) has been amended to provide that when a paper is served on a party by electronic means, and that party is required or permitted to respond to that paper within a prescribed period, 3 calendar days are added to the prescribed period. Electronic service is usually instantaneous, but sometimes it is not, because of technical problems. Also, if a paper is electronically transmitted to a party on a Friday evening, the party may not realize that he or she has been served until two or three days later. Finally, extending the "three day rule" to electronic service will encourage parties to consent to such service under Rule 25(c).

Prof. Cooper explained why the Civil Rules Committee had decided to apply the three day rule to electronic service, after initially deciding not to. First, the Bankruptcy Rules Committee strongly favored extending the three day rule to electronic service, and it is important

to maintain consistency between the civil rules and the bankruptcy rules. Second, the vast majority of those who commented on the proposed electronic service rules favored extending the three day rule to electronic service. Third, if the three day rule applies to electronic service, parties are more likely, at the outset of a case, to consent to the use of electronic service. Fourth, electronic transmissions are not always immediate; Prof. Cooper recently received an electronic transmission over two days after it had been sent. And fifth, the attachments to electronic messages often arrive in a garbled form, and it can take a day or two to "ungarble" them.

A member said that he thought the appellate rules and civil rules should be consistent on application of the three day rule to electronic service. He said that he had been persuaded that extending the three day rule to electronic service made sense. Other members concurred.

Mr. Fulbruge also concurred; he views consistency between the appellate and civil rules as important. Mr. Fulbruge went on to object to the statement in the Committee Note to Rule 25(b) that "[t]echnological advances will soon make it possible for a court to forward an electronically filed paper to all parties with the push of a button." Mr. Fulbruge said that he was concerned that this statement would create unreasonable expectations, as such software does not now exist and may not exist for some time. The Reporter said that the statement cited by Mr. Fulbruge was meant to be metaphorical; the point is simply that some day it may be easy for clerks to serve electronically filed papers. Moreover, no such service would be permitted — or expected — until a court's local rules authorized it. Mr. Fulbruge said that he appreciated the explanation, but would nevertheless be grateful if this statement in the Committee Note were softened.

A member pointed out that the draft electronic services rules seem to reflect an assumption that electronic service would generally be made party-to-party. However, under pilot projects now operating in a few federal courts, a party is required to file a paper electronically with the court and then to notify the other parties that they can retrieve the paper from the court. Parties do not actually transmit papers to each other. Committee members pointed out that nothing in the electronic service rules would prohibit local rules from authorizing such service.

A member moved that the electronic service rules be approved. The motion was seconded.

The Committee continued to discuss the draft rules, focusing in particular on the problem of the bounced transmission — that is, the situation in which a party attempts to serve a paper electronically and then learns, from the party's e-mail program or otherwise, that the transmission did not go through. Members were sympathetic to the notion that, if a party learns that electronic service failed, the party should try to serve the paper again. At the same time, members were concerned about abuse. What would happen if a party, the day before a motion was to be argued, informed its adversary that it had never received the electronically served motion?

Prof. Cooper described the Civil Rules Committee's deliberations on this issue. The electronic service rules that the Civil Rules Committee published attempted to address the

bounced transmission problem by inserting the following sentence in a Committee Note: "As with other modes of service, however, actual notice that the transmission was not received defeats the presumption that arises from the provision that service is complete upon transmission. The sender must take additional steps to effect service." But this statement turned out to be inaccurate. Additional research discovered that mail service has been held to be effective upon mailing, even when the paper was not delivered, and even when the sender was notified of the nondelivery by the Postal Service.

In preparation for the Civil Rules Committee's meeting earlier this week, Prof. Cooper drafted a revised rule, which provided that *any* kind of service is not effective when the party attempting service learns that the service was unsuccessful. The revised rule would have provided, inter alia, that when a party tried to serve a paper by mail, and the paper was returned by the Postal Service, the party would have to try to serve the paper again.

The Civil Rules Committee balked at the revised rule. Members were quite reluctant to tamper with the "mailbox rule." Millions of papers have been served by mail since enactment of the FRCP in 1938; the fact that only a handful of published cases address the failure of a serving party to re-serve a paper returned as undeliverable is compelling evidence that the system works well. Attorneys who learn that mail service was not successful will almost always try to serve again, both out of courtesy and out of a desire to protect their clients' interests.

The Civil Rules Committee concluded that electronic service is different, and thus that the rules should explicitly provide that failed electronic service is not effective, even though the rules will say nothing about failed personal or mail service. Because failed electronic transmissions are so common, attorneys who are contemplating whether to consent to electronic service will be concerned about the issue. Those attorneys will be more likely to consent to electronic service if they can be reassured that a failed transmission will not qualify as service.

Members of the Appellate Rules Committee agreed that neither this Committee nor the Civil Rules Committee should tinker with the rules on personal or mail service. However, on the issue of electronic service, the members struggled with how the rules can both (1) require a party whose e-mail program informs her that a service did not go through to try again, yet (2) not leave the system open to abuse. As written, the rule would permit one party to call another party on the morning of a hearing, claim that an electronic transmission was never received, and get the hearing postponed.

One member suggested that this problem might be addressed by providing in Rule 25(c) that "[s]ervice by electronic means is complete on transmission, unless the party making service is notified *within 3 calendar days after transmission* that the paper was not received *by the party served*." The members discussed this suggestion and agreed that it provided an effective, if somewhat rough, way of distinguishing between the situation in which a party's own e-mail program promptly notifies her that a transmission did not go through and the situation in which a party is not notified of a problem with the transmission until her opponent claims on the day of a hearing that the paper was never received. The member who had moved adoption of the

electronic service rules agreed to accept these proposed changes to Rule 25(c) as a friendly amendment to his motion.

A member suggested that Rule 25(c) also be amended to require that consent to electronic service be in writing, and that this requirement be mentioned in the Committee Note. Prof. Cooper pointed out that the civil rules provisions on electronic service require consent to be in writing. The Committee quickly reached a consensus that this suggestion was a good one, and it was accepted as a second friendly amendment to the motion to adopt the electronic service rules.

One member asked whether service "by electronic means" included service by fax. The Reporter replied that it did. The member asked that a few words be added to the Committee Note to clarify this issue. No member of the Committee objected to this request.

One member returned to the failed transmission issue and argued that, instead of providing that service is not effective if the serving party learns that the paper was not "received," the rule should instead provide that service is not effective if the serving party learns that the paper was not "delivered." Other members disagreed.

Before voting on the motion to approve the electronic service rules, the maker of the motion clarified that he intended to move adoption of the rules as drafted by the Reporter, with two exceptions. First, the friendly amendments that he had accepted to his motion should be incorporated. And second, draft Rule 26(c) should be replaced by "Alternative Two" of the draft circulated by the Reporter this morning.

The motion carried (unanimously).

The Reporter reviewed for the Committee the changes to the electronic service rules that had been suggested by the Subcommittee on Style. By consensus, the Committee agreed that the changes should be adopted, with the exception of the suggested changes to Rule 36(b).

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

The Committee returned to this item, having earlier deferred consideration until after the arrival of Prof. Cooper.

The Reporter introduced the following proposed amendment and Committee Note:

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(7) Entry Defined.

(A) A judgment or order is entered for purposes of this Rule 4(a) when it is entered ~~in compliance with~~ for purposes of Rules 58(b) ~~and 79(a)~~ of the Federal Rules of Civil Procedure.

(B) The failure to enter a judgment or order on a separate document when required by Rule 58(a)(1) of the Federal Rules of Civil Procedure does not invalidate an appeal from that judgment or order.

Committee Note

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

1. The first circuit split addressed by the amendments to Rule 4(a)(7) and Fed. R. Civ. P. 58 concerns the extent to which orders that dispose of post-judgment motions must be entered on separate documents. Under Rule 4(a)(4)(A), the filing of certain post-judgment motions tolls the time to appeal the underlying judgment until the "entry" of the order disposing of the last such remaining motion. Courts have disagreed about whether such an order must be set forth on a separate document before it is treated as "entered." This disagreement reflects a broader dispute among courts about whether Rule 4(a)(7) independently imposes a separate document requirement (a requirement that is distinct from the separate document requirement that is imposed by the Federal Rules of Civil Procedure ("FRCP")) or whether Rule 4(a)(7) instead incorporates the separate document requirement as it exists in the FRCP. Further complicating the matter, courts in the former "camp" disagree among themselves about the scope of the separate document requirement that they interpret Rule 4(a)(7) as imposing, and courts in the latter "camp" disagree among themselves about the scope of the separate document requirement imposed by the FRCP.

Rule 4(a)(7) has been amended to make clear that it simply incorporates the separate document requirement as it exists in Fed. R. Civ. P. 58. Under amended Rule 4(a)(7), a judgment or order is entered for purposes of Rule 4(a) when that judgment or order is entered for purposes of Fed. R. Civ. P. 58(b). Thus, if a judgment or order is not entered for purposes of Fed. R. Civ. P. 58(b) until it is set forth on a separate document, that judgment or order is also not entered for purposes of Rule 4(a) until it is so set forth. Similarly, if a judgment or order is entered for purposes of Fed. R. Civ. P. 58(b) even though not set forth on a separate document, that judgment or order is also entered for purposes of Rule 4(a).

In conjunction with the amendment to Rule 4(a)(7), Fed. R. Civ. P. 58 has been amended to provide that orders disposing of the post-judgment motions that can toll the time to appeal

under Rule 4(a)(4)(A) do not have to be entered on separate documents. *See* Fed. R. Civ. P. 58(a)(1). Rather, such orders are entered for purposes of Fed. R. Civ. P. 58 — and therefore for purposes of Rule 4(a) — when they are entered in the civil docket pursuant to Fed. R. Civ. P. 79(a). *See* Fed. R. Civ. P. 58(b).

2. The second circuit split addressed by the amendments to Rule 4(a)(7) and Fed. R. Civ. P. 58 concerns the following question: When a judgment or order is required to be entered on a separate document under Fed. R. Civ. P. 58 but is not, does the time to appeal the judgment or order ever begin to run? According to every circuit except the First Circuit, the answer is "no." The First Circuit alone holds that parties will be deemed to have waived their right to have a judgment or order entered on a separate document three months after the judgment or order is entered in the civil docket. *See Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 229, 236 (1st Cir. 1992) (en banc). Other circuits have rejected this cap as contrary to the relevant rules. *See, e.g.*, *United States v. Haynes*, 158 F.3d 1327, 1331 (D.C. Cir. 1998); *Hammack v. Baroid Corp.*, 142 F.3d 266, 269-70 (5th Cir. 1998); *Rubin v. Schottenstein, Zox & Dunn*, 110 F.3d 1247, 1253 n.4 (6th Cir. 1997), *vacated on other grounds* 143 F.3d 263 (6th Cir. 1998) (en banc). However, no court has questioned the wisdom of imposing such a cap as a matter of policy.

Fed. R. Civ. P. 58 has been amended to impose such a cap. Under amended Fed. R. Civ. P. 58(b) — and therefore under amended Rule 4(a)(7) — a judgment or order is treated as entered when it is entered in the civil docket pursuant to Fed. R. Civ. P. 79(a). There is one exception: When Fed. R. Civ. P. 58(a)(1) requires the judgment or order to be set forth on a separate document, that judgment or order is not entered until it is so set forth or until the expiration of 60 days after its entry in the civil docket, whichever occurs first. This cap will ensure that parties will not be given forever to appeal a judgment or order that should have been set forth on a separate document but was not.

3. The third circuit split — this split addressed only by the amendment to Rule 4(a)(7) — concerns whether the appellant may waive the separate document requirement over the objection of the appellee. In *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387 (1978) (per curiam), the Supreme Court held that the "parties to an appeal may waive the separate-judgment requirement of Rule 58." Specifically, the Supreme Court held that when a district court enters an order and "clearly evidence[s] its intent that the . . . order . . . represent[s] the final decision in the case," the order is a "final decision" for purposes of 28 U.S.C. § 1291, even if the order has not been entered on a separate document for purposes of Fed. R. Civ. P. 58. *Id.* Thus, the parties can choose to appeal without waiting for the order to be entered on a separate document.

Courts have disagreed about whether the consent of all parties is necessary to waive the separate document requirement. Some circuits permit appellees to object to attempted *Mallis* waivers and to force appellants to return to the trial court, request entry of judgment on a separate document, and appeal a second time. *See, e.g.*, *Selletti v. Carey*, 173 F.3d 104, 109-10 (2d Cir. 1999); *Williams v. Borg*, 139 F.3d 737, 739-40 (9th Cir. 1998); *Silver Star Enters., Inc. v. M/V*

Saramacca, 19 F.3d 1008, 1013 (5th Cir. 1994). Other courts disagree and permit *Mallis* waivers even if the appellee objects. *See, e.g.*, *Haynes*, 158 F.3d at 1331; *Miller v. Artistic Cleaners*, 153 F.3d 781, 783-84 (7th Cir. 1998); *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1006 n.8 (3d Cir. 1994).

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

[It should be noted that the time frame within which an appellant must decide whether to waive the separate document requirement has been dramatically shortened by amended Fed. R. Civ. P. 58. Under former Fed. R. Civ. P. 58, the time to bring post-judgment motions or to appeal a judgment did not begin to run if the judgment was not entered on a separate document. Thus, the appellant could, in theory, waive the separate document requirement and appeal many years after the judgment was entered in the civil docket. Under amended Fed. R. Civ. P. 58, a judgment that is supposed to be set forth on a separate document but is not will nevertheless be considered entered — and the time to bring post-judgment motions and to appeal will nevertheless begin to run — 60 days after the judgment is entered in the civil docket. Thus, the separate document requirement is essentially waived by operation of Fed. R. Civ. P. 58 on the 60th day after entry of the judgment in the civil docket.]

4. The final circuit split addressed by the amendment to Rule 4(a)(7) concerns the question whether an appellant who chooses to waive the separate document requirement must appeal within 30 days (60 days if the government is a party) from the entry in the civil docket of the judgment or order that should have been entered on a separate document but was not. In *Townsend v. Lucas*, 745 F.2d 933 (5th Cir. 1984), the district court dismissed a 28 U.S.C. § 2254 action on May 6, 1983, but failed to enter the judgment on a separate document. The plaintiff appealed on January 10, 1984. The Fifth Circuit dismissed the appeal, reasoning that, if the plaintiff waived the separate document requirement, then his appeal would be from the May 6 order, and if his appeal was from the May 6 order, then it was untimely under Rule 4(a)(1). The Fifth Circuit stressed that the plaintiff could return to the district court, move for entry of judgment on a separate document, and appeal from that judgment within 30 days. *Id.* at 934. Several other cases have embraced the *Townsend* approach. *See, e.g.*, *Armstrong v. Ahitow*, 36 F.3d 574, 575 (7th Cir. 1994) (per curiam); *Hughes v. Halifax County Sch. Bd.*, 823 F.2d 832, 835-36 (4th Cir. 1987); *Harris v. McCarthy*, 790 F.2d 753, 756 n.1 (9th Cir. 1986).

Those cases are in the distinct minority. There are numerous cases in which courts have heard appeals that were not filed within 30 days (60 days if the government was a party) from the judgment or order that should have been entered on a separate document but was not. *See, e.g.*, *Haynes*, 158 F.3d at 1330-31; *Pack*, 130 F.3d at 1073; *Clough v. Rush*, 959 F.2d 182, 186 (10th

Cir. 1992); *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1218-19 (9th Cir. 1990). In the view of these courts, the remand in *Townsend* was "precisely the purposeless spinning of wheels abjured by the Court in the [*Mallis*] case." 15B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3915, at 259 n.8 (3d ed. 1992).

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

The Reporter said that at the Standing Committee's January 2000 meeting there was a great deal of discussion about the amendment to Rule 4(a)(7) that this Committee approved at its October 1999 meeting. The Standing Committee concluded that the problems that the amendment attempted to solve could be addressed more effectively if the Appellate Rules Committee and the Civil Rules Committee worked together to propose complementary amendments to their respective sets of rules. The Standing Committee directed Judge Garwood and the Reporter to work with Judge Paul Niemeyer (the Chair of the Civil Rules Committee) and Prof. Cooper to draft amendments for presentation to their respective committees in April. The two chairs and two reporters have done so.

The Reporter reminded the Committee that the amendment to Rule 4(a)(7) was intended to address four issues: (1) the widespread confusion over the extent to which orders that dispose of post-judgment motions must be entered on separate documents; (2) the "time bomb" problem — that is, the fact that every circuit except the First holds that when a judgment is required to be set forth on a separate document but is not, the time to appeal the judgment never begins to run; (3) the circuit split over whether the consent of all parties is necessary to waive the separate document requirement; and (4) the *Townsend* problem.

The Reporter said that the first and second issues had been addressed in proposed new Rule 4(a)(7)(**A**), while the third and fourth issues had been addressed in proposed new Rule 4(a)(7)(**B**). The Standing Committee raised no objection to proposed Rule 4(a)(7)(B). Thus, the draft Rule 4(a)(7)(B) being presented to the Committee today is identical to the draft Rule 4(a)(7)(B) approved by the Committee in October 1999 and considered by the Standing Committee in January 2000, except that the Committee Note has been shortened.

The Standing Committee's concerns were directed solely at draft Rule 4(a)(7)(A). The Standing Committee was supportive of the *goals* of draft Rule 4(a)(7)(A), but concerned about the *means* chosen to achieve those goals.

1. As to the time bomb problem: This Committee had proposed to amend Rule 4(a)(7) to impose a cap on the time that a party could wait to appeal a judgment that should have been set forth on a separate document but was not. Specifically, the amendment provided that such a judgment would be treated as entered for purposes of Rule 4(a)(7) — notwithstanding anything to the contrary in the FRCP — 150 days after the judgment was entered in the civil docket. On the 150th day, the time to appeal the judgment would begin to run, even if the judgment was one

that had to be set forth on a separate document under FRCP 58, and even if the judgment had not been so set forth.

The Standing Committee's main concern about this proposal was that it would decouple the running of the time to bring post-judgment motions from the running of the time to bring appeals. At present, both the time to bring post-judgment motions under the FRCP and the time to bring appeals under FRAP begin to run at the same time — when judgment is set forth on a separate document. But under the proposed amendment to Rule 4(a)(7), if a judgment was supposed to be set forth on a separate document but was not, the time to bring *post-judgment motions* would never begin to run under the FRCP, while the time to *appeal* would begin to run on the 150th day under FRAP.

The Standing Committee was uncomfortable with this decoupling. The Standing Committee also pointed out that it would create a substantial loophole in the 150 day cap. Under current Rule 4(a)(4)(A), the timely filing of certain post-judgment motions tolls the time to appeal, and, according to the rule, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." Because the timeliness of post-judgment motions would be measured under the FRCP (not FRAP), and because the time to bring a post-judgment motion would not begin to run under the FRCP until the judgment was *actually* set forth on a separate document, a timely post-judgment motion could be filed under the FRCP long after the time to appeal the underlying judgment had theoretically expired under the proposed amendment to Rule 4(a)(7). Such a post-judgment motion would "revive" the time to appeal, and thus defeat the cap.

Although it might be possible for this Committee to close this loophole by amending Rule 4(a)(4)(A), the Standing Committee clearly wants this Committee to work with the Civil Rules Committee to find a solution that imposes an effective cap and does so without decoupling the running of the time to bring post-judgment motions from the running of the time to bring appeals.

The Reporter said that Judge Garwood, Judge Niemeyer, Prof. Cooper, and the Reporter had come up with such a proposal. Under the proposal, FRCP 58(b) would provide that, *if* entry of the judgment on a separate document was required by FRCP 58(a), the judgment would be considered entered upon the earlier of the following: (1) actual entry on a separate document, or (2) the passage of 60 days after entry in the civil docket. As part of this proposal, Rule 4(a)(7) would be amended to provide that a judgment will be treated as entered for purposes of Rule 4 (that is, for purposes of the running of the time to appeal) when it is treated as entered for purposes of FRCP 58 (that is, for purposes of the running of the time to bring post-judgment motions). In this way, a 60 day cap is imposed on judgments that should have been entered on separate documents but were not, and the running of the time to appeal continues to be coupled with the running of the time to bring post-judgment motions.

2. As to the confusion over the extent to which orders that dispose of post-judgment motions must be entered on separate documents: At present, there is at least a four-way circuit split on this issue. Some courts hold that Rule 4(a)(7) independently imposes a separate document requirement (a requirement that is distinct from the separate document requirement

that is imposed by the FRCP), while other courts hold that Rule 4(a)(7) merely incorporates the separate document requirement as it exists in the FRCP. Further complicating the matter, courts in the former camp disagree among themselves about the scope of the separate document requirement that they interpret Rule 4(a)(7) as imposing, and courts in the latter camp disagree among themselves about the scope of the separate document requirement imposed by the FRCP.

The amendment to Rule 4(a)(7) approved by this Committee in October 1999 would have made clear that FRAP simply incorporates the separate document requirement as it exists in the FRCP, and does not impose a separate document requirement of its own. However, under that amendment, the law would still be a mess. Whether an order disposing of a post-judgment motion would have to be entered on a separate document under FRCP 58 (and thus under Rule 4(a)(7)) would depend upon whether the order was appealable, and the circuits would remain all over the map on the issue of the appealability of such orders.

At its meeting earlier this week, the Civil Rules Committee approved for public comment a new FRCP 58(a). That provision retains the general requirement that judgments and amended judgments be entered on separate documents. However, the provision expressly exempts from the separate document requirement orders disposing of post-judgment motions. Thus, new FRCP 58(a) would resolve all of the conflicts over this issue by imposing a uniform national rule, and new Rule 4(a)(7)(A) would make clear that FRAP does not impose a separate document requirement of its own.

The Reporter concluded by noting that, when new FRCP 58 is published, commentators will be invited to address the question whether the separate document requirement should be abolished altogether. However, nothing about the drafting of Rule 4(a)(7) turns on this question. Whether or not the civil rules continue to impose a separate document requirement, Rule 4(a)(7) will simply incorporate the civil rules provisions by reference.

Judge Garwood mentioned that Judge Anthony J. Scirica, the Chair of the Standing Committee, was among those who had suggested that perhaps the separate document requirement should be abolished. Judge Garwood said that he personally thought that the requirement should be maintained to the extent that proposed new FRCP 58(a) does so.

Prof. Cooper pointed out that proposed new FRCP 58(a) would exempt *all* orders disposing of post-judgment motions from the separate document requirement — not just those that toll the time to appeal under Rule 4(a)(4)(A). Rule 4(a)(4)(A) qualifies which post-judgment motions can toll the time to appeal; for example, it provides that a FRCP 60 motion can toll the time to appeal only if it is brought within 10 days. Those qualifications, although important for appellate purposes, are not important for separate document purposes. It is better to have a simple rule — e.g., a rule that *no* order disposing of a FRCP 60 motion needs to be entered on a separate document.

Prof. Cooper also pointed out that the cap imposed by new FRCP 58(b) was 60 days, while the cap imposed under the earlier proposed amendment to Rule 4(a)(7) was 150 days. Several Committee members said that they did not object to the shorter cap.

A member moved that the amendment to Rule 4(a)(7) be approved. The motion was seconded. The motion carried (unanimously).

The Committee reviewed the suggestions of the Style Subcommittee and, by consensus, agreed that Rule 4(a)(7)(B) should be redrafted to provide, "A failure to enter a judgment or order on a separate document when required by Rule 58(a)(1) of the Federal Rules of Civil Procedure does not affect the validity of an appeal from that judgment or order."

The Reporter asked about the bracketed paragraph in the draft Committee Note to Rule 4(a)(7)(B). The Reporter said that he did not believe that the paragraph was necessary, but wanted the Committee to have a chance to consider it. A member moved that the bracketed paragraph be deleted. The motion was seconded. The motion carried (unanimously).

Judge Garwood and several members of the Committee expressed appreciation for the work of Prof. Cooper and the Reporter on this complicated and difficult matter.

D. Item No. 99-07 (FRAP 26.1 — broaden financial disclosure obligations)

The Reporter introduced the following proposed amendment and Committee Note:

Rule 26.1. ~~Corporate~~ Disclosure Statement

(a) Who Must File. Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement identifying all its parent corporations, ~~and~~ listing any publicly held company that owns 10% or more of the party's stock, and providing any additional information that the Judicial Conference of the United States requires to be disclosed. Any other party to a proceeding in a court of appeals must file a statement providing any information that the Judicial Conference of the United States requires to be disclosed.

(b) Time for Filing. A party must file the statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. A party must supplement its statement whenever the information that must be disclosed under this Rule 26.1(a) changes.

(c) Number of Copies. If the statement is filed before the principal brief, or if a supplemental statement is filed, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.

Committee Note

Subdivision (a). Rule 26.1(a) presently requires nongovernmental corporate parties to file a "corporate disclosure statement." In that statement, a nongovernmental corporate party is required to identify all of its parent corporations and all publicly held companies that own 10% or more of its stock. The corporate disclosure statement is intended to assist judges in determining whether they must recuse themselves by reason of "a financial interest in the subject matter in controversy." Code of Judicial Conduct, Canon 3C(1)(c) (1972).

Rule 26.1 does not require the disclosure of all information that could conceivably be relevant to a judge who is trying to decide whether he or she has a "financial interest" in a case. However, using the Rules Enabling Act process to formulate more detailed financial disclosure requirements would be difficult. The Advisory Committees responsible for drafting the rules of practice and procedure do not have intimate knowledge of the Code of Judicial Conduct, periodic interpretations of the Code, or the ongoing experiences of judges, clerks, and parties under the Code. Moreover, the Advisory Committees cannot respond quickly as rapidly advancing technology changes the way that the Code is administered.

Rule 26.1(a) has been amended to authorize the Judicial Conference, with the assistance of the Administrative Office and others who have expertise in judicial conduct and court administration, to promulgate more detailed financial disclosure requirements, if and when the Judicial Conference decides that such requirements are advisable.

Subdivision (b). Rule 26.1(b) has been amended to require parties to file supplemental disclosure statements whenever there is a change in the information that Rule 26.1(a) requires the parties to disclose. For example, if a publicly held company acquires 10% or more of a party's stock after the party has filed its disclosure statement, the party should file a supplemental statement identifying that publicly held company.

Subdivision (c). Rule 26.1(c) has been amended to provide that a party who is required to file a supplemental disclosure statement must file an original and 3 copies, unless a local rule or an order entered in a particular case provides otherwise.

The Reporter reminded the Committee that the Standing Committee's concern about the financial disclosure issue was in part attributable to a series of articles in the *Kansas City Star* and the *Washington Post* that described several instances in which federal judges should have recused themselves from cases but did not.

At present, Rule 26.1 requires a nongovernmental corporate party to file a corporate disclosure statement, in which it identifies all of its parent corporations and all publicly held companies that own at least 10% of the party's stock. At the time that Rule 26.1 was enacted, this Committee expressly acknowledged that judges needed more information than that required by Rule 26.1 to meet their recusal obligations — and, in the Committee Note to Rule 26.1, this Committee expressly invited local rulemaking on this issue. The courts of appeals have accepted this invitation with a vengeance; most courts of appeals have enacted local rules on financial disclosure, some of which require disclosure far in excess of that required by Rule 26.1.

The Standing Committee's concern about Rule 26.1 is twofold. First, the Standing Committee is concerned that none of the other rules of practice and procedure contain anything like Rule 26.1. At a minimum, the Standing Committee would like the other rules of practice and procedure to incorporate a provision very much like Rule 26.1. Second, the Standing Committee is concerned that Rule 26.1 may not require broad enough disclosure.

Prior to the Standing Committee's January meeting, Judge Scirica and Prof. Coquillette met with the reporters to the advisory committees to attempt to reach a consensus on a financial disclosure proposal that could be presented to the advisory committees at their spring meetings. The participants in that meeting agreed that a proposal along the following lines would be presented to each advisory committee:

- Rule 26.1 would be amended to require that disclosure statements be supplemented when necessary.
- All of the rules of practice and procedure would incorporate a provision patterned after Rule 26.1. This would act as a "floor."
- All of the rules of practice and procedure would also include a provision that would give the Judicial Conference the authority to require *all* parties (not just nongovernmental corporate parties) to submit a financial disclosure form — a form that could require information in addition to that required by Rule 26.1.
- The financial disclosure rules would be silent on the issue of local rulemaking. Although the Committee on Codes of Conduct would like to preempt any local rulemaking on the topic of financial disclosure, such a goal is impractical at this time.

Earlier this week, the Civil Rules Committee approved for publication financial disclosure provisions that were consistent with this proposal. Likewise, at its spring meeting, the Bankruptcy Rules Committee approved this proposal in principle, although the Bankruptcy Rules Committee will need more time to draft implementing rules because of complications that arise in the bankruptcy context.

The Reporter said that his draft amendments to Rule 26.1 were intended to implement the proposal that the Civil Rules Committee and Bankruptcy Rules Committee had already accepted. He noted that there were two differences between his draft and the rules approved by the Civil

Rules Committee. First, the civil rules would require a "null" report — that is, they would require parties who do not have information that must be disclosed under Rule 26.1 to inform the court of that fact. Second, the civil rules specifically require the clerk of court to give the financial disclosure information to the judge. The Reporter's draft does not include any such provision. The Reporter said that the rules of practice and procedure assume that *everything* filed with a clerk is provided to a judge; he is afraid of the negative implication that might arise if the rules start specifying that certain information must be given to a judge while remaining silent about other information.

Prof. Cooper addressed the two differences between the provisions approved by the Civil Rules Committee and the provisions drafted by the Reporter. The requirement that a null report be filed was initially suggested by the Committee on Codes of Conduct. The Committee's staff now seems to be backpedaling on whether a null report should be required. The Civil Rules Committee thought that requiring such a report would be helpful, as a court could be assured that the reason it had received no Rule 26.1 information from a party is not because that party had erred, but because that party had no Rule 26.1 information to report. As to the requirement that clerks provide Rule 26.1 information to judges: One member of the Civil Rules Committee felt strongly that such a requirement should be in the rule. Although other members had their doubts, the requirement was included in the rule that was approved. Such a requirement may be more defensible in the civil rules than in the appellate rules, as in the in the district courts it is common for cases to be pending longer with more interim judicial actions before final resolution.

On the issue of local rules, Prof. Cooper said that the Committee on Codes of Conduct and several members of the Civil Rules Committee felt strongly that local rules should be forbidden — that there should be a uniform financial disclosure rule in all federal courts. But such a uniform rule is almost surely not attainable at this time; it also may not be wise, as it may be in everyone's interests to permit courts to continue to experiment with local rules. The Civil Rules Committee did not forbid local rulemaking, but it included language in the Committee Note that was intended to discourage it.

A member of the Committee agreed with Prof. Cooper that differences between the trial courts and the appellate courts might justify including in the civil rules, but not in the appellate rules, an explicit direction to clerks to convey Rule 26.1 information to judges. Other members of the Committee expressed reluctance to include such a direction in the appellate rules, in large part because of the negative implication described by the Reporter.

Mr. Rabiej said that the Committee on Codes of Conduct was adamant that courts should not use local rules to require more information than is required by Rule 26.1. The Committee on Codes of Conduct thought that such additional information was rarely helpful and often harmful, because inundating judges with too much information makes it *less* likely that judges will recuse themselves when appropriate. Mr. Rabiej pointed out that in the Committee Note accompanying the 1989 adoption of Rule 26.1, this Committee was encouraging — even inviting — of local rules. Mr. Rabiej wondered whether silence on the issue of local rulemaking now would be interpreted as a reaffirmation of that prior sentiment.

Mr. Rabiej also said that the Committee on Codes of Conduct favors the requirement of a null report. Apparently, the current practice of many clerks is to contact a party who does not file a Rule 26.1 statement to make certain that the omission was not inadvertent. Requiring a null report would reduce the burden on the clerks' offices. Several Committee members urged that Rule 26.1 be redrafted to include the requirement of a null report.

A couple of members expressed concern about some of the stylistic differences between the provisions approved by the Civil Rules Committee and the provisions drafted by the Reporter. For example, the Civil Rules Committee explicitly refers to a "form," whereas the word is not used in the new Rule 26.1. Prof. Coquillette responded that, at this point, these rules are being approved for publication only, and that, after publication, the rules can be made more consistent stylistically. Prof. Cooper asserted that there is a benefit to publishing rules that are drafted somewhat differently; it will give commentators a chance to compare the approaches and express their opinions on what works best.

The Committee came to a consensus that the language of the draft Rule 26.1 was acceptable, except that a requirement for a null report should be included in draft Rule 26.1(a) and the word "this" appearing immediately before the phrase "Rule 26(a) changes" in draft Rule 26.1(b) should be deleted. The Committee also agreed that several changes should be made to the Committee Note, including the following:

- The penultimate sentence of the second paragraph in the Committee Note to subdivision (a) should be changed, so that instead of focusing on the *disadvantage* of having the advisory committees address financial disclosure issues, the Note focuses on the *advantage* of having this work done by the Judicial Conference.

- The last sentence of the second paragraph in the Committee Note to subdivision (a) should be changed so that it refers to the inability of the "Rules Enabling Act process" to respond to technological changes, rather than to the inability of "the Advisory Committees."

- Explicit reference should be made in the Committee Note to the ability of the Judicial Conference to use its authority under amended Rule 26.1(a) to preempt local rulemaking on the subject of financial disclosure.

The Committee decided to adjourn for lunch. The Reporter was asked to use the lunch break to redraft the amendments to Rule 26.1 to incorporate these changes. The Committee adjourned for lunch at 1:00 p.m.

The Committee reconvened at 2:25 p.m. The Reporter distributed the following amendments and Committee Note:

Rule 26.1 ~~Corporate~~ Disclosure Statement

(a) Who Must File.

(1) **Nongovernmental corporate parties.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that

(a) identifyingies all its parent corporations and listings any publicly held ~~company~~ corporation that owns 10% or more of the party's stock or reports that there are no such corporations, and

(b) provides any additional information that the Judicial Conference of the United States requires to be disclosed.

(2) **Other parties.** Any other party to a proceeding in a court of appeals must file a statement that provides any information that the Judicial Conference of the United States requires to be disclosed.

(b) Time for Filing. A party must file the statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. A party must supplement its statement whenever the information that must be disclosed under Rule 26.1(a) changes.

(c) Number of Copies. If the statement is filed before the principal brief, or if a supplemental statement is filed, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.

Committee Note

Subdivision (a). Rule 26.1(a) presently requires nongovernmental corporate parties to file a "corporate disclosure statement." In that statement, a nongovernmental corporate party is

required to identify all of its parent corporations and all publicly held corporations that own 10% or more of its stock. The corporate disclosure statement is intended to assist judges in determining whether they must recuse themselves by reason of "a financial interest in the subject matter in controversy." Code of Judicial Conduct, Canon 3C(1)(c) (1972).

Rule 26.1(a) has been amended to require that nongovernmental corporate parties who currently do not have to file a corporate disclosure statement — that is, nongovernmental corporate parties who do not have any parent corporations and at least 10% of whose stock is not owned by any publicly held corporation — inform the court of that fact. At present, when a corporate disclosure statement is not filed, courts do not know whether it has not been filed because there was nothing to report or because of ignorance of Rule 26.1.

Rule 26.1 does not require the disclosure of all information that could conceivably be relevant to a judge who is trying to decide whether he or she has a "financial interest" in a case. Experience with divergent disclosure practices and improving technology may provide the foundation for more comprehensive disclosure requirements. The Judicial Conference, supported by the committees that work regularly with the Code of Judicial Conduct and by the Administrative Office of the United States Courts, is in the best position to develop any additional requirements and to adjust those requirements as technological and other developments warrant. Thus, Rule 26.1 has been amended to authorize the Judicial Conference to promulgate more detailed financial disclosure requirements — requirements that might apply beyond nongovernmental corporate parties.

As has been true in the past, Rule 26.1 does not forbid the promulgation of local rules that require disclosures in addition to those required by Rule 26.1 itself. However, along with the authority provided to the Judicial Conference to require additional disclosures is the authority to preempt any local rulemaking on the topic of financial disclosure.

Subdivision (b). Rule 26.1(b) has been amended to require parties to file supplemental disclosure statements whenever there is a change in the information that Rule 26.1(a) requires the parties to disclose. For example, if a publicly held corporation acquires 10% or more of a party's stock after the party has filed its disclosure statement, the party should file a supplemental statement identifying that publicly held corporation.

Subdivision (c). Rule 26.1(c) has been amended to provide that a party who is required to file a supplemental disclosure statement must file an original and 3 copies, unless a local rule or an order entered in a particular case provides otherwise.

Several members of the Committee expressed support for the redraft. A member moved that the amendments and Committee Note be approved. The motion was seconded. The motion carried (unanimously).

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

The Reporter introduced the following proposed amendments and Committee Notes:

Rule 5. Appeal by Permission

(c) Form of Papers; Number of Copies. All papers must conform to Rule ~~32(a)(1)~~ 32(c)(2). A paper must not exceed 20 pages, exclusive of the [corporate] disclosure statement, the proof of service, and the accompanying documents required by Rule 5(b)(1)(E). An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

Committee Note

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

Rule 5(c) has been further amended to limit the length of papers filed under Rule 5.

Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

(d) Form of Papers; Number of Copies. All papers must conform to Rule ~~32(a)(1)~~ 32(c)(2). A paper must not exceed 20 pages, exclusive of the [corporate] disclosure statement, the proof of service, and the accompanying documents required by Rule 21(a)(2)(C). An original and 3 copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

Committee Note

Subdivision (d). A petition for a writ of mandamus or prohibition, an application for another extraordinary writ, and an answer to such a petition or application are all "other papers" for purposes of Rule 32(c)(2), and all of the requirements of Rule 32(a) apply to those papers, except as provided in Rule 32(c)(2). During the 1998 restyling of the Federal Rules of Appellate Procedure, Rule 21(d) was inadvertently changed to suggest that only the requirements of Rule 32(a)(1) apply to such papers. Rule 21(d) has been amended to correct that error.

Rule 21(d) has been further amended to limit the length of papers filed under Rule 21.

Rule 5(c) currently provides that a petition for permission to appeal (as well as a cross-petition for permission to appeal and an answer to a petition or cross-petition) "must conform to Rule 32(a)(1)." This is a mistake. Rule 32(a)(1) addresses only how a paper must be reproduced; it says nothing about whether the paper needs a cover or a caption, what information must be contained in the cover or caption, how the paper must be bound, what size paper must be used, what type face must be used, and so on. In October 1999, the Committee addressed this error in Rule 5(c) by approving an amendment that would substitute a reference to "Rule 32(c)(2)" for the current reference to "Rule 32(a)(1)." At its January 2000 meeting, the Standing Committee approved this amendment for publication.

After the agenda book was distributed, Mr. Fulbruge brought two concerns about the amendment to Judge Garwood's attention. First, Mr. Fulbruge pointed out that the mistake that appears in Rule 5(c) also appears in Rule 21(d), which governs petitions for extraordinary relief. Second, Mr. Fulbruge pointed out that nothing in Rule 5 or in any other rule imposes any limitation on the length of a petition for permission to appeal or related paper. Likewise, no rule imposes any limitation on the length of a petition for extraordinary relief or related paper. Rule 32(c)(2) does not help, as it specifically exempts "other papers" from the page limitations imposed on briefs by Rule 32(a)(7).

The Reporter drafted two amendments for the Committee's consideration. The draft amendment to Rule 5(c) is identical to the amendment that the Committee approved in October 1999, except that it adds a page limitation. The draft amendment to Rule 21(d) substitutes "Rule 32(c)(2)" for "Rule 32(a)(1)" — as the amendment to Rule 5(c) does — and also adds a page limitation. The page limitations are patterned after Rule 27(d)(2), which imposes page limitations on motions and responses to motions. As a result of these amendments, all of the form requirements that apply to briefs will also apply to papers filed in connection with requests for permission to appeal and requests for extraordinary writs, except that covers will not be required and different page limitations will be imposed.

Several members expressed support for the amendments. No member objected, except that one member suggested that, in both Rule 5(c) and Rule 21(d), the phrase "[e]xcept by the court's permission" be inserted prior to "[a] paper must not exceed 20 pages." By consensus, the Committee agreed with the suggestion.

A member moved that the amendments to Rules 5(c) and 21(d), as modified by the suggestion, be approved. The motion was seconded. The motion carried (unanimously).

V. Discussion Items

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

Prof. Coquillette gave the Committee a brief update on the Standing Committee's efforts to draft "Federal Rules of Attorney Conduct" or "FRAC." Specifically, Prof. Coquillette reported on a February 2000 meeting of the Subcommittee on Attorney Conduct, at which the Department of Justice and several other organizations were invited to share comments on how, if at all, the rules of practice and procedure should address the hundreds of conflicting and confusing local rules on attorney conduct.

Prof. Coquillette said that, although no decision had yet been made by the Subcommittee, much less by the Standing Committee, he thought that a consensus was emerging on at least a couple of points. First, there is widespread agreement that the appellate courts are not experiencing a problem in this area, and that Rule 46 should be left unchanged. Second, there is also widespread agreement that the best way to address the problems in the district and bankruptcy courts is through a "dynamic state conformity" rule embodied in a "FRAC 1" — that is, a rule that would essentially provide that state rules of professional responsibility govern the conduct of attorneys in federal court.

Two problems remain. First, there is sharp disagreement over whether an additional rule of attorney conduct — a "FRAC 2" — should exempt discrete subjects from regulation by state authorities. The most contentious issue is whether federal prosecutors should be exempt from state application of Model Rule 4.2. Second, there are special problems in the bankruptcy context that might have to be addressed in a "FRAC 3." However, the Bankruptcy Rules Committee is busy with more pressing matters, so work on a "FRAC 3" is not likely for some time.

Prof. Coquillette said that there will probably be another invitational meeting in the fall, and that the advisory committees will not be asked to act on rules of attorney conduct until spring 2001 at the earliest. Prof. Coquillette stressed again that this Committee will probably not be asked to take any action with respect to attorney conduct, given that Rule 46 appears to be working well.

Judge Garwood thanked Prof. Coquillette for his report.

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

Rule 22(a) requires that a habeas petition be filed in the district court and that, if it is erroneously presented to a circuit judge, it be transferred to the district court. Judge Kenneth F.

Ripple has suggested that Rule 22(a) be amended to permit circuit judges to deny habeas petitions. At the Committee's October 1998 meeting, Judge Garwood asked the Department of Justice to study this issue and make a recommendation to the Committee.

Mr. Letter said that, after struggling with this issue for over a year, the Justice Department has concluded that it is not an appropriate subject of rulemaking. The fact that Rule 22(a) requires habeas petitions to first be presented to district court judges is controversial only in the context of immigration. Rule 22(a) is controversial in the context of immigration because, under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), a person who has been ordered deported is authorized in some circumstances to move in the court of appeals for a stay of deportation. In ruling upon such a motion, a circuit judge must review the merits of the case — that is, a judge must review the same evidence and arguments that are likely presented in an accompanying habeas petition.

Several difficult circuit splits have developed over the meaning of the IIRIRA and how it interacts with the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Courts disagree even about such fundamental matters as whether district courts continue to have authority to rule on habeas petitions filed by aliens who have been ordered deported. It will likely take several years to work out the most important of these conflicts. That being the case, the Justice Department believes that this Committee would be ill-advised to intervene in this area through rulemaking. Mr. Letter recommended that Item No. 98-07 be removed from the Committee's study agenda.

Several members of the Committee concurred with Mr. Letter's recommendation. A member moved that Item No. 98-07 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

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

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

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

At the Committee's October 1999 meeting, the Reporter introduced this matter and recommended that it be removed from the study agenda. The Reporter argued that the Sixth Circuit's decision was reasonable and did not conflict with the decision of any other court of appeals. Mr. Letter asked the Committee to postpone a decision on Item No. 99-05 to give the Department of Justice a chance to look at the issue and formulate a recommendation. The Committee agreed.

Mr. Letter reported that the Department of Justice had found that only three other circuits have addressed this issue, and all three agree with the approach taken by the Sixth Circuit in *Dillon*. For that reason, the Department of Justice concurred that this item should be removed from the Committee's study agenda.

A member moved that Item No. 99-05 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

D. Items Awaiting Initial Discussion

1. Item No. 99-06 (FRAP 33 — notice of bankruptcy settlements)

FRBP 7041 and 9019(a) provide special rules regarding settlements reached in bankruptcy actions. The rules require that all settlements be approved by the bankruptcy court after notice to the creditors and the trustee. The rules prevent the debtor from cutting a "sweetheart" deal with a favored creditor.

The bankruptcy judges of the Fourth Circuit have raised a concern about Rule 33, which authorizes "appeal conferences" to try to settle cases and authorizes a court of appeals to "enter an order . . . implementing any settlement agreement" that results from such a conference. The concern of the Fourth Circuit bankruptcy judges is that the debtor and a favored creditor could cut a sweetheart deal on appeal and, under Rule 33, get an order implementing that deal, without notice to the other creditors or the trustee and without an opportunity for the bankruptcy judge to consider the fairness of the settlement.

The Reporter said that he had drafted an amendment to Rule 33 to address the concern of the Fourth Circuit bankruptcy judges, but both the former and current reporter to the Bankruptcy Rules Committee had raised objections to the Reporter's draft and described several questions that will have to be answered before anyone can try to solve this problem. The Reporter said that the Bankruptcy Rules Committee was in the best position to identify and answer those questions. Thus, this Committee will simply hold this matter in abeyance until it receives a specific proposal from the Bankruptcy Rules Committee. The Reporter concluded by pointing out that, to the best of his knowledge, the concern of the Fourth Circuit bankruptcy judges is purely theoretical. No one is aware of any party who has actually used Rule 33 in the manner feared by the bankruptcy judges.

A member of the committee agreed that this matter is extremely complicated and should first be addressed by the Bankruptcy Rules Committee. He said that even the logistics of trying to make certain that settlements reached on appeal be approved were complicated. Should the court of appeals remand the case to the bankruptcy court? Hold the appeal in abeyance until the bankruptcy court can consider the fairness of the settlement? Dismiss the appeal without prejudice? Constitute itself as a bankruptcy court and hear arguments on the fairness of the settlement?

Another member of the Committee pointed out that settlements must be approved in contexts other than bankruptcy — for example, in class actions and derivative actions. In those contexts, parties who are affected by a settlement may not be parties to the appeal in which the settlement is reached. The member said that if and when this Committee revisits this issue, it should explore whether changes to Rule 33 are needed — changes beyond those necessary to address the bankruptcy problem.

By consensus, the Committee agreed to leave Item No. 99-06 on the study agenda and await a specific proposal from the Bankruptcy Rules Committee.

2. Item No. 99-08 (FRAP 4 — give pro se litigants more time to appeal)

Mr. Howard Rich, who is incarcerated in Texas, has proposed a number of changes to FRAP, including giving pro se appellants more time to bring appeals. After a brief discussion of Mr. Rich's proposals, a member moved that Item No. 99-08 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

3. Item No. 99-09 (FRAP 22(b) — specify procedure for obtaining COA)

Before a party who has applied for a writ of habeas corpus in the district court can appeal the denial of his application, he must obtain a certificate of appealability ("COA") from "a circuit justice or a circuit or district judge." Rule 22(b)(1). Judge Scirica has pointed out that the circuits have different procedures for considering requests for a COA. In particular, circuits answer the following questions differently: (1) Should the court decide whether to grant a COA before or after it receives briefing on the merits of the appeal? (2) How many judges should be involved in deciding whether a COA should be granted? (3) When, if ever, should counsel be appointed for a party who seeks a COA? Judge Scirica has asked whether FRAP, the FRCrP, or both might be amended to bring about more uniformity.

The Committee briefly discussed the various procedures used by the courts of appeals. A couple of members said that the summary of procedures that had been prepared for Judge Scirica did not accurately describe the procedures used in their circuits. All members of the Committee agreed that the matter was worth studying.

By consensus, the Committee requested the Department of Justice to study this matter and to make a recommendation at a future meeting. In particular, the Committee would appreciate knowing whether the Justice Department believes that there is a serious problem and, if so, whether the problem is best addressed by Congress, by case law, by local rules, or by amending FRAP and/or the FRCrP. A couple of members suggested that the Justice Department call the clerk of each circuit to determine whether the circuit's day-to-day practices are consistent with its formal policies. One member asked that the Justice Department include in its study the procedures used by courts when parties seek permission to file a second or successive habeas application.

Mr. Letter said that the Department of Justice would be happy to study this matter for the Committee and would make a report and recommendation at a future meeting.

4. Item No. 00-01 (FRAP 15(b) — clarify whether private parties can file applications to enforce agency orders)

Item No. 00-01 arises out of a suggestion by Michael Powell, an attorney in Dallas.

Before it was restylized, Rule 15(b) stated that, if a petition for review of an agency order was filed, "*the respondent* may file a cross-application for enforcement." As then written, Rule 15(b) seemed to contemplate that only the agency — which is always "the respondent" to a petition for review — could file a cross-application for enforcement.

After being restylized, Rule 15(b)(1) now states that, if a petition for review of an agency order is filed, "*a party opposing the petition* may file a cross-application for enforcement." Apparently, in at least one case, the question arose whether Rule 15(b) now permits cross-applications for enforcement to be filed not only by the agency, but by *any* party who opposes the petition for review (whether or not the agency itself has chosen to file a cross-application for enforcement). Mr. Powell suggests that FRAP should be amended to clarify this ambiguity.

Mr. Powell also raises a second question: "whether under the first sentence of Rule 15(b)(1), a private party may file an original application for enforcement of an agency order." He notes that the first sentence of Rule 15(b)(1) — "[a]n application to enforce an agency order must be filed with the clerk of a court of appeals authorized to enforce the order" — is written "in the passive" and "d[oes] not specify who may file an application."

At Judge Garwood's request, the Department of Justice consulted with several federal agencies about Mr. Powell's concern. The agencies said that they had not experienced a problem and did not expect to experience a problem in the future. The agencies stressed that Rule 15 does not give a court jurisdiction over any application for enforcement; such jurisdiction must come from an underlying statute, and no underlying statute permits a private party to file an application for enforcement.

A member moved that Item No. 00-01 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

5. Item No. 00-02 (FRAP 29 — restrict who may file amicus briefs)

At the Standing Committee's January 2000 meeting, Charles Cooper, a member of the Committee, told Judge Garwood and the Reporter that he was concerned about the frequency with which amicus briefs are filed in the courts of appeals by law professors and others who neither have a stake in the particular dispute nor represent a client who has a stake in the particular dispute. Mr. Cooper suggested that this Committee might want to consider amending Rule 29 to place restrictions on who may file amicus briefs.

Several objections were raised to Mr. Cooper's suggestion. First, members said that amicus briefs are designed to assist the courts, and the fact that a lawyer does not have a personal stake in a case does not mean that the lawyer cannot help the court. Second, this matter is best left to courts to decide on a brief-by-brief basis. Courts can always deny permission to file an amicus brief or ignore an amicus brief after it is filed. Finally, it would be extremely difficult to craft restrictions on amicus briefs; the energy that would have to be devoted to the task, and the controversy that the task would generate, would outweigh any potential benefits.

A member moved that Item No. 00-02 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

6. Item No. 00-03 (FRAP 26(a)(4)/45(a)(2) — description of holidays)

Jason Bezis, a student at Boalt Hall School of Law, has called the Committee's attention to the fact that Rules 26(a)(4) and 45(a)(2) refer to three legal holidays in a different manner than 5 U.S.C. § 6103(a). The rules refer to "Presidents' Day," whereas the statute refers to "Washington's Birthday"; the rules refer to "Martin Luther King, Jr.'s Birthday," whereas the statute refers to the "Birthday of Martin Luther King, Jr."; and the rules refer to "Veterans' Day," whereas the statute refers to "Veterans Day."

No member of the Committee thought that the differences regarding the King holiday and Veterans' Day warranted Committee action. Some members thought that the difference between "Presidents' Day" and "Washington's Birthday" might be substantial enough to justify amending Rules 26(a)(4) and 45(a)(2), but these members first wanted to know whether an executive order or other official source designates the third Monday in February as "Presidents' Day." Mr. McGough offered to look into this matter and report back to the Committee at its next meeting.

7. Item No. 00-04 (new FRAP 4.1 — indicative rulings)

The Department of Justice has proposed that FRAP be amended to authorize a procedure — commonly referred to as an "indicative ruling" — that is permitted under the common law of most of the courts of appeals. The need for an indicative ruling most often arises in the following situation: A district court enters judgment. A party files a notice of appeal. Sometime later, that party — or another party — files a motion under FRCP 60(b) for relief from the judgment. At that point, the district court cannot grant the FRCP 60(b) motion, as it no longer has jurisdiction over the case. The party can ask the court of appeals to remand the case to the district court, but that would be a waste of everyone's time if the district court will not grant the FRCP 60(b) motion.

Under the indicative ruling procedure, the party files its FRCP 60(b) motion in the district court. The district court then issues an "indicative ruling" — that is, a memorandum in which the district court indicates how it would rule on the FRCP 60(b) motion if it had jurisdiction. If the district court indicates that it would grant the motion, the court of appeals remands the case.

For several reasons, the Justice Department believes that FRAP should be amended to explicitly authorize the indicative ruling procedure. First, the procedure is not well known; if FRAP embraced the procedure, more parties would become aware of it. Second, the Second Circuit does not permit district courts to issue indicative rulings; the Ninth Circuit, unlike the other circuits, requires a remand for a *denial* (as well as for a grant) of a Rule 60(b) motion. An amendment to FRAP would resolve this circuit split. Finally, the circuits that do authorize indicative rulings use somewhat different procedures. An amendment to FRAP would promote uniformity.

In a March 14, 2000 letter to Judge Garwood, Solicitor General Waxman proposed adding a new Rule 4.1 on indicative rulings and suggested language for both the rule and the Committee Note. That letter was included in the Committee's agenda book. Mr. Letter highlighted two aspects of the draft rule. First, the rule would not apply in criminal cases or in cases under 28 U.S.C. §§ 2241, 2254, or 2255, which are technically civil in nature but are closely linked to criminal matters. Second, the rule would apply to interlocutory appeals, as some circuits hold that a district court loses jurisdiction over a preliminary injunction, even though it retains jurisdiction over the underlying case in which the injunction was issued.

The Committee discussed the proposal. Most of the discussion focused on the exclusion of habeas proceedings from the proposed rule. Some members opposed the exclusion, arguing that there was no principled reason for denying indicative rulings to those involved in habeas proceedings. These members pointed out that, in most circuits, those involved in habeas proceedings can *now* seek an indicative ruling, so this rule would deprive some litigants of a right that they now have. Other members supported the exclusion, arguing that habeas proceedings are numerous, often frivolous, and often brought pro se, and that any benefits that would be gained from approving the proposed Rule 4.1 would be outweighed by the many frivolous requests for indicative rulings that it would occasion.

A couple of members said that they would be inclined to support the proposal, if the exclusion of habeas proceedings were eliminated. Others expressed concerns about the proposal. All members agreed that the proposal deserved further consideration.

By consensus, the Committee agreed that Item No. 00-04 should remain on the Committee's study agenda. Committee members suggested that the Justice Department reconsider the exclusion of habeas proceedings from proposed Rule 4.1. If this Committee was unwilling to approve a rule that excluded habeas proceedings, would the Justice Department still want to go forward with its proposal? Also, Committee members suggested that the Justice Department be prepared to better explain how the indicative ruling procedure would work in the context of interlocutory appeals. Finally, Committee members recommended that the Committee Note be tightened up. For example, one member objected to the Committee Note's reference to a district court notifying the court of appeals that it would "seriously entertain a post-judgment motion."

Mr. Letter agreed that the Justice Department would give the matter further study.

8. Item No. 00-05 (notice of appeal for corporation signed by non-lawyer)

This matter was brought to the Committee's attention by Judge Motz after the agenda books were distributed.

If a party wishes to appeal a judgment or order of a district court, it must file a notice of appeal. A notice of appeal must be signed by the party's attorney or, if the party is proceeding pro se, by the party. *See* FRCP 11(a). Because a corporation cannot appear pro se in federal court, a notice of appeal filed on behalf of a corporation must be signed by an attorney. The question is: What if it is not? What if a notice of appeal is filed on behalf of a corporation, but, rather than being signed by an attorney, the notice is signed by one of the corporation's officers? Must the appeal be dismissed? Or can the court of appeals hold the appeal in abeyance and give the corporation an opportunity to hire counsel?

A 1999 decision of the Ninth Circuit — *Bigelow v. Brady (In re Bigelow)*, 179 F.3d 1164 (9th Cir. 1999) — appears to be the only published decision of a court of appeals addressing this issue. In *Bigelow*, the Ninth Circuit held that a notice of appeal filed on behalf of a corporation but not signed by counsel was not a nullity "so long as a lawyer promptly thereafter enters a formal appearance on behalf of the corporation and undertakes the representation." *Id.* at 1165. This issue is now pending before the Fourth Circuit.

The Committee briefly discussed this issue. Most of the members who spoke argued that this issue may not warrant rulemaking, given that there is only a single published decision addressing the issue, and given that, as far as the Committee knows, the issue has arisen in only one other case. A member suggested that, given the brief amount of time the Committee had been given to consider this issue, Item No. 00-05 should not be removed from the study agenda

at this time. Rather, the Committee should await the Fourth Circuit's decision. If the Fourth agrees with the Ninth, the Committee should remove this item from its study agenda. If the Fourth disagrees with the Ninth, Committee action might be warranted.

By consensus, the Committee agreed with this suggestion.

VI. Additional Old Business and New Business

There was no additional old business or new business.

VII. Scheduling of Dates and Location of Fall 2000 Meeting

Judge Garwood informed the Committee that he was not certain whether a fall meeting would be necessary. He also said that, if a fall meeting is necessary, it might last no more than a half day. He suggested that the fall 2000 meeting be scheduled for Washington, D.C., which would allow much of the Committee to attend a half day meeting without having to spend a night away from home. The Committee agreed to reserve October 2 and 3, 2000, for the meeting. Judge Garwood said that he would inform the Committee later this summer whether it would have to meet in October and, if so, how long the meeting would probably last.

VIII. Adjournment

By unanimous consent, the Advisory Committee adjourned at 5:15 p.m.

Respectfully submitted,

Patrick J. Schiltz
Reporter

Reporter's Note: Attached as an appendix to these minutes are copies of all amendments and Committee Notes approved by the Committee at this meeting.

APPENDIX

To the Minutes of the Spring 2000 Meeting of the Advisory Committee on Appellate Rules

Reporter's Note: This appendix contains copies of all amendments to the Federal Rules of Appellate Procedure and Committee Notes approved by the Advisory Committee on Appellate Rules at its April 2000 meeting.

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(7) **Entry Defined.**

(A) A judgment or order is entered for purposes of this Rule 4(a) when it is entered ~~in compliance with~~ for purposes of Rules 58(b) ~~and 79(a)~~ of the Federal Rules of Civil Procedure.

(B) A failure to enter a judgment or order on a separate document when required by Rule 58(a)(1) of the Federal Rules of Civil Procedure does not affect the validity of an appeal from that judgment or order.

Committee Note

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

1. The first circuit split addressed by the amendments to Rule 4(a)(7) and Fed. R. Civ. P. 58 concerns the extent to which orders that dispose of post-judgment motions must be entered on separate documents. Under Rule 4(a)(4)(A), the filing of certain post-judgment motions tolls the time to appeal the underlying judgment until the "entry" of the order disposing of the last such remaining motion. Courts have disagreed about whether such an order must be set forth on a separate document before it is treated as "entered." This disagreement reflects a broader dispute among courts about whether Rule 4(a)(7) independently imposes a separate document requirement (a requirement that is distinct from the separate document requirement that is imposed by the Federal Rules of Civil Procedure ("FRCP")) or whether Rule 4(a)(7) instead incorporates the separate document requirement as it exists in the FRCP. Further complicating the matter, courts in the former "camp" disagree among themselves about the scope of the separate document requirement that they interpret Rule 4(a)(7) as imposing, and courts in the latter "camp" disagree among themselves about the scope of the separate document requirement imposed by the FRCP.

Rule 4(a)(7) has been amended to make clear that it simply incorporates the separate document requirement as it exists in Fed. R. Civ. P. 58. Under amended Rule 4(a)(7), a judgment or order is entered for purposes of Rule 4(a) when that judgment or order is entered for purposes of Fed. R. Civ. P. 58(b). Thus, if a judgment or order is not entered for purposes of Fed. R. Civ. P. 58(b) until it is set forth on a separate document, that judgment or order is also

not entered for purposes of Rule 4(a) until it is so set forth. Similarly, if a judgment or order is entered for purposes of Fed. R. Civ. P. 58(b) even though not set forth on a separate document, that judgment or order is also entered for purposes of Rule 4(a).

In conjunction with the amendment to Rule 4(a)(7), Fed. R. Civ. P. 58 has been amended to provide that orders disposing of the post-judgment motions that can toll the time to appeal under Rule 4(a)(4)(A) do not have to be entered on separate documents. *See* Fed. R. Civ. P. 58(a)(1). Rather, such orders are entered for purposes of Fed. R. Civ. P. 58 — and therefore for purposes of Rule 4(a) — when they are entered in the civil docket pursuant to Fed. R. Civ. P. 79(a). *See* Fed. R. Civ. P. 58(b).

2. The second circuit split addressed by the amendments to Rule 4(a)(7) and Fed. R. Civ. P. 58 concerns the following question: When a judgment or order is required to be entered on a separate document under Fed. R. Civ. P. 58 but is not, does the time to appeal the judgment or order ever begin to run? According to every circuit except the First Circuit, the answer is "no." The First Circuit alone holds that parties will be deemed to have waived their right to have a judgment or order entered on a separate document three months after the judgment or order is entered in the civil docket. *See Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 229, 236 (1st Cir. 1992) (en banc). Other circuits have rejected this cap as contrary to the relevant rules. *See, e.g.*, *United States v. Haynes*, 158 F.3d 1327, 1331 (D.C. Cir. 1998); *Hammack v. Baroid Corp.*, 142 F.3d 266, 269-70 (5th Cir. 1998); *Rubin v. Schottenstein, Zox & Dunn*, 110 F.3d 1247, 1253 n.4 (6th Cir. 1997), *vacated on other grounds* 143 F.3d 263 (6th Cir. 1998) (en banc). However, no court has questioned the wisdom of imposing such a cap as a matter of policy.

Fed. R. Civ. P. 58 has been amended to impose such a cap. Under amended Fed. R. Civ. P. 58(b) — and therefore under amended Rule 4(a)(7) — a judgment or order is treated as entered when it is entered in the civil docket pursuant to Fed. R. Civ. P. 79(a). There is one exception: When Fed. R. Civ. P. 58(a)(1) requires the judgment or order to be set forth on a separate document, that judgment or order is not entered until it is so set forth or until the expiration of 60 days after its entry in the civil docket, whichever occurs first. This cap will ensure that parties will not be given forever to appeal a judgment or order that should have been set forth on a separate document but was not.

3. The third circuit split — this split addressed only by the amendment to Rule 4(a)(7) — concerns whether the appellant may waive the separate document requirement over the objection of the appellee. In *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387 (1978) (per curiam), the Supreme Court held that the "parties to an appeal may waive the separate-judgment requirement of Rule 58." Specifically, the Supreme Court held that when a district court enters an order and "clearly evidence[s] its intent that the . . . order . . . represent[s] the final decision in the case," the order is a "final decision" for purposes of 28 U.S.C. § 1291, even if the order has not been entered on a separate document for purposes of Fed. R. Civ. P. 58. *Id.* Thus, the parties can choose to appeal without waiting for the order to be entered on a separate document.

Courts have disagreed about whether the consent of all parties is necessary to waive the separate document requirement. Some circuits permit appellees to object to attempted *Mallis* waivers and to force appellants to return to the trial court, request entry of judgment on a separate document, and appeal a second time. *See, e.g.*, *Selletti v. Carey*, 173 F.3d 104, 109-10 (2d Cir. 1999); *Williams v. Borg*, 139 F.3d 737, 739-40 (9th Cir. 1998); *Silver Star Enters., Inc. v. M/V Saramacca*, 19 F.3d 1008, 1013 (5th Cir. 1994). Other courts disagree and permit *Mallis* waivers even if the appellee objects. *See, e.g.*, *Haynes*, 158 F.3d at 1331; *Miller v. Artistic Cleaners*, 153 F.3d 781, 783-84 (7th Cir. 1998); *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1006 n.8 (3d Cir. 1994).

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

4. The final circuit split addressed by the amendment to Rule 4(a)(7) concerns the question whether an appellant who chooses to waive the separate document requirement must appeal within 30 days (60 days if the government is a party) from the entry in the civil docket of the judgment or order that should have been entered on a separate document but was not. In *Townsend v. Lucas*, 745 F.2d 933 (5th Cir. 1984), the district court dismissed a 28 U.S.C. § 2254 action on May 6, 1983, but failed to enter the judgment on a separate document. The plaintiff appealed on January 10, 1984. The Fifth Circuit dismissed the appeal, reasoning that, if the plaintiff waived the separate document requirement, then his appeal would be from the May 6 order, and if his appeal was from the May 6 order, then it was untimely under Rule 4(a)(1). The Fifth Circuit stressed that the plaintiff could return to the district court, move for entry of judgment on a separate document, and appeal from that judgment within 30 days. *Id.* at 934. Several other cases have embraced the *Townsend* approach. *See, e.g.*, *Armstrong v. Ahitow*, 36 F.3d 574, 575 (7th Cir. 1994) (per curiam); *Hughes v. Halifax County Sch. Bd.*, 823 F.2d 832, 835-36 (4th Cir. 1987); *Harris v. McCarthy*, 790 F.2d 753, 756 n.1 (9th Cir. 1986).

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

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

Rule 5. Appeal by Permission

(c) Form of Papers; Number of Copies. All papers must conform to Rule ~~32(a)(1)~~ 32(c)(2). Except by the court's permission, a paper must not exceed 20 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 5(b)(1)(E). An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

Committee Note

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

Rule 5(c) has been further amended to limit the length of papers filed under Rule 5.

Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

(d) Form of Papers; Number of Copies. All papers must conform to Rule ~~32(a)(1)~~ 32(c)(2). Except by the court's permission, a paper must not exceed 20 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 21(a)(2)(C). An original and 3 copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

Committee Note

Subdivision (d). A petition for a writ of mandamus or prohibition, an application for another extraordinary writ, and an answer to such a petition or application are all "other papers" for purposes of Rule 32(c)(2), and all of the requirements of Rule 32(a) apply to those papers, except as provided in Rule 32(c)(2). During the 1998 restyling of the Federal Rules of Appellate Procedure, Rule 21(d) was inadvertently changed to suggest that only the requirements of Rule 32(a)(1) apply to such papers. Rule 21(d) has been amended to correct that error.

Rule 21(d) has been further amended to limit the length of papers filed under Rule 21.

Rule 25. Filing and Service

(c) Manner of Service.

(1) Service may be any of the following:

(A) personal, including delivery to a responsible person at the office of counsel;

(B) by mail, ~~or~~ ;

(C) by third-party commercial carrier for delivery within 3 calendar days; ; or

(D) by electronic means, if the party being served consents in writing.

(2) If authorized by local rule, a party may use the court's transmission equipment to make electronic service under Rule 25(c)(1)(D).

(3) When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court.

(4) ~~Personal service includes delivery of the copy to a responsible person at the office of counsel.~~ Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on transmission, unless the party making service is notified within 3 calendar days after transmission that the paper was not received by the party served.

(d) Proof of Service.

(1) A paper presented for filing must contain either of the following:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mailing or e-mail addresses, or the addresses of the places of delivery.

Committee Note

Rule 25(a)(2)(D) presently authorizes the courts of appeals to permit papers to be *filed* by electronic means. Rule 25 has been amended in several respects to permit papers also to be *served* electronically. In addition, Rule 25(c) has been reorganized and subdivided to make it easier to understand.

Subdivision (c)(1)(D). New subdivision (c)(1)(D) has been added to permit service to be made electronically, such as by e-mail or fax. No party may be served electronically, either by the clerk or by another party, unless the party has consented in writing to such service.

A court of appeals may not, by local rule, forbid the use of electronic service on a party that has consented to its use. At the same time, courts have considerable discretion to use local rules to regulate electronic service. Difficult and presently unforeseeable questions are likely to arise as electronic service becomes more common. Courts have the flexibility to use their local rules to address those questions. For example, courts may use local rules to set forth specific procedures that a party must follow before the party will be deemed to have given written consent to electronic service.

Subdivision (c)(2). The courts of appeals are authorized under Rule 25(a)(2)(D) to permit papers to be filed electronically. Technological advances may someday make it possible for a court to forward an electronically filed paper to all parties automatically or semi-automatically. When such court-facilitated service becomes possible, courts may decide to permit parties to use the courts' transmission facilities to serve electronically filed papers on other parties who have consented to such service. Court personnel would use the court's computer system to forward the papers, but the papers would be considered served by the filing parties, just as papers that are carried from one address to another by the United States Postal Service are considered served by the sending parties. New subdivision (c)(2) has been added so that the courts of appeals may use local rules to authorize such use of their transmission facilities, as well as to address the many questions that court-facilitated electronic service is likely to raise.

Subdivision (c)(4). The second sentence of new subdivision (c)(4) has been added to provide that electronic service is complete upon transmission. Transmission occurs when the sender performs the last act that he or she must perform to transmit a paper electronically; typically, it occurs when the sender hits the "send" or "transmit" button on an electronic mail program. There is one exception to the rule that electronic service is complete upon transmission: If the sender is notified within 3 calendar days — by the sender's e-mail program

or otherwise — that the paper was not received, service is not complete, and the sender must take additional steps to effect service. A paper has been "received" by the party on which it has been served as long as the party has the ability to retrieve it. A party cannot defeat service by choosing not to access electronic mail on its server.

Subdivision (d)(1)(B)(iii). Subdivision (d)(1)(B)(iii) has been amended to require that, when a paper is served by e-mail, the proof of service of that paper must include the e-mail address to which the paper was transmitted.

Rule 26. Computing and Extending Time

(c) Additional Time after Service. When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

Committee Note

Subdivision (c). Rule 26(c) has been amended to provide that when a paper is served on a party by electronic means, and that party is required or permitted to respond to that paper within a prescribed period, 3 calendar days are added to the prescribed period. Electronic service is usually instantaneous, but sometimes it is not, because of technical problems. Also, if a paper is electronically transmitted to a party on a Friday evening, the party may not realize that he or she has been served until two or three days later. Finally, extending the "three day rule" to electronic service will encourage parties to consent to such service under Rule 25(c).

Rule 36. Entry of Judgment; Notice

(b) Notice. On the date when judgment is entered, the clerk must ~~mail to~~ serve on all parties a copy of the opinion — or the judgment, if no opinion was written — and a notice of the date when the judgment was entered.

Committee Note

Subdivision (b). Subdivision (b) has been amended so that the clerk may use electronic means to serve a copy of the opinion or judgment or to serve notice of the date when judgment was entered upon parties who have consented to such service.

Rule 45. Clerk's Duties

(c) Notice of an Order or Judgment. Upon the entry of an order or judgment, the circuit clerk must immediately serve ~~by mail~~ a notice of entry on each party ~~to the proceeding~~, with a copy of any opinion, and must note the ~~mailing~~ date of service on the docket. Service on a party represented by counsel must be made on counsel.

Committee Note

Subdivision (c). Subdivision (c) has been amended so that the clerk may use electronic means to serve notice of entry of an order or judgment upon parties who have consented to such service.

Rule 26.1 ~~Corporate~~ Disclosure Statement

(a) Who Must File.

(1) **Nongovernmental corporate parties.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that

(a) identify~~ingies~~ all its parent corporations and list~~ings~~ any publicly held ~~company~~ corporation that owns 10% or more of the party's stock or reports that there are no such corporations, and

(b) provides any additional information that the Judicial Conference of the United States requires to be disclosed.

(2) **Other parties.** Any other party to a proceeding in a court of appeals must file a statement that provides any information that the Judicial Conference of the United States requires to be disclosed.

(b) Time for Filing. A party must file the statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. A party must supplement its statement whenever the information that must be disclosed under Rule 26.1(a) changes.

(c) Number of Copies. If the statement is filed before the principal brief, or if a supplemental statement is filed, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.

Committee Note

Subdivision (a). Rule 26.1(a) presently requires nongovernmental corporate parties to file a "corporate disclosure statement." In that statement, a nongovernmental corporate party is required to identify all of its parent corporations and all publicly held corporations that own 10%

or more of its stock. The corporate disclosure statement is intended to assist judges in determining whether they must recuse themselves by reason of "a financial interest in the subject matter in controversy." Code of Judicial Conduct, Canon 3C(1)(c) (1972).

Rule 26.1(a) has been amended to require that nongovernmental corporate parties who currently do not have to file a corporate disclosure statement — that is, nongovernmental corporate parties who do not have any parent corporations and at least 10% of whose stock is not owned by any publicly held corporation — inform the court of that fact. At present, when a corporate disclosure statement is not filed, courts do not know whether it has not been filed because there was nothing to report or because of ignorance of Rule 26.1.

Rule 26.1 does not require the disclosure of all information that could conceivably be relevant to a judge who is trying to decide whether he or she has a "financial interest" in a case. Experience with divergent disclosure practices and improving technology may provide the foundation for more comprehensive disclosure requirements. The Judicial Conference, supported by the committees that work regularly with the Code of Judicial Conduct and by the Administrative Office of the United States Courts, is in the best position to develop any additional requirements and to adjust those requirements as technological and other developments warrant. Thus, Rule 26.1 has been amended to authorize the Judicial Conference to promulgate more detailed financial disclosure requirements — requirements that might apply beyond nongovernmental corporate parties.

As has been true in the past, Rule 26.1 does not forbid the promulgation of local rules that require disclosures in addition to those required by Rule 26.1 itself. However, along with the authority provided to the Judicial Conference to require additional disclosures is the authority to preempt any local rulemaking on the topic of financial disclosure.

Subdivision (b). Rule 26.1(b) has been amended to require parties to file supplemental disclosure statements whenever there is a change in the information that Rule 26.1(a) requires the parties to disclose. For example, if a publicly held corporation acquires 10% or more of a party's stock after the party has filed its disclosure statement, the party should file a supplemental statement identifying that publicly held corporation.

Subdivision (c). Rule 26.1(c) has been amended to provide that a party who is required to file a supplemental disclosure statement must file an original and 3 copies, unless a local rule or an order entered in a particular case provides otherwise.

Advisory Committee on Appellate Rules
Table of Agenda Items — Revised May 2000

FRAP Item	Proposal	Source	Current Status
95-03	Amend FRAP 15(f) to conform to new FRAP 4(a)(4)(B)(i).	Hon. Stephen F. Williams (CADC)	Awaiting initial discussion Retained in part on agenda with medium priority 09/97 Draft approved 10/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00
95-04	Amend computation of time to conform to Civil Rules method. (Related to Nos. 97-01 and 98-12.)	James B. Doyle, Esq.	Awaiting initial discussion Retained on agenda with medium priority 09/97 Discussed and retained on agenda 04/98 Draft approved 10/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00
95-07	Amend FRAP 4(a)(5) to make it clear that a "good cause" extension is available after expiration of original period.	Luther T. Munford, Esq.	Awaiting initial discussion Retained on agenda with low priority 09/97 Draft approved 10/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00
97-01	Amend FRAP 26(a) so that time computation is consistent with FRCP 6(a). (Related to Nos. 95-04 and 98-12.)	Advisory Committee & Los Angeles County Bar Ass'n	Awaiting initial discussion Retained on agenda with medium priority 09/97 Discussed and retained on agenda 04/98 Draft approved 10/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00
97-05	Amend FRAP 24(a)(2) in light of Prisoner Litigation Reform Act.	Advisory Committee	Awaiting initial discussion Retained on agenda with high priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00
97-07	Amend FRAP 28(j) to allow brief explanation.	Jack Goodman, Esq.	Awaiting initial discussion Retained on agenda with low priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00
97-09	Amend FRAP 32 — cover color for petition for rehearing/rehearing en banc, response to either, and supplemental brief.	Paul Alan Levy, Esq. Public Citizen Litigation Group	Awaiting initial discussion Retained on agenda with low priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00

FRAP Item	Proposal	Source	Current Status
97-12	Amend FRAP 44 to apply to constitutional challenges to state laws.	Advisory Committee	Awaiting initial discussion Retained on agenda with low priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00
97-14	Amend FRAP 46(b)(1)(B) to replace the general "conduct unbecoming" standard with a more specific standard or, alternatively, supplement FRAP 46(b)(1)(B) by recommending a model local rule governing attorney conduct.	Standing Committee	Awaiting initial discussion Retained on agenda with low priority 09/97 Discussed and retained on agenda 04/98 Discussed and retained on agenda 10/99 Discussed and retained on agenda 04/00
97-18	Amend or delete FRAP 1(b)'s assertion that the "rules do not extend or limit the jurisdiction of the courts of appeals."	Hon. Frank H. Easterbrook (CA7)	Awaiting initial discussion Retained on agenda with high priority 09/97 Draft approved 10/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00
97-21	Amend FRAP 31(b) to clarify that briefs must be served on unrepresented parties, as well as on "counsel for each separately represented party."	Advisory Committee	Awaiting initial discussion Draft approved 09/97 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00
97-30	Amend FRAP 32(a)(7)(C) to require use of a standard certificate of compliance with type-volume limitation.	Luther T. Munford, Esq.	Awaiting initial discussion Retained on agenda with high priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00
97-31	Amend FRAP 47(a)(1) to require that all new and amended local rules take effect on December 1. (Related to No. 98-01.)	Luther T. Munford, Esq.	Awaiting initial discussion Retained on agenda with medium priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 04/98 draft withdrawn; discussed further and retained on agenda 10/99; will await action by other Advisory Committees on similar proposals
97-41	Amend FRAP 4 to specify time for appeal of order granting or denying writ of coram nobis.	Solicitor General Waxman	Awaiting initial discussion Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00

FRAP Item	Proposal	Source	Current Status
98-01	Amend FRAP 47(a) to provide that local rules do not become effective until filed with the Administrative Office. (Related to No. 97-31.)	Standing Committee	Awaiting initial discussion Draft approved 04/98 for submission to Standing Committee in 01/00 04/98 draft withdrawn; discussed further and retained on agenda 10/99; will await action by other Advisory Committees on similar proposals
98-02	Amend FRAP 4 to clarify the application of FRAP 4(a)(7) to orders granting or denying the motions for post-judgment relief listed in FRAP 4(a)(4)(A).	Hon. Will Garwood (CA5) Luther T. Munford, Esq.	Awaiting initial discussion Discussed and retained on agenda 04/98 Draft approved 10/98 for submission to Standing Committee in 01/00 10/98 draft withdrawn; discussed further and retained on agenda 04/99 Revised draft approved 10/99 for submission to Standing Committee in 01/00 Standing Committee deferred action 01/00 Further revised draft approved 04/00 for submission to Standing Committee in 06/00
98-06	Amend FRAP 4(b)(3)(A) to clarify whether and to extent the filing of a FRCrP 35(c) motion for correction of sentence tolls the time to file appeal.	Hon. Will Garwood (CA5)	Awaiting initial discussion Discussed and retained on agenda 10/98; awaiting specific proposal from Department of Justice Discussed and retained on agenda 04/99; awaiting draft amendment and Committee Note Draft approved 10/99 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00
98-11	Amend FRAP 5(c) to clarify application of FRAP 32(a) to petitions for permission to appeal.	Christopher A. Goelz (CA9 Circuit Mediator)	Awaiting initial discussion Discussed and retained on agenda 04/99 Draft approved 10/99 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Revised draft approved 04/00 for submission to Standing Committee in 06/00
98-12	Amend FRAP 4(a)(4)(A)(vi), 27(a)(3)(A), 27(a)(4) & 41(b) to account for amendment to FRAP 26(a) regarding calculating time. (Related to Nos. 95-04 and 97-01.)	Advisory Committee	Awaiting initial discussion Discussed and retained on agenda 10/98 Draft approved 04/99 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00

FRAP Item	Proposal	Source	Current Status
99-01	Amend FRAP 24(a)(3) & 24(a)(5) to address potential conflicts with Prisoner Litigation Reform Act.	Hon. Will Garwood (CA5)	Awaiting initial discussion Discussed and retained on agenda 04/99 Draft approved 10/99 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00
99-02	Amend FRAP 32 to require that briefs, written motions, rehearing petitions, etc. be signed.	Hon. Will Garwood (CA5)	Awaiting initial discussion Draft approved 04/99 for submission to Standing Committee in 01/00 Revised draft approved 10/99 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00
99-03	Amend unspecified rules to permit electronic filing and service.	Subcommittee on Technology	Awaiting initial discussion Discussed and retained on agenda 04/99 Draft approved 04/00 for submission to Standing Committee in 06/00
99-06	Amend FRAP 33 to incorporate notice provisions of FRBP 7041 and 9019.	Hon. L. Edward Friend II (Bankr. N.D. W. Va.)	Awaiting initial discussion Discussed and retained on agenda 04/00; awaiting proposal from Bankruptcy Rules Committee
99-07	Amend FRAP 26.1 to broaden financial disclosure obligations.	Standing Committee	Awaiting initial discussion Discussed and retained on agenda 10/99 Draft approved 04/00 for submission to Standing Committee in 06/00
99-09	Amend FRAP 22(b) to specify procedure for obtaining certificate of appealability.	Hon. Anthony J. Scirica (CA3)	Awaiting initial discussion Discussed and retained on agenda 04/00; awaiting proposal from Department of Justice
00-03	Amend FRAP 26(a)(4) & 45(a)(2) to use "official" names of legal holidays.	Jason A. Bezis	Awaiting initial discussion Discussed and retained on agenda 04/00
00-04	Add new FRAP 4.1 to explicitly authorize "indicative rulings."	Solicitor General Waxman	Awaiting initial discussion Discussed and retained on agenda 04/00; awaiting revised proposal from Department of Justice
00-05	Amend FRAP 3 to address notice of appeal filed on behalf of corporation but not signed by attorney.	Hon. Diana Gribbon Motz (CA4)	Awaiting initial discussion Discussed and retained on agenda 04/00
00-06	Amend FRAP 4(b)(4) to address failure of of clerk to file notice of appeal when requested by defendant under FRCrP 32(c)(5).	Hon. Frank H. Easterbrook (CA7)	Awaiting initial discussion

Item 6A

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

ANTHONY J. SCIRICA
CHAIR

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SECRETARY

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APPELLATE RULES

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W. EUGENE DAVIS
CRIMINAL RULES

MILTON I. SHADUR
EVIDENCE RULES

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

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

DATE: May 11, 2000

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on March 9-10, 2000, in Key Largo, Florida. The Advisory Committee considered public comments regarding proposed amendments to the Bankruptcy Rules that were published in August, 1999.

The proposed amendments published in 1999, include revisions to eight Bankruptcy Rules (Rules 1007, 2002, 3016, 3017, 3020, 9006, 9020, and 9022). The Advisory Committee received thirteen written comments on the proposed rules. Several of the comments were offered on behalf of groups, including the Bankruptcy Judges of the Northern District of Illinois and the Chief Bankruptcy Judges of the Ninth Circuit. One person initially requested an opportunity to appear at a public hearing on the proposed amendments, but he later withdrew that request and rested on his written submission. The Advisory Committee considered the comments at its March 2000 meeting and approved each of the proposed amendments to the Rules, and will present them to the Standing Committee at its June 2000 meeting for final approval and transmission to the Judicial Conference. The Advisory Committee also will present amendments to Official Form 7 (Statement of Financial Affairs) to the Standing Committee for final approval and transmission to the Judicial Conference. The proposed amendments to this Form were published in August 1998 and the Advisory Committee considered the comments at its March 1999 and September 1999 meetings.

The Advisory Committee approved a preliminary draft of proposed amendments to Bankruptcy Rules 1004, 2004, 2014, 2015, and 9027, and new Bankruptcy Rule 1004.1. The Advisory Committee also approved a preliminary draft of proposed amendments to Official Form 1 (Voluntary Petition), and will present the Form and Rules proposals to the Standing Committee at its June 2000 meeting with a request that they be published for comment.

The Advisory Committee also discussed whether to support a proposal to require or encourage local courts to publish their local rules on the Internet accessible from a link from the website of the Administrative Office of the United States Courts. The discussion noted that local rules often are effectively unpublished notwithstanding efforts to improve access to those rules. The Advisory Committee then approved a resolution to 1) urge each bankruptcy court to establish and maintain a website; 2) encourage each court to post its local rules on the website; and 3) establish a local rules link from the Administrative Office website to each local court's website.

II Action Items

A. Proposed Amendments to Bankruptcy Rules 1007, 2002(c)(3), 2002(g), 3016, 3017, 3020, 9006(f)[1], and 9022, and Official Form 7 Submitted for Final Approval by the Standing Committee and Transmittal to the Judicial Conference.

1. *Public Comment.*

The Preliminary Draft of the Proposed Amendments to the Federal Rules of Bankruptcy Procedure and related committee notes were published for comment by the bench and bar in August 1999, and a public hearing on the preliminary draft was scheduled for January 18, 2000. The public hearing was canceled when the only person submitting comments on the proposals who requested to appear at the scheduled hearing withdrew that request.

There were thirteen comments received regarding the proposed amendments to the rules. The comments contained in these submissions are summarized on a rule-by-rule basis following the text of each rule in the GAP Report set out below. The Advisory Committee reviewed these comments, and, as a result, it made several revisions to the published draft. The post-publication revisions are identified in the GAP Report.

[1] Rule 9006(f) extends the three day "mail rule" to electronic service of documents. Civil Rule 5(b), on the other hand, does not provide additional time when service is accomplished electronically. The Advisory Committee considered the public comments and concluded that retention of the additional three days is preferable to the provisions in proposed Rule 5(b) F. R. Civ. P. The Advisory Committee, however, also believes strongly that the bankruptcy and civil rules should be consistent.

The proposed amendments to Official Form 7 were published for comment in August 1998. The Advisory Committee received six comments on the proposed amendments to the form, and those comments are summarized following the text of the form.

2. *Synopsis of Proposed Amendments:*

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

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

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

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

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

notice of the proposed injunction, the confirmation hearing, and the deadline for objecting to confirmation of the plan.

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

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

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

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

3. *Text of Proposed Amendments to Rules 1007, 2002,3016, 3017, 3020, 9006, 9020, and 9022.*

Rule 1007. Lists, Schedules and Statements; Time Limits

* * * * *

(m) *Infants and Incompetent Persons.* If the debtor knows that a person on the list of creditors or schedules is an infant or incompetent person, the debtor also shall include the name, address, and legal relationship of any person upon whom process would be served in an adversary proceeding against the infant or incompetent person in accordance with Rule 7004(b)(2).

accordance with Rule 7004(b)(2).

COMMITTEE NOTE

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

The proper mailing address of the representative is determined in accordance with Rule 7004(b)(2), which requires mailing to the person's dwelling house or usual place of abode or at the place where the person regularly conducts a business or profession.

Public Comment on Proposed Amendments to Rule 1007(m):

(1) Karen Eddy (Clerk, Bankr. S.D. Fl.) suggested that the Rule set out a format for submitting the address on the service matrix. She also proposed that the Official Forms be amended to include a column for listing a guardian or representative of the creditor.

GAP Report on Rule 1007(m). No changes since publication.

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

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(c) *Content of Notice.*

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

(A) include in conspicuous language (bold, italic,

or underlined text) a statement that the plan proposes an injunction;

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

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

* * * * *

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

(g) *Addressing Notices.*

(1) Notices required to be mailed under Rule 2002 to a creditor, indenture trustee, or equity security holder shall be addressed as such entity or an authorized agent has directed in its last request filed in the particular case. For the purposes of this subdivision —

(A) a proof of claim filed by a creditor or indenture trustee that designates a mailing address

constitutes a filed request to mail notices to that address, unless a notice of no dividend has been given under Rule 2002(e) and a later notice of possible dividend under Rule 3002(c)(5) has not been given; and

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

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

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

designated in the request or proof of claim.

* * * * *

COMMITTEE NOTE

Subdivision (c)(3) is added to assure that parties given notice of a hearing to consider confirmation of a plan under subdivision (b) are given adequate notice of an injunction provided for in the plan if it would enjoin conduct that is not otherwise enjoined by operation of the Code. The validity and effect of any injunction provided for in a plan are substantive law matters that are beyond the scope of these rules.

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

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

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

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

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

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

Public Comment on Proposed Amendments to Rule 2002(c)(3):

(1) Jack E. Horsley, Esq. (Mattoon, Il.) urged that the notice include a statement of the reason why entities would be subject to an injunction.

(2) Matthew E. Wilkins, Esq. (Detroit, Mi.) supports the notion of increased notice to parties that are subject to injunctions, but he asserts that the proposed amendments will encourage the issuance of injunctions not authorized by the Bankruptcy Code.

(3) Hon. S. Martin Teel, Jr. (Bankr. D.D.C.) supports improving notice to parties subject to injunctions, but suggests that the rule require the title of the notice to state that the plan includes an injunction. He also suggests that the rule include a remedy in the event of a failure to comply with its provisions.

(4) Hon. Susan Pierson Sonderby (Bankr. N.D. Il.), on behalf of the Bankruptcy Judges for the Northern District of Illinois, supports the proposed amendments.

(5) Hon. Louise De Carl Adler (Bankr. S.D. Cal.), on behalf of the Conference of Chief Bankruptcy Judges of the Ninth Circuit, expressed concern that the amendments go beyond establishing procedural protection and may engender disputes

GAP Report on Rule 2002(c)(3). In Rule 2002(c)(3), the word "highlighted" was replaced with "underlined" because highlighted documents are difficult to scan electronically for inclusion in the clerks' files. The Committee Note was revised to put in a more prominent position the statement that the validity and effect of any injunction provided for in a plan are substantive matters beyond the scope of the rules.

Public Comment on Proposed Amendments to Rule 2002(g):

(1) Karen Eddy (Clerk, Bankr. S.D. Fl.) proposed that the Rule be clarified to give greater assistance to clerks who receive multiple requests for service by or on behalf of the same creditor. She suggested that a national form "Request for Service" be developed.

(2) Mark A. Cronin, Esq. (Fort Washington, Pa.) finds the proposed amendments preferable, and joins with Raymond P. Bell, Jr. (Bankruptcy Manager, Fleet Credit Card Services, L.P., Horsham, Pa.) to suggest that claims in all cases be "deemed allowed" without the need for filing proof of the claim unless the claim is listed as disputed, contingent, or unliquidated.

GAP Report on Proposed Amendments to Rule 2002(g). No changes since publication.

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

* * * * *

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

COMMITTEE NOTE

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

proposed injunction. The validity and effect of any injunction are substantive law matters that are beyond the scope of these rules.

Specific and conspicuous language is not necessary if the injunction contained in the plan is substantially the same as an injunction provided under the Code. For example, if a plan contains an injunction against acts to collect a discharged debt from the debtor, Rule 3016(c) would not apply because that conduct would be enjoined nonetheless under § 524(a)(2). But if a plan provides that creditors will be permanently enjoined from asserting claims against persons who are not debtors in the case, the plan and disclosure statement must highlight the injunctive language and comply with the requirements of Rule 3016(c). *See* § 524(e).

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

Public Comment on Proposed Amendments to Rule 3016:

(1) Jack E. Horsley, Esq. (Mattoon, Il.) believes that the proposed amendments will ensure that adequate notice of the injunction is given.

(2) Matthew E. Wilkins, Esq. (Detroit, Mi.) opposed the amendments because they could constitute an endorsement of the issuance of injunctions which the courts have no authority to issue.

(3) Hon. Louise De Carl Adler (Bankr. S.D. Cal.), on behalf of the Chief Bankruptcy Judges of the Ninth Circuit, contends that the proposed amendments go beyond procedural change and are substantive in nature.

GAP Report on Rule 3016. The word "highlighted" in the parenthesis was replaced with "underlined" because highlighted documents are difficult to scan electronically for inclusion in the clerks' files. The Committee Note was revised to put in a more prominent position the statement that the validity and effect of any injunction provided for in a plan are substantive matters beyond the scope of the rules. Other stylistic changes were made to the Committee Note.

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

* * * * *

(f) *Notice and Transmission of Documents to Entities Subject to an Injunction Under a Plan.* If a plan provides for an injunction against conduct not otherwise enjoined under the Code and an entity that would be subject to the injunction is not a creditor or equity security holder, at the hearing held under Rule 3017(a), the court shall consider procedures for providing the entity with:

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

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

COMMITTEE NOTE

Subdivision (f) is added to assure that entities whose conduct would be enjoined under a plan, rather than by operation of the Code, and who will not receive the documents listed in subdivision (d) because they are neither creditors nor equity security holders, are provided with adequate notice of the proposed injunction. It does not address any substantive law issues relating to the validity or effect of any injunction provided under a plan, or any due process or other constitutional issues relating to notice. These issues are beyond the scope of these rules and are left for judicial determination.

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

are mailed to creditors under Rule 3017(d). If mailing notices and other documents is not feasible because the entities subject to the injunction are described in the plan and disclosure statement by class or category and they cannot be identified individually by name and address, the court may require that notice under Rule 3017(f)(1) be published.

Public Comment on Proposed Amendments to Rule 3017:

(1) Jack E. Horsley, Esq. (Mattoon, Il.) believes that the proposed amendments will ensure that adequate notice of the injunction is given.

(2) Matthew E. Wilkins, Esq. (Detroit, Mi.) opposed the amendments because they could constitute an endorsement of the issuance of injunctions which the courts have no authority to issue.

(3) Hon. Louise De Carl Adler (Bankr. S.D. Cal.), on behalf of the Chief Bankruptcy Judges of the Ninth Circuit, contends that the proposed amendments go beyond procedural change and are substantive in nature.

GAP Report on Rule 3017. No changes in the text of the proposed amendments since publication. The Committee Note was revised to put in a more prominent position the statement that the rule does not address related substantive law issues which are beyond the scope of the rules.

Rule 3020. Deposit; Confirmation of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case

* * * * *

(c) *Order of Confirmation.*

(1) The order of confirmation shall conform to the appropriate Official Form ~~and~~ . If the plan provides for an injunction against conduct not otherwise enjoined under the Code, the order of confirmation shall (1) describe in reasonable detail all acts enjoined; (2) be specific in its terms regarding the injunction; and (3) identify the entities subject to the

injunction.

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

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

* * * * *

COMMITTEE NOTE

Subdivision (c) is amended to provide notice to an entity subject to an injunction provided for in a plan against conduct not otherwise enjoined by operation of the Code. This requirement is not applicable to an injunction contained in a plan if it is substantially the same as an injunction provided under the Code. The validity and effect of any injunction provided for in a plan are substantive law matters that are beyond the scope of these rules.

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

Public Comment on Proposed Amendments to Rule 3020:

(1) Matthew E. Wilkins, Esq. (Detroit, Mi.) opposed the amendments because they could constitute an endorsement of the issuance of injunctions which the courts have no authority to issue.

(2) Hon. Louise De Carl Adler (Bankr. S.D. Cal.), on behalf of the Chief Bankruptcy Judges of the Ninth Circuit, contends that the proposed amendments go beyond procedural change and are substantive in nature.

GAP Report on Rule 3020. No changes in the text of the proposed amendments since publication. The Committee Note was revised to put in a more prominent position the statement that the validity and effect of injunctions provided for in plans is beyond the scope of the rules.

Rule 9006. Time

* * * * *

(f) *Additional Time after Service by Mail or Under Rule 5(b)(2)(C) or (D) F. R. Civ. P.* When there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail or under Rule 5(b)(2)(C) or (D) F. R. Civ. P., three days shall be added to the prescribed period.

* * * * *

COMMITTEE NOTE

Rule 5(b) F. R. Civ. P., which is made applicable in adversary proceedings by Rule 7005, is being restyled and amended to authorize service by electronic means — or any other means not otherwise authorized under Rule 5(b) — if consent is obtained from the person served. The amendment to Rule 9006(f) is intended to extend the three-day "mail rule" to service under Rule 5(b)(2)(D), including service by electronic means. The three-day rule also will apply to service under Rule 5(b)(2)(C) F. R.

Civ. P. when the person served has no known address and the paper is served by leaving a copy with the clerk of the court.

Public Comment on Proposed Amendments to Rule 9006:

(1) Jack E. Horsley, Esq. (Mattoon, Il.) supports service by electronic means buts suggests that "electronic means" should be more explicitly defined in the rule.

(2) Mark D. Reed, Esq. (Des Moines, Ia.) wholeheartedly supports service by electronic means.

(3) Hon. Susan Pierson Sonderby (Bankr. N.D. Il.), on behalf of the Bankruptcy Judges for the Northern District of Illinois, strongly supports service by electronic means and proposed that such service be allowed even in the absence of the consent of the party to be served. She also states those judges' opposition to retaining the 3-day rule to service by electronic means.

(4) Hon. Louise De Carl Adler (Bankr. S.D. Cal.), on behalf of the Chief Bankruptcy Judges of the Ninth Circuit, stated that there are good arguments for and against adding 3 days to the response period after electronic service, and she expressed no preference other than that the rule be identical under both the bankruptcy rules and the civil rules.

(5) Ralph W. Brenner, Esq., David H. Marion, Esq., and Stephen A. Madva, Esq. (Philadelphia, Pa.) all strongly support electronic service and recommend that the bankruptcy rules and the civil rules by made consistent.

(6) Francis Patrick Newell, Esq. (Phildelphia, Pa.) strongly supports electronic service and recommends that the bankruptcy rules and the civil rules be made consistent.

(7) Martha L. Davis, Esq., General Counsel, Executive Office for United States Trustees (Washington, D.C.) supports the amendments permitting service by electronic means on persons who consent to that form of service. She also supports the adoption of a 3-day rule comparable to the mailing grace period already contained in the rules as a means of encouraging electronic service as well as to avoid artificially shortening the period due to electronic transmission errors, incompatible message formats, and the like.

(8) Michael E. Kunz (Clerk, E.D. Pa.) states that the 3-day rule is unnecessary when electronic service is employed, and he notes also that the 3-day rule does not apply under the civil rules.

GAP Report on Rule 9006. No changes since publication.

Rule 9020. Contempt Proceedings

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

~~(a) *Contempt Committed in Presence of Bankruptcy Judge.* Contempt committed in the presence of a bankruptcy judge may be determined summarily by a bankruptcy judge. The order of contempt shall recite the facts and shall be signed by the bankruptcy judge and entered of record.~~

~~(b) *Other Contempt.* Contempt committed in a case or proceeding pending before a bankruptcy judge, except when determined as provided in subdivision (a) of this rule, may be determined by the bankruptcy judge only after a hearing on notice. The notice shall be in writing, shall state the essential facts constituting the contempt charged and describe the contempt as criminal or civil and shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense. The notice may be given on the court's own initiative or on application of the United States attorney or by an attorney appointed by the court for that purpose. If the contempt charged involves disrespect to or criticism of a bankruptcy judge, that judge is~~

~~disqualified from presiding at the hearing except with the consent of the person charged.~~

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

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

COMMITTEE NOTE

The amendments to this rule cover a motion for an order of contempt filed by the United States trustee or a party in interest. This rule, as amended, does not address a contempt proceeding initiated by the court sua sponte.

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

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

concerning the authority of a bankruptcy judge to punish for either civil or criminal contempt under the 1984 Act and, therefore, the rule as amended in 1987 "recognizes that bankruptcy judges may not have the power to punish for contempt." Committee Note to 1987 Amendments to Rule 9020.

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

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

Public Comment on Proposed Amendments to Rule 9020:

(1) Hon. Louise De Carl Adler (Bankr. S.D. Cal.), on behalf of the Chief Bankruptcy Judges of the Ninth Circuit, expressed concern that the proposed amendments could be read to undercut the bankruptcy courts' authority to exercise *sua sponte* contempt powers.

(2) Martha L. Davis, Esq., General Counsel, Executive Office for United States Trustees (Washington, D.C.) stated strong opposition to the proposed amendments and advocated retention of the existing rule. The basis of her objection is that she is unpersuaded that the judicial developments governing the contempt powers of the bankruptcy courts justify the deletion of the more elaborate system of contempt actions in place under the current rule

GAP Report on Rule 9020. No changes in the text of the proposed amendments since publication. Stylistic changes were made to the Committee Note.

Rule 9022. Notice of Judgment or Order

(a) *Judgment or Order of Bankruptcy Judge.* Immediately on the entry of a judgment or order the clerk shall serve a notice of entry ~~by mail~~ in the manner provided ~~by Rule 7005~~ in Rule 5(b) F. R. Civ. P. on the contesting parties and on other entities as the court directs. Unless the case is a chapter 9 municipality case, the clerk shall forthwith transmit to the United States trustee a copy of the judgment or order. Service of the notice shall be noted in the docket. Lack of notice of the entry does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 8002.

* * * * *

COMMITTEE NOTE

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

Public Comment on Proposed Amendments to Rule 9022:

(1) Jack E. Horsley, Esq. (Mattoon, Il.) supports the service of notice of entry of judgments and orders by electronic means.

(2) Martha L. Davis, Esq., General Counsel, Executive Office for United States Trustees (Washington, D.C.) supports the proposed amendments but cautions that the rule could be construed to permit electronic service of judgments and orders even in the absence of

consent by the recipient of the notice.

GAP Report on Rule 9022. No changes since publication.

Form 7
(9/00)

FORM 7. STATEMENT OF FINANCIAL AFFAIRS

UNITED STATES BANKRUPTCY COURT

_____ DISTRICT OF _____

In re: _____, (Name) Debtor

Case No. _____ (if known)

STATEMENT OF FINANCIAL AFFAIRS

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

Questions 1 - 18 are to be completed by all debtors. Debtors that are or have been in business, as defined below, also must complete Questions 19 - 25. **If the answer to an applicable question is "None," mark the box labeled "None."** If additional space is needed for the answer to any question, use and attach a separate sheet properly identified with the case name, case number (if known), and the number of the question.

DEFINITIONS

"In business." A debtor is "in business" for the purpose of this form if the debtor is a corporation or partnership. An individual debtor is "in business" for the purpose of this form if the debtor is or has been, within the six years immediately preceding the filing of this bankruptcy case, any of the following: an officer, director, managing executive, or owner of 5 percent or more of the voting or equity securities of a corporation; a partner, other than a limited partner, of a partnership; a sole proprietor or self-employed.

"Insider." The term "insider" includes but is not limited to: relatives of the debtor; general partners of the debtor and their relatives; corporations of which the debtor is an officer, director, or person in control; officers, directors, and any owner of 5 percent or more of the voting or equity securities of a corporate debtor and their relatives; affiliates of the debtor and insiders of such affiliates; any managing agent of the debtor. 11 U.S.C. § 101.

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1. Income from employment or operation of business

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

AMOUNT SOURCE (if more than one)

2. Income other than from employment or operation of business

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

AMOUNT	SOURCE

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3. Payments to creditors

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

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

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

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

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

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

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

None ☐ b. Describe all property that has been attached, garnished or seized under any legal or equitable process within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF PERSON FOR WHOSE BENEFIT PROPERTY WAS SEIZED	DATE OF SEIZURE	DESCRIPTION AND VALUE OF PROPERTY

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5. Repossessions, foreclosures and returns

None ☐ List all property that has been repossessed by a creditor, sold at a foreclosure sale, transferred through a deed in lieu of foreclosure or returned to the seller, within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR OR SELLER	DATE OF REPOSSESSION, FORECLOSURE SALE, TRANSFER OR RETURN	DESCRIPTION AND VALUE OF PROPERTY

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6. Assignments and receiverships

None ☐ a. Describe any assignment of property for the benefit of creditors made within **120 days** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include any assignment by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF ASSIGNEE	DATE OF ASSIGNMENT	TERMS OF ASSIGNMENT OR SETTLEMENT

None ☐ b. List all property which has been in the hands of a custodian, receiver, or court-appointed official within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CUSTODIAN	NAME AND LOCATION OF COURT CASE TITLE & NUMBER	DATE OF ORDER	DESCRIPTION AND VALUE OF PROPERTY

7. Gifts

None ☐ List all gifts or charitable contributions made within **one year** immediately preceding the commencement of this case except ordinary and usual gifts to family members aggregating less than $200 in value per individual family member and charitable contributions aggregating less than $100 per recipient. (Married debtors filing under chapter 12 or chapter 13 must include gifts or contributions by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF PERSON OR ORGANIZATION	RELATIONSHIP TO DEBTOR, IF ANY	DATE OF GIFT	DESCRIPTION AND VALUE OF GIFT

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8. Losses

None ☐ List all losses from fire, theft, other casualty or gambling within **one year** immediately preceding the commencement of this case **or since the commencement of this case**. (Married debtors filing under chapter 12 or chapter 13 must include losses by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

DESCRIPTION AND VALUE OF PROPERTY	DESCRIPTION OF CIRCUMSTANCES AND, IF LOSS WAS COVERED IN WHOLE OR IN PART BY INSURANCE, GIVE PARTICULARS	DATE OF LOSS

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9. Payments related to debt counseling or bankruptcy

None ☐ List all payments made or property transferred by or on behalf of the debtor to any persons, including attorneys, for consultation concerning debt consolidation, relief under the bankruptcy law or preparation of a petition in bankruptcy within **one year** immediately preceding the commencement of this case.

NAME AND ADDRESS OF PAYEE	DATE OF PAYMENT, NAME OF PAYOR IF OTHER THAN DEBTOR	AMOUNT OF MONEY OR DESCRIPTION AND VALUE OF PROPERTY

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10. Other transfers

None ☐ List all other property, other than property transferred in the ordinary course of the business or financial affairs of the debtor, transferred either absolutely or as security within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include transfers by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF TRANSFEREE, RELATIONSHIP TO DEBTOR	DATE	DESCRIBE PROPERTY TRANSFERRED AND VALUE RECEIVED

11. Closed financial accounts

None ☐ List all financial accounts and instruments held in the name of the debtor or for the benefit of the debtor which were closed, sold, or otherwise transferred within **one year** immediately preceding the commencement of this case. Include checking, savings, or other financial accounts, certificates of deposit, or other instruments; shares and share accounts held in banks, credit unions, pension funds, cooperatives, associations, brokerage houses and other financial institutions. (Married debtors filing under chapter 12 or chapter 13 must include information concerning accounts or instruments held by or for either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF INSTITUTION	TYPE AND NUMBER OF ACCOUNT AND AMOUNT OF FINAL BALANCE	AMOUNT AND DATE OF SALE OR CLOSING

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12. Safe deposit boxes

None ☐ List each safe deposit or other box or depository in which the debtor has or had securities, cash, or other valuables within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include boxes or depositories of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF BANK OR OTHER DEPOSITORY	NAMES AND ADDRESSES OF THOSE WITH ACCESS TO BOX OR DEPOSITORY	DESCRIPTION OF CONTENTS	DATE OF TRANSFER OR SURRENDER, IF ANY

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13. Setoffs

None ☐ List all setoffs made by any creditor, including a bank, against a debt or deposit of the debtor within **90 days** preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR	DATE OF SETOFF	AMOUNT OF SETOFF

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14. Property held for another person

None ☐ List all property owned by another person that the debtor holds or controls.

NAME AND ADDRESS OF OWNER	DESCRIPTION AND VALUE OF PROPERTY	LOCATION OF PROPERTY

15. Prior address of debtor

None ☐ If the debtor has moved within the **two years** immediately preceding the commencement of this case, list all premises which the debtor occupied during that period and vacated prior to the commencement of this case. If a joint petition is filed, report also any separate address of either spouse.

ADDRESS	NAME USED	DATES OF OCCUPANCY

16. Spouses and Former Spouses

None ☐ If the debtor resides or resided in a community property state, commonwealth, or territory (including Alaska, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, or Wisconsin) within the six-year period immediately preceding the commencement of the case, identify the name of the debtor's spouse and of any former spouse who resides or resided with the debtor in the community property state.

NAME

17. Environmental Information.

For the purpose of this question, the following definitions apply:

"Environmental Law" means any federal, state, or local statute or regulation regulating pollution, contamination, releases of hazardous or toxic substances, wastes or material into the air, land, soil, surface water, groundwater, or other medium, including, but not limited to statutes or regulations regulating the cleanup of these substances, wastes, or material.

"Site" means any location, facility, or property as defined under any Environmental Law, whether or not presently or formerly owned or operated by the debtor, including, but not limited to, disposal sites.

"Hazardous Material" means anything defined as a hazardous waste, hazardous substance, toxic substance, hazardous material, pollutant, or contaminant or similar term under an Environmental Law

None ☐ a. List the name and address of every site for which the debtor has received notice in writing by a governmental unit that it may be liable or potentially liable under or in violation of an Environmental Law. Indicate the governmental unit, the date of the notice, and, if known, the Environmental Law:

SITE NAME AND ADDRESS	NAME AND ADDRESS OF GOVERNMENTAL UNIT	DATE OF NOTICE	ENVIRONMENTAL LAW

None ☐ b. List the name and address of every site for which the debtor provided notice to a governmental unit of a release of Hazardous Material. Indicate the governmental unit to which the notice was sent and the date of the notice.

SITE NAME AND ADDRESS	NAME AND ADDRESS OF GOVERNMENTAL UNIT	DATE OF NOTICE	ENVIRONMENTAL LAW

None ☐ c. List all judicial or administrative proceedings, including settlements or orders, under any Environmental Law with respect to which the debtor is or was a party. Indicate the name and address of the governmental unit that is or was a party to the proceeding, and the docket number.

NAME AND ADDRESS OF GOVERNMENTAL UNIT	DOCKET NUMBER	STATUS OR DISPOSITION

18 . Nature, location and name of business

None ☐ a. If the debtor is an individual, list the names, addresses, taxpayer identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was an officer, director, partner, or managing executive of a corporation, partnership, sole proprietorship, or was a self-employed professional within the **six years** immediately preceding the commencement of this case, or in which the debtor owned 5 percent or more of the voting or equity securities within the six years immediately preceding the commencement of this case.

If the debtor is a partnership, list the names, addresses, taxpayer identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was a partner or owned 5 percent or more of the voting or equity securities, within the **six years** immediately preceding the commencement of this case.

If the debtor is a corporation, list the names, addresses, taxpayer identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was a partner or owned 5 percent or more of the voting or equity securities within the **six years** immediately preceding the commencement of this case.

NAME	TAXPAYER I.D. NUMBER	ADDRESS	NATURE OF BUSINESS	BEGINNING AND ENDING DATES

None ☐ b. Identify any business listed in response to subdivision a., above, that is "single asset real estate" as defined in 11 U.S.C. § 101.

NAME	ADDRESS

The following questions are to be completed by every debtor that is a corporation or partnership and by any individual debtor who is or has been, within the six years immediately preceding the commencement of this case, any of the following: an officer, director, managing executive, or owner of more than 5 percent of the voting or equity securities of a corporation; a partner, other than a limited partner, of a partnership; a sole proprietor or otherwise self-employed.

*(An individual or joint debtor should complete this portion of the statement **only** if the debtor is or has been in business, as defined above, within the six years immediately preceding the commencement of this case. A debtor who has not been in business within those six years should go directly to the signature page.)*

19. Books, records and financial statements

None ☐ a. List all bookkeepers and accountants who within the **two years** immediately preceding the filing of this bankruptcy case kept or supervised the keeping of books of account and records of the debtor.

NAME AND ADDRESS	DATES SERVICES RENDERED

None ☐ b. List all firms or individuals who within the **two years** immediately preceding the filing of this bankruptcy case have audited the books of account and records, or prepared a financial statement of the debtor.

NAME	ADDRESS	DATES SERVICES RENDERED

None ☐ c. List all firms or individuals who at the time of the commencement of this case were in possession of the books of account and records of the debtor. If any of the books of account and records are not available, explain.

NAME	ADDRESS

None ☐ d. List all financial institutions, creditors and other parties, including mercantile and trade agencies, to whom a financial statement was issued within the **two years** immediately preceding the commencement of this case by the debtor.

NAME AND ADDRESS	DATE ISSUED

20. Inventories

None ☐ a. List the dates of the last two inventories taken of your property, the name of the person who supervised the taking of each inventory, and the dollar amount and basis of each inventory.

DATE OF INVENTORY	INVENTORY SUPERVISOR	DOLLAR AMOUNT OF INVENTORY (Specify cost, market or other basis)

None ☐ b. List the name and address of the person having possession of the records of each of the two inventories reported in a., above.

DATE OF INVENTORY	NAME AND ADDRESSES OF CUSTODIAN OF INVENTORY RECORDS

21 . Current Partners, Officers, Directors and Shareholders

None ☐ a. If the debtor is a partnership, list the nature and percentage of partnership interest of each member of the partnership.

NAME AND ADDRESS	NATURE OF INTEREST	PERCENTAGE OF INTEREST

None ☐ b. If the debtor is a corporation, list all officers and directors of the corporation, and each stockholder who directly or indirectly owns, controls, or holds 5 percent or more of the voting or equity securities of the corporation.

NAME AND ADDRESS	TITLE	NATURE AND PERCENTAGE OF STOCK OWNERSHIP

22 . Former partners, officers, directors and shareholders

None ☐ a. If the debtor is a partnership, list each member who withdrew from the partnership within **one year** immediately preceding the commencement of this case.

NAME	ADDRESS	DATE OF WITHDRAWAL

None ☐ b. If the debtor is a corporation, list all officers, or directors whose relationship with the corporation terminated within **one year** immediately preceding the commencement of this case.

NAME AND ADDRESS	TITLE	DATE OF TERMINATION

23 . Withdrawals from a partnership or distributions by a corporation

None ☐ If the debtor is a partnership or corporation, list all withdrawals or distributions credited or given to an insider, including compensation in any form, bonuses, loans, stock redemptions, options exercised and any other perquisite during **one year** immediately preceding the commencement of this case.

NAME & ADDRESS OF RECIPIENT, RELATIONSHIP TO DEBTOR	DATE AND PURPOSE OF WITHDRAWAL	AMOUNT OF MONEY OR DESCRIPTION AND VALUE OF PROPERTY

24. Tax Consolidation Group.

None ☐ If the debtor is a corporation, list the name and federal taxpayer identification number of the parent corporation of any consolidated group for tax purposes of which the debtor has been a member at any time within the six-year period immediately preceding the commencement of the case.

NAME OF PARENT CORPORATION TAXPAYER IDENTIFICATION NUMBER

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25. Pension Funds.

None ☐ If the debtor is not an individual, list the name and federal taxpayer identification number of any pension fund to which the debtor, as an employer, has been responsible for contributing at any time within the six-year period immediately preceding the commencement of the case.

NAME OF PENSION FUND TAXPAYER IDENTIFICATION NUMBER

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* * * * * *

[If completed by an individual or individual and spouse]

I declare under penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct.

Date _____ Signature _____
of Debtor

Date _____ Signature _____
of Joint Debtor
(if any)

[If completed on behalf of a partnership or corporation]

I, declare under penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct to the best of my knowledge, information and belief.

Date _____ Signature _____

_____
Print Name and Title

[An individual signing on behalf of a partnership or corporation must indicate position or relationship to debtor.]

____ continuation sheets attached

Penalty for making a false statement: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. § 152 and 3571

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 II and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 156.

COMMITTEE NOTE

The form has been amended to provide more information to taxing authorities, pension fund supervisors, and governmental units charged with environmental protection and regulation. Four new questions have been added to the form, covering community property owned by a debtor and the debtor's non-filing spouse or former spouse (Question 16), environmental information (Question 17), any consolidated tax group of a corporate debtor (Question 24), and the debtor's contributions to any employee pension fund (Question 25). In addition, every debtor will be required to state on the form whether the debtor has been in business within six years before filing the petition and, if so, must answer the remaining questions on the form (Questions 19-25). This is an enlargement of the two-year period previously specified. One reason for the longer "reach back" period is that business debtors often owe taxes that have been owed for more than two years. Another is that some of the questions already addressed to business debtors request information for the six-year period before the commencement of the case. Application of a six-year period to this section of the form will assure disclosure of all relevant information.

Public Comment on Official Form 7:

(1) Jay W. Browder, General Manager of Forms, Inc. noted that the form is unclear as to whether a debtor who is not engaged in business must answer "none" or leave those boxes blank in the portion of the form addressed to business debtors. He also noted that Question 10 contains a subpart (a) but no other subparts.

(2) Thomas J. Yerbich, Esq. (Alaska) suggested adding Alaska to the list of community property states set out in Question 16.

(3) Bankruptcy and Reorganization Committee, Assoc. of the Bar of the City of New York supports the proposed changes to Form 7.

(4) Sandra Connors, Director, Regional Support Division, Office of Site Remediation Enforcement, U. S. Environmental Protection Agency, supported the addition of Question 25 to the form.

(5) Stephen J. Csontos, Senior Legislative Counsel, Tax Division, U.S. Dept. of Justice, supports the proposed changes to Form 7.

(6) Karen J. Cordry, Esq., on behalf of the Bankruptcy and Taxation Working Group, National Assoc. of Attorneys General, stated that the amendments are generally helpful, but urged that the debtor be required to serve a copy of the petition and schedules on the relevant environmental agencies.

GAP Report on Official Form 7. The Form was revised in several respects. First, Alaska was added to the list of community property states listed in Question 16 of the Form. Second, the instructions on page 1 of the Form were restyled to clarify that non-business debtors need not answer Questions 18-25 of the Form. The Questions relating to environmental hazards were renumbered to be made applicable to all debtors, not just those engaged in business.

Item 6B

(1) Preliminary Draft of Proposed Amendments to Bankruptcy Rules 1004, 2004, 2014, 2015(a)(5), and 9027(a)(3), new Proposed Bankruptcy Rule 1004.1, and Proposed Amendments to Official Form 1.

1. *Synopsis of Proposed Amendments:*

(a) Rule 1004 is amended to clarify that the rule implements § 303(b)(3)(A) of the Bankruptcy Code and is not intended to establish any substantive standard for the commencement of a voluntary case by a partnership.

(b) Rule 1004.1 is added to set out the manner in which a case is commenced on behalf of an infant or an incompetent person. Proposed Rule 1004.1 is derived from Rule 17(c) F. R. Civ. P.

(c) Rule 2004 is amended to clarify that an examination ordered under that rule may be held outside of the district in which the case is pending. The court where the examination will be held issues the subpoena, and it is served in the manner provided in Rule 45 F. R. Civ. P., made applicable by Rule 9016. Moreover, the rule makes clear that an attorney authorized to practice either in the court in which the case is pending or in the court for the district in which the examination will be held may issue and sign the subpoena on behalf of the court for the district in which the examination will be held.

(d) Rule 2014 is rewritten to make it conform more closely to the applicable provisions of the Bankruptcy Code. The rule also includes stylistic changes and sets out service requirements for the application.

(e) Rule 2015(a)(5) is amended to conform to 28 U.S.C. § 1930(a)(6) which was amended in 1996.

(f) Rule 9027(a)(3) is amended to clarify that the time limits for filing a notice of removal of a claim or cause of action apply to any claim or cause of action initiated after the commencement of a bankruptcy case, whether the bankruptcy case is still pending or has been suspended, dismissed, or closed.

(g) Official Form 1 is the form of a voluntary petition, and it is amended to require the debtor to disclose ownership or possession of property that poses or is alleged to pose a threat of imminent and identifiable harm to public health or safety.

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

Rule 1004. ~~Partnership Petition~~ Involuntary Petition Against a Partnership.

~~*(a) Voluntary Petition.* A voluntary petition may be filed on behalf of a partnership by one or more general partners if all general partners consent to the petition.~~

~~(b) *Involuntary Petition; Notice and Summons.*~~ After filing of an involuntary petition under § 303(b)(3) of the Code, (1) the petitioning partners or other petitioners shall ~~cause forthwith a copy of the petition to be sent~~ promptly send to or ~~served~~ serve on each general partner who is not a petitioner a copy of the petition; and (2) the clerk shall promptly issue ~~forthwith~~ a summons for service on each general partner who is not a petitioner. Rule 1010 applies to the form and service of the summons.

COMMITTEE NOTE

Section 303(b)(3)(A) of the Code provides that fewer than all of the general partners in a partnership may commence an involuntary case against the partnership. There is no counterpart provision in the Code setting out the manner in which a partnership commences a voluntary case. The Supreme Court has held in the corporate context that applicable nonbankruptcy law determines whether authority exists for a particular debtor to commence a bankruptcy case. *See Price v. Gurney*, 324 U.S. 100 (1945). The lower courts have followed this rule in the partnership context as well. *See, e.g., Jolly v. Pittore*, 170 B.R. 793 (S.D.N.Y. 1994); *Union Planters National Bank v. Hunters Horn Associates*, 158 B.R. 729 (Bankr. M.D. Tenn. 1993); *In re Channel 64 Joint Venture*, 61 B.R. 255 (Bankr. S.D. Oh. 1986). Rule 1004(a) could be construed as requiring the consent of all of the general partners to the filing of a voluntary petition, even if fewer than all of the general partners would have the authority under applicable nonbankruptcy law to commence a bankruptcy case for the partnership. Since this is a matter of substantive law beyond the scope of these rules, Rule 1004(a) is deleted as is the designation of subdivision (b).

The rule is retitled to reflect that it applies only to involuntary petitions filed against partnerships.

Rule 1004.1. Petition for an Infant or Incompetent Person.

If an infant or incompetent person has a representative, including a general

guardian, committee, conservator, or similar fiduciary, the representative may file a voluntary petition on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may file a voluntary petition by next friend or guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person who is a debtor and is not otherwise represented or shall make any other order to protect the infant or incompetent debtor.

COMMITTEE NOTE

This rule is derived from Rule 17(c) F.R. Civ. P. It does not address the commencement of a case filed on behalf of a missing person. *See, e.g.*, In re King, 234 B.R. 515 (Bankr. D.N.M. 1999).

Rule 2014. Employment of a Professional Person.

(a) *Application for Order Approving Employment.* An application for an order approving the employment of a professional person under §327, §1103, or §1114 of the Code shall be in writing and may be made only by the trustee or committee. The application shall state:

(1) specific facts showing why the employment is necessary;

(2) the name of the person to be employed and the reasons for the selection;

(3) the professional services to be rendered;

(4) any proposed arrangement for compensation; and

(5) that, to the best of the trustee's or committee's knowledge, the person to be employed is eligible under the Code for employment for the purposes set forth in the

application.

(b) *Statement of Professional.* The application shall be accompanied by a verified statement of the person to be employed, made according to the best of that person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, which shall state:

(1) that the person is eligible under the Code for employment for the purposes set forth in the application;

(2) any interest that the person holds or represents that is adverse to the estate;

(3) any interest, connection, or relationship that the person has relevant to determining whether the person is disinterested under § 101;

(4) any relationship the person has with the United States trustee, or with any employee of the United States trustee, for the region in which the case is pending;

(5) the information required to be disclosed under §329(a) if the professional is an attorney; and

(6) whether the person shared or has agreed to share any compensation with any person, other than a partner, employee, or regular associate of the person to be employed, and if so, the details.

(c) *Service and Transmittal of Application.*

(1) The applicant shall serve a copy of the application on:

(A) the trustee;

(B) the debtor and the debtor's attorney;

(C) any committee elected under §705 or appointed under § 1102, or, if the case is a chapter 9 case or a chapter 11 case and no committee of unsecured creditors has been appointed, on the creditors included on the list filed under Rule 1007(d); and

(D) any other entity as the court may direct.

(2) Unless the case is a chapter 9 case, the applicant shall transmit a copy of the application to the United States trustee.

(d) *Services Rendered by Member or Associate of Firm of Employed Professional.* If the court approves the employment of an individual, partnership, or corporation, any partner, member, or regular associate of the individual, partnership, or corporation may act as the person so employed, without further order of the court. If a partnership is employed, a further order approving employment is not required if the partnership has dissolved solely because of the addition or withdrawal of a partner.

(e) *Supplemental Statement of Professional.* Within 15 days after becoming aware of any undisclosed matter that is required to be disclosed under Rule 2014(b), a person employed under this rule shall file a supplemental statement, serve a copy on each entity listed in Rule 2014(c), and, unless the case is a chapter 9 case, transmit a copy to the United States trustee.

COMMITTEE NOTE

The rule has been rewritten to make stylistic changes and to make it conform more closely to the applicable provisions of the Code. The rule directs professionals seeking court approval of their employment to disclose all information relevant to determining whether the person is "disinterested" as defined in § 101 of the Code.

The rule requires the professional to undertake a reasonable inquiry under the circumstances to identify any facts relevant to that determination.

The rule also sets out the service requirements for the application for the approval of employment. There is no provision requiring a hearing on the application. In most cases, an order approving the employment will be entered without a hearing. The court may set a hearing sua sponte or on request or may vacate an order issued under the rule upon motion of an interested party.

The rule does not address the standards that courts should apply in ruling on an application for employment of a professional.

Rule 2015. Duty to Keep Records, Make Reports, and Give Notice of Case

(a) TRUSTEE OR DEBTOR IN POSSESSION. A trustee or debtor in possession shall

****

(5) in a chapter 11 reorganization case, on or before the last day of the month after each calendar quarter during which there is a duty to pay fees under 28 U.S.C. § 1930(a)(6). ~~until a plan is confirmed or the case is converted or dismissed,~~ file and transmit to the United States trustee a statement of ~~the~~ any disbursements made during ~~such calendar~~ that quarter and ~~a statement of the amount~~ of ~~the~~ any fees payable under ~~required pursuant to~~ 28 U.S.C. § 1930(a)(6) ~~that has been paid~~ for ~~such calendar~~ that quarter.

COMMITTEE NOTE

Subdivision (a)(5) is amended to provide that the duty to file quarterly disbursement reports continues only so long as there is an obligation to make quarterly payments to the United States trustee under 28 U.S.C. § 1930(a)(6).

Other amendments are stylistic.

Rule 9027. Removal

(a) *Notice of Removal.*

****

(3) TIME FOR FILING; CIVIL ACTION INITIATED AFTER COMMENCEMENT OF THE CASE UNDER THE CODE. ~~If a case under the Code is pending when a claim or cause of action is asserted in another court,~~ If a claim or cause of action is asserted in another court after the commencement of a case under the Code, a notice of removal may be filed with the clerk only within the shorter of (A) 30 days after receipt, through service or otherwise, of a copy of the initial pleading setting forth the claim or cause of action sought to be removed, or (B) 30 days after receipt of the summons if the initial pleading has been filed with the court but not served with the summons.

COMMITTEE NOTE

Subdivision (a)(3) is amended to clarify that if a claim or cause of action is initiated after the commencement of a bankruptcy case, the time limits for filing a notice of removal of the claim or cause of action apply whether the case is still pending or has been suspended, dismissed, or closed.

(Official Form 1) (9/97)

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. & Street, City, State & Zip Code):	Street Address of Joint Debtor (No. & Street, City, State & 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):	

Information Regarding the Debtor (Check the Applicable Boxes)

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.

Type of Debtor (Check all boxes that apply)

☐ Individual(s) ☐ Railroad
☐ Corporation ☐ Stockbroker
☐ Partnership ☐ Commodity Broker
☐ Other _____

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

Nature of Debts (Check one box)

☐ Consumer/Non-Business ☐ Business

Filing Fee (Check one box)

☐ Full 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.

Chapter 11 Small Business (Check all boxes that apply)

☐ 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)

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	$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 $50 million	$50,000,001 to $100 million	More than $100 million
	☐	☐	☐	☐	☐	☐	☐	☐

Estimated Debts	$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 $50 million	$50,000,001 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 Filed:
District:	Relationship:	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 Attorney

X _____
Signature of Attorney for Debtor(s)

_____
Printed Name of Attorney for Debtor(s)

_____
Firm Name

_____
Address

_____

_____
Telephone Number

_____
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

_____
Printed Name of Authorized Individual

_____
Title of Authorized Individual

_____
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

Exhibit C

Does the debtor own or have possession of any property that poses or is alleged to pose a threat of imminent and identifiable harm to public health or safety?

☐ Yes, and Exhibit C is attached and made a part of this petition.
☐ No

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 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 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.

Form B1, Exhibit C
(Draft)

Exhibit "C"

[If, to the best of the debtor's knowledge, the debtor owns or has possession of property that poses or is alleged to pose a threat of imminent and identifiable harm to the public health or safety, attach this Exhibit "C" to the petition.]

[Caption as in Form 16B]

Exhibit "C" to Voluntary Petition

1. Identify and briefly describe all real or personal property owned by or in possession of the debtor that, to the best of the debtor's knowledge, poses or is alleged to pose a threat of imminent and identifiable harm to the public health or safety (attach additional sheets if necessary):

.....
.....
.....
.....

2. With respect to each parcel of real property or item of personal property identified in question 1, describe the nature and location of the dangerous condition, whether environmental or otherwise, that poses or is alleged to pose a threat of imminent and identifiable harm to the public health or safety (attach additional sheets if necessary):

.....
.....
.....
.....

COMMITTEE NOTE

The form has been amended to require the debtor to disclose whether the debtor owns or had possession of any property that poses or is alleged to pose a threat of imminent and identifiable harm to public health or safety. If any such property exists, the debtor must complete and attach Exhibit "C" describing the property, its location, and the potential danger it poses. Exhibit "C" will alert the United States trustee and any person selected as trustee that immediate precautionary action may be necessary.

II Information Items

(1) *Proposed Bankruptcy Legislation*

Congress continues to consider comprehensive bankruptcy reform legislation. The House of Representatives passed H.R. 833 on May 5, 1999, and the Senate passed a different version of H.R. 833 on February 2, 2000. Both bills include provisions directing the Advisory Committee or the Judicial Conference to amend or add new Bankruptcy Rules or Official Bankruptcy Forms. Many other provisions also would create a need for amendments to the Bankruptcy Rules or Forms. A conference committee has not been created as of the date of this report, and the Advisory Committee is monitoring these developments closely.

(2) *Attorney Conduct and Disclosure of Financial Interests by Parties*

The Advisory Committee had the benefit of the presence and participation of Professor Coquillette, Reporter to the Standing Committee, who led a discussion of the work of the Standing Committee's Subcommittee on Attorney Conduct. He described the status of the work of the Subcommittee and noted that the current proposals would allow for the adoption of a specific rule to govern bankruptcy cases, but that it is premature to begin work on a special rule. When that time arises, the Advisory Committee will be asked to prepare a draft rule to supplement any other Federal Rules of Attorney Conduct.

Professor Coquillette also conducted a discussion of draft rule 7.1 prepared by the Advisory Committee on Civil Rules that would require disclosure of financial interests by parties. He noted that the rule likely would except bankruptcy cases from its reach, and that the Advisory Committee would be asked to address the subject more fully at its September 2000 meeting.

(3) Attachment: Draft Minutes of the March 9-10, 2000, meeting of the Advisory Committee on Bankruptcy Rules.

Item 6C

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of March 9 - 10, 2000
Key Largo, Florida

Draft Minutes

The following members attended the meeting:

District Judge Adrian G. Duplantier, Chairman
District Judge Robert W. Gettleman
District Judge Ernest G. Torres
District Judge Norman C. Roettger, Jr.
Bankruptcy Judge A. Jay Cristol
Bankruptcy Judge Robert J. Kressel
Bankruptcy Judge Donald E. Cordova
Bankruptcy Judge James D. Walker, Jr.
Professor Kenneth N. Klee
Professor Mary Jo Wiggins
Professor Alan N. Resnick
Leonard M. Rosen, Esquire
Eric L. Frank, Esquire
Howard L. Adelman, Esquire
J. Christopher Kohn, Esquire

Professor Jeffrey W. Morris, Reporter, attended the meeting. District Judge Bernice B. Donald and District Judge J.Garvan Murtha, liaison to this Committee from the Committee on Rules of Practice and Procedure ("Standing Committee") were unable to attend. Bankruptcy Judge Frank W. Koger, a member of the Committee on the Administration of the Bankruptcy System ("Bankruptcy Administration Committee"), attended, as did Professor Daniel R. Coquillette, Reporter to the Standing Committee, and Peter G. McCabe, Secretary to the Standing Committee and Assistant Director of the Administrative Office of the United States Courts ("Administrative Office"). Two former members of the Committee also attended: District Judge Eduardo C. Robreno and Gerald K. Smith, Esquire.

The following additional persons attended the meeting: Kevyn D. Orr, Acting Director of the Executive Office for United States Trustees ("EOUST"); Richard G. Heltzel, Clerk, United States Bankruptcy Court for the Eastern District of California; Patricia S. Ketchum, Bankruptcy Judges Division, Administrative Office; Mark D. Shapiro, Rules Committee Support Office, Administrative Office; and Robert Niemic, Research Division, Federal Judicial Center.

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 of the Standing Committee. Votes and other action taken by the

Committee and assignments by the Chairman appear in **bold.**

Introductory Items

The Committee approved the minutes of the September 1999 meeting.

The Chairman welcomed Judge Torres as a new member and Mr. Orr, who was attending his first meeting as acting director of the EOUST.

January 2000 Meeting of the Standing Committee. The Chairman reported on the January 2000 meeting of the Standing Committee. The Committee had no action items before the Standing Committee, but informed the Standing Committee that the Committee had referred to the Advisory Committee on Appellate Rules a request to consider amending the Federal Rules of Appellate Procedure to make Federal Rule of Bankruptcy Procedure 9019 applicable when there is a settlement of a bankruptcy matter that is pending before a court of appeals. The Chairman said the Committee also had reported that it had responded to the Committee on Codes of Conduct supporting in principle a suggestion to extend to the federal rules generally the corporate disclosure requirements imposed on parties by Federal Rule of Appellate Procedure 26.1.

Local Rules on the Internet. The Committee had been asked to consider whether to support a proposal under which Internet users looking for a court's local rules could utilize a link from the Administrative Office's website to the website of the particular court. Each court would be responsible for establishing and maintaining an individual court website, posting its local rules to its website, and for keeping the posted rules current. Judge Cristol suggested amending Rule 9029 to provide that a local rule would not be effective until so posted. Judge Walker said that making local rules more easily available would counter the trend toward more national, uniform, rules. Making use of the Internet as proposed, so that all local rules were readily available, could modify the thinking of the national rules committees. Another member suggested posting local rules to the Administrative Office's website and amending Rule 9029 to provide that a local rule would not be effective until posted there. Mr. McCabe said that had been suggested one year previously and rejected as impractical, in part because compliance with 28 U.S.C. § 2072, which requires courts to provide copies of their local rules to the Director of the Administrative Office, is not conscientiously observed. Mr. Niemic said that the FJC, in researching local rules, has found that neither Lexis, nor Westlaw, nor the Administrative Office's paper library of local rules is reliably up-to-date, and that the FJC invariably must contact the individual court to obtain its current local rules.

The Committee unanimously approved a resolution to: 1) urge each bankruptcy court to establish and maintain a website, 2) strongly encourage each court to post its local rules on that website, and 3) establish a local rules link from the Administrative Office's website to that of each court.

January 2000 Bankruptcy Administration Committee Meeting. Judge Walker reported on the January 2000 meeting of the Bankruptcy Administration Committee, which he had attended as the Chairman's representative. He described briefly that committee's discussion of the "unanswerable" question of public access/personal privacy and its resolution requesting the Committee to consider whether the official forms might be amended to require less information from debtors, a matter which he noted was on the Committee's agenda for later in the meeting.

Attorney Conduct Rules. Mr. Smith reported that Standing Committee's subcommittee on attorney conduct had met twice since the last meeting of the Advisory Committee, on September 29, 1999, and again on February 4, 2000. The proposals, and most of the discussion about whether there should be federal rules on attorney conduct, have centered on civil and criminal practice. Bankruptcy practice, however, is understood to be important and its special problems are recognized, he said. Based on the proposed drafts that have been circulated and the discussions to date, he said, it seems likely there will be a "rule of dynamic conformity" with the individual state rules governing attorney conduct. Also likely, he said, is a special rule directed toward the role of United States attorneys in supervising criminal investigations of individuals who may have retained lawyers. Bankruptcy attorneys also need a special rule, he said, even though such a rule might be viewed as "substantive." If such a rule were to be drafted, he said, it should: 1) define the term "adverse interest," and 2) adjust the bilateral litigation rule that you can not sue an existing client for the "collective proceeding" environment that characterizes bankruptcy cases. He noted a similarity to judicial conflicts in bankruptcy cases and suggested that the key to problems with both rules in a bankruptcy setting likely would center on defining who is a "party."

Professor Coquillette described what may become "Federal Rule of Attorney Conduct 1," as a rule adopting for federal courts the standards of the state where the particular federal court is located. Under a "FRAC 1," he said, the approximately 150 conflicting federal local rules on the subject would be abrogated. In connection with a possible "FRAC 2," he referred to the "McDade amendment," enacted a few years ago, that requires Department of Justice attorneys to abide by state or local rules of attorney conduct and said the amendment has worked hardship, because the federal court's local rule often differs from the rule of the state in which the federal court is located. Professor Coquillette added that two bills currently are pending in Congress on the subject. One, he said, would simply repeal the McDade amendment, and the other would send the issue to the Standing Committee to address with a rule. A possible "FRAC 3," covering bankruptcy proceedings, he said, would be up to the Committee to draft.

Financial Disclosure by Parties. Professor Coquillette said no action by the Committee was needed yet, although Congress is looking for quick action by the judiciary to correct perceived shortcomings concerning recusal by trial court judges. He referred to the materials handed out at the meeting, which included materials from the Committee on Codes of Conduct and its chair, Judge Amon, a draft Rule 7.1 prepared by the Advisory Committee on Civil Rules, and proposed additions and variations for the civil, bankruptcy, and criminal rules prepared by the Committee on Codes of Conduct. Professor Coquillette said the Civil Rules Committee believes

its draft Rule 7.1 contains the minimum that should be required, that it is an open question whether any national rule should prohibit or encourage local rules, and contemplated developing a form to supplement the rule. The Committee on Codes of Conduct, on the other hand, clearly wants a uniform, national rule with no local options. The Committee on Codes of Conduct did not favor developing a form, he said, because the committee believes it would be easy to introduce local variations. Professor Coquillette said Judge Scirica would be agreeable to carving out bankruptcy cases and proceedings from any proposed civil rule and suggested the Committee would want to think about its options until its September 2000 meeting. There was no objection to bankruptcy being excepted from any general civil rule that might be proposed. Judge Duplantier said it would seem best for the Committee to approach a bankruptcy rule separately. Mr. Smith said the draft bankruptcy rule provided by the Committee on Codes of Conduct probably is too narrow. Judge Duplantier said he does not think a rule is the appropriate method for addressing disclosure by parties, but if there is a rule, local rules should be permitted to supplement it; a form and general order would be preferable, he said. The form would be due at a party's first appearance, he said, and no person or party's filing would be accepted without the form attached. Judge Torres said there should be an explicit requirement to file a new or supplemental form whenever a change of ownership occurs. A member suggested that Rule 9009 authorizes the Director of the Administrative Office to issue bankruptcy forms. Professor Coquillette said the Standing Committee is aware of that rule and would be agreeable to use of a form in bankruptcy matters. There was a consensus that a form issued by the Director would be appropriate and that local rules should be permitted to broaden the scope of any national rule. Professor Coquillette said the Committee would be asked to address the subject more fully in the fall.

Action Items

The Reporter reviewed the comments on the preliminary draft amendments published in August 1999. The publication included proposed amendments to the civil rules concerning electronic service of documents other than an initiating pleading such as a complaint and summons, as well as proposed amendments to the bankruptcy rules.

Rules 9006(f) and 9022, and Civil Rule 5(b)(2)(D). The Committee received a total of 13 comments, most of them directed to the electronic service proposals. One issue on which the advisory committees specifically had sought comment was whether a party receiving service electronically should be afforded the additional three days for response that is available to a party receiving service by mail. All of the commentators approved the concept of electronic service, and the majority preferred permitting the additional three days for response, while acknowledging the importance of having uniform federal rules regardless of whether the additional three days is approved. The Reporter said that of the comments received by the Advisory Committee on Civil rules, all were favorable, with the majority endorsing uniformity across the federal rules while expressing a preference for permitting the additional three days.

Mr. Smith said it is not feasible to obtain consent when there is a large number of creditors

in a case and that he hoped the Committee would consider authorizing electronic service outside the adversary proceeding context and without requiring consent. Mr. Kohn said that obtaining consent assures that the party giving notice will have the recipient's correct e-mail address. **The Committee approved without objection 1) the transmittal of Rules 9006(f) and 9022 to the Standing Committee with a recommendation for their adoption, and 2) notifying the Advisory Committee on Civil Rules that the Committee supports the amendments to Civil Rule 5 authorizing electronic service as published and, further, that the Committee supports permitting an additional three days for response when service is made electronically, as demonstrated by its approval of the proposed amendment to Rule 9006(f), but supports even more strongly the principle of uniformity among the civil and bankruptcy rules on this subject.**

Rule 2002(g). The proposed amendments would clarify that when a creditor files a proof of claim which includes a mailing address and a separate request designating a different mailing address, the last paper filed determines the proper address, and a request designating a mailing address is effective only with respect to a particular case. The comments submitted noted that it may be difficult in some situations for a clerk to determine what is the "last request" of a creditor designating a mailing address, and suggested that the proposed amendment should go further and permit a creditor to designate a mailing address for all cases. Mr. Heltzel said a clerk faced with multiple designations of mailing addresses for a creditor typically will simply add each new address to the mailing matrix without deleting any earlier addresses. This results in some duplication of mailings to the creditor, he said, but is more efficient because of the labor required to perform a deletion. A new paragraph that was added to the rule to ensure that notices to an infant or incompetent person are mailed to the person's legal representative identified in the schedules or list of creditors drew no comments. **The Committee approved the proposed rule as published.**

Rules 2002(c), 3016(c), 3017(f), and 3020(c). The proposed amendments to these rules would ensure that any creditor or other entity whose conduct would be enjoined under a chapter 9, 11, 12, or 13 plan is provided with adequate notice of the proposed injunction, the confirmation hearing, the deadline for objecting to confirmation of the plan, and the order confirming the plan. One means for achieving adequate notice is the requirement to use "bold, italic or highlighted text" to convey the injunctive provisions. The Reporter noted that Mr. Heltzel had stated at the September 1999 meeting that "highlighted" text can become illegible when it is copied or scanned for imaging or other electronic storage. **The Committee approved replacing the word "highlighted" with the word "underlined" in the proposed amendments to Rules 2002(c) (line 9) and 3016(c) (line 5).**

Two comments stated that providing procedures for notifying entities about the kinds of injunctions covered by the amendments may cause the rules to adopt a position at odds with the Bankruptcy Code. Professor Klee said these amendments are the second part of a deal the Committee reached with the Department of Justice and should go forward. Mr. Kohn said he does not think the Committee is condoning injunctions with these amendments and noted that the

Committee Notes say that explicitly. He suggested that the fourth paragraph of the notes explaining these amendments could be moved to the beginning of each note to make that point more clearly. Professor Resnick said that on December 1, 1999, the related amendment to Rule 7001 referred to by Professor Klee had taken effect. This amendment excepts injunctions in plans from the general requirement of an adversary proceeding, and the Committee Note to the Rule 7001 amendment clearly states the Committee's intent. Moreover, he noted, the 1994 amendments to § 524 of the Code expressly permit injunctions in asbestos cases. Professor Wiggins said the bankruptcy judges of the Ninth Circuit were deeply concerned about a possible substantive effect and she urged the Committee to make clear what it perceives as the scope of the rule. She asked that the Reporter include in the GAP report to the Standing Committee information about the Committee's good faith effort to respond to the concerns expressed about potential substantive consequences of these amendments. The Reporter said he would redraft the Committee Notes to reflect the Mr. Kohn's suggestion and submit the revisions for consideration on the second day of the meeting.

Judge Torres asked whether it would be a good idea to add notice to the caption of each document, as in "Plan of Reorganization and Request for Injunction." Professor Klee said he thought doing so would cause attorneys and parties to put the language in every plan caption, whether or not the plan contained an injunction, diluting the effect of the requirement. One comment suggested that the amendment should contain some mention of the effect of non-compliance with the notice requirements, but the Committee took no action on the suggestion.

On the second day, the Reporter circulated redrafts of the proposed amendments to Rules 2002(c)(c) and 3016 showing the change in wording from "highlighted text" to "underlined text" and the redrafted Committee Notes to the amendments to Rules 2002(c)(3), 3016, 3017, and 3020. After discussion, **the Committee determined to delete from the first paragraph of the redrafted notes to Rules 2002(c)(3), 3016, and 3020 the sentences that disclaimed any intent to affect a determination of whether or to what extent a plan may provide for injunctive relief. With these modifications, the Committee approved the proposed amendments to Rules 2002(c)(3), 3016, 3017, and 3020 for adoption.**

Rule 1007. **The Committee approved without objection the proposed amendments as published.**

Rule 9020. Martha L. Davis, Esquire, general counsel of the EOUST, had expressed strong opposition to the proposed amendments. Professor Klee said he agrees with Ms. Davis and asked the Committee to consider whether the power to punish contempt is an inherent power of any court in the federal system or is restricted only to Article III courts. He referred to In re Sequoia Auto Brokers Limited, Inc., 827 F. 2d 1281 (9th Cir. 1987), although noting that the decision had been superseded in Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.), 77 F. 3d 278, 283-285 (9th Cir. 1996). Judge Kressel said he also agrees, but not about what should be done. He said he thinks the existing rule is substantive and that courts mistakenly rely

on it for authority. The best solution, he said, would be to amend the rule as proposed and let the courts rule on the issue of whether and to what extent bankruptcy judges have contempt authority.

Professor Resnick offered some background information for the benefit of the new members. He observed that the amendment does not mention "bankruptcy judge," and simply directs a party requesting an order of contempt to do so by motion. He said the Committee had considered simply abrogating the existing rule, but was concerned about creating a negative inference that could give the erroneous impression that a bankruptcy judge's contempt power was being abrogated by the rule abrogation. He noted that several circuits have ruled that bankruptcy judges have contempt authority as an inherent power of judicial office, and the proposed rule amendment is not intended to affect such holdings. He added that the Ninth Circuit is the only one to have relied on existing Rule 9020 to support its ruling that bankruptcy judges have civil contempt power. Judge Torres asked whether there were further reasons to amend the rule rather than abrogate it. Professor Resnick said that a Committee Note is not published to explain why a rule has been abrogated. The Committee believed abrogating the rule without explanation would be mis-read as a statement that bankruptcy judges do not have contempt authority, and the amendment gives the Committee a vehicle for writing a lengthy Committee Note. Professor Resnick said if the Committee were to write a rule that said a bankruptcy judge can rule on contempt, such a rule would be substantive; existing Rule 9020, however, is more restrictive than current case law. Mr. Orr agreed.

Judge Gettleman asked the purpose of the final sentence of the first paragraph of the Committee Note which states that neither the bankruptcy rules nor the civil rules provide procedures for sua sponte contempt orders. Judge Duplantier responded that it explains why, although the existing rule contains a subdivision governing sua sponte orders, there is no need to say anything about them in the rule as amended. **A motion to delete the sentence passed with 2 opposed. A further motion to transmit the proposed amendment to the Standing Committee with the Committee Note amended as above passed on a vote of 9 to 4.** Professor Klee explained that his "no" vote meant that if Rule 9020 is not to be abrogated entirely, he would prefer to retain the existing rule.

Rule 2014. The Reporter briefly reviewed his memorandum describing the proposed amendments which would alter for professionals seeking to be employed by the bankruptcy estate the standard for disclosure of relationships with creditors and their lawyers and accountants. The Chairman explained, for the benefit of the new members, that similar amendments to Rule 2014 had been adopted by the Committee earlier as part of its 1998 preliminary draft amendments (the "litigation package"). Although the package had been withdrawn after the public comment period, the Rule 2014 amendments had been among the few selected by the Committee for further consideration, he said. Mr. Adelman, a member of the subcommittee that had redrafted the proposed amendments, said the subcommittee's objective was to advise practitioners on what they must disclose. The published cases involving this rule, he said, present egregious violations of the rule, rather than conduct at the fringes of the line between acceptable and unacceptable. Accordingly, he said, the case law is not helpful to a practitioner faced with narrow choices. For

example, he said the subcommittee had adapted the "materially adverse interest" standard for disinterestedness in § 101(14) of the Code to "may give rise to an interest materially adverse" in the proposed amendments. Professor Resnick said the proposed draft is narrower than the existing rule and narrower than the draft that was published in 1998. Professor Klee said the subcommittee had tracked the statute in preparing the new draft. Mr. Smith said that using the word "materially" with "adverse" in line 29 would be controversial. The adverb "materially" is not in § 327 of the Code, although it is used in § 101(14). Circuit Judge Edith H. Jones, he noted, had opposed the addition of "materially" during the National Bankruptcy Review Commission's deliberations on this subject. Mr. Rosen said the Bankruptcy Code contains two standards, and the language used in line 29 and elsewhere in the proposed draft tracks the standard established in § 101(14).

Professor Resnick said the word "motion" in line 4, and the word "request" in lines 2, 17, and 49, and in the heading, should be changed to "application." Professor Klee questioned the introduction of a different term when there can be an ex parte motion. Professor Resnick said specifying a motion would make the item a contested matter with all the notice and service requirements Rule 9014 prescribes. Mr. Smith said notice should be given to the appropriate parties. He said, also, that the word "authorizing" in the heading should be changed to "approving" to track the language of § 327 and that proposed subdivision 6 at lines 39-43 of the draft should be deleted in favor of the bracketed alternative subdivision 6 that follows on lines 44-48. Professor Resnick said that directing a professional to state that he or she is eligible to be employed, in line 22, requires the person to draw a legal conclusion and suggested that the preamble would be a better place to cover that aspect of the procedure. Professor Klee said he would prefer that every directive after line 21 be qualified by the phrase "upon knowledge, information and belief formed after reasonable inquiry."

Mr. Smith said the proposed rule should disclose the scope of the attorney's conflicts check., but Mr. Rosen disagreed on the basis that these checks are so extensive the volume of disclosure would overwhelm a judge. Professor Wiggins said lines 63-4 should be revised to read "if the partnership has dissolved solely due to the addition or withdrawal of a partner." Judge Torres said the debtor and the debtor's attorney should be added to the list of those to be served with the application, and Professor Resnick suggested also adding to the service list the 20 largest unsecured creditors, if no committee has been appointed. He also suggested using the language already to be found in Rule 4001(b)(1). Professor Klee said the word "verified" should be deleted from line 69.

Returning to subdivisions (b)(3) and (b)(4) of the proposed draft, Professor Resnick said the intent is to make the rule "user friendly," because the existing rule is very broad, and the cases say "disclose everything." It is impossible to comply without disclosing too much, and there is no guidance concerning where to stop, he said. The members discussed differences in wording between subdivisions (3) and (4) and whether variations in wording--"connection" does not appear in subdivision (4), although "relationship" does-- represent a difference in meaning. Mr. Orr said that if the wording is not the same, there will be the same discussions in law firms that the

Committee was having at the meeting. Mr. Rosen said a prior draft of the proposed rule had avoided variations by combining subdivisions (3) and (4) and requiring disclosure of "any interest, connection, or relationship relevant to a determination that the person is disinterested under § 101 of the Code." **A motion to combine subdivisions (3) and (4) and accept Mr. Rosen's suggested wording passed with no objection.**

It was suggested that a new subdivision (4) be inserted to require disclosure of any relationship the person may have to the United States trustee and any person employed in the office of the United States trustee. A member said it might not be necessary, because Rule 5002 already addresses those relationships. Another member, however, noted that, although Rule 5002 provides that a relationship with a United States trustee or employee of a United States trustee potentially may disqualify a person for employment, there is no requirement in that rule to disclose the existence of a relationship.

It was suggested further that the Committee Note would need rewriting. Professor Klee asked that the word "parameters" be deleted from the final paragraph of the note. Judge Duplantier suggested that the last two sentences be deleted and replaced with a statement that the professional must exercise judgment in deciding what information is relevant. Professor Wiggins expressed reservations about directing lawyers to exercise judgment on the grounds that the subject is an ethical matter and is not appropriately addressed in a Committee Note. **The consensus was to delete all but the first sentence of paragraph 3 of the note and to delete the phrase "attempt to" from the first sentence.** The Reporter said he intended to rewrite the first paragraph of the note also, in light of the discussion at the meeting. **A motion to adopt the rule as agreed to during the discussion passed without objection.**

Rules 1006(b) and 2016. After an introduction by the Reporter, the Committee discussed the advisability of amending or abrogating Rule 1006(b)(3), which requires a debtor who applies to pay the filing fee in installments to postpone paying an attorney until the filing fee has been paid in full. Professor Klee said Rule 1006(b)(3) should be abrogated or amended to include non-attorney bankruptcy "petition preparers," whose compensation is not similarly delayed under the existing rule. Professor Resnick explained that the current rule treats petition preparers differently, because the court lacks the disciplinary authority that it has over attorneys and because petition preparers have no ethical duty to disclose to their clients the consequences of paying the petition preparer. **The Committee took no action on Rule 1006(b).**

With respect to the draft amendment to Rule 2016 requiring a petition preparer to file a statement disclosing the compensation paid, Professor Resnick recommended changing the 15-day deadlines in lines 2 and 8 of the draft to ten days, but also spoke against the proposal, because there is no statutory bar to fee sharing by petition preparers and § 110 of the Code already requires petition preparers to disclose their fees. Judge Duplantier asked whether there is enough money at stake to require petition preparers to disclose their fees. Judge Cristol said some petition preparers charge surprisingly high fees, up to several hundred dollars. Mr. Heltzel said the requirement in the draft to transmit the disclosure to the United States trustee in addition to filing

it would be an improvement over the current statutory procedure that requires only filing, because the United States trustee now must obtain the information from the court rather than receiving it directly. Judge Kressel asked why the draft requires the petition preparer to provide "particulars" when the existing Rule 2016(a) requires an attorney to provide "details." He asked if the intent is that the information disclosed be the same or different and recommended using the same word as in the existing rule to the extent possible. Mr. Rosen questioned whether the fee sharing language should vary from that applicable to attorneys in Rule 2016(a). Judge Duplantier said the draft should conform as closely as possible to the language the Committee is developing in its draft amendments to Rule 2014, in which the exclusion of employees appears at the beginning of the fee sharing provision. Professor Resnick suggested deleting from line 2 of the draft the clause authorizing the court to direct a different deadline from the one specified and cautioned generally against varying too much from the language of § 110 of the Code. **The consensus was to table the proposed amendment until after the Committee has finalized its draft amendments to Rule 2014.**

Rule 1004(a). The Reporter stated that Professor Klee, at the September 1999 meeting, had raised the question whether existing Rule 1004(a) is substantive and should either be amended or abrogated. Professor Klee said he favored the draft amendment. Professor Resnick said the draft appears to restrict the right of a non-filing partner to object to a filing, a right the existing rule preserves by requiring that an involuntary petition be filed unless all partners consent to the bankruptcy. The proposed amendment would authorize a filing under a partnership agreement that permits a majority of the partners to bind all. Professor Klee said that if state law allows a bankruptcy filing, the rule should not preclude it. Judge Gettleman suggested cross-referencing § 303(b)(3)(A). Judge Duplantier asked how the different wording, namely filing "on behalf of" in the proposed amendment to the rule and "against" in § 303(b) of the Code would affect the parties. Mr Adelman said the choice of wording would determine the standing of a non-filing partner. Under a partnership agreement that authorizes filing based on a two-thirds vote, he said, failure to achieve a two-thirds vote would require those who still wanted to file the bankruptcy to do so by an involuntary petition to which the dissenters could object. If two-thirds voted in favor of the filing, however, the dissenters would have no standing to object. **A motion to abrogate subdivision (a) of Rule 1004, delete "(b) Involuntary Petition; Notice and Summons" from existing subdivision (b), and re-title the rule "Partnership Involuntary Petition" passed with none opposed.**

Proposed New Rule 1004.1. The Reporter stated that the present draft had been prepared in response to the Committee's directive at the September 1999 meeting that the proposed new rule should track Rule 17(c) of the Federal Rules of Civil Procedure ("Infants or Incompetents") as closely as possible. Professor Klee said he agreed with that principle, but in light of In re King, 234 B.R. 515 (Bankr. D.N.M. 1999), which had been brought to the Committee's attention by Mr. Kohn, he thought the Committee also should suggest to the Advisory Committee on Civil Rules that it consider limiting the scope of Rule 17(c) to infants and incompetents "whose whereabouts are known." Judge Kressel questioned the need for the final sentence of the draft because it seemed to him unlikely a party would come to the bankruptcy court for appointment of a guardian

ad litem prior to filing a petition. Judge Duplantier said he thought the sentence in the civil rule refers to a defendant and, thus, would not be necessary in a rule about filing a bankruptcy petition. Judge Kressel suggested changing the word "person" to "debtor" in lines 6 and 8 to make it clear that the final sentence refers to post-petition orders by the court. Others disagreed with this departure from the wording of Civil rule 17(c), and Judge Torres said the Committee Note would be a better place to explain that the rule does not cover a person entering the case later or any person other than the debtor. Judge Robreno said he only supports departing from a related civil rule when there is a good reason to do so, and in this instance, he said, he believes there may be one. Mr. Rosen suggested that the choice of verb between "shall" and "may" offered by the Reporter on line 5 should be "may," and Judge Walker said using "may" would facilitate the issuing of an order that might not protect the infant or incompetent person, such as an order of dismissal if the court found that proceeding with the case would not be appropriate. **A motion was made to adopt the Reporter's draft using "including" in line 1 (rather than "such as") and using "shall" in line 5 (rather than "may"). A motion to amend the motion to change the word "person" in lines 6 and 8 to "debtor" passed with 2 opposed. A further motion to delete from line 4 the phrase "duly appointed," to preserve the right of a parent to file on behalf of a minor, failed by a vote of 4 to 8. The motion to adopt the draft as amended passed with none opposed. On reviewing the re-draft, the Committee also changed the word "Whenever" on line 1 to "If," and deleted from the Committee Note all except a statement that the rule is derived from Rule 17(c) Fed. R. Civ. P.**

Rule 9027(d). The Reporter introduced a proposed draft which was based on the Committee's discussion of the rule at the September 1999 meeting. After further discussion, **there was a motion to take no action, which passed without opposition.**

Rule 9027(a)(3). At the September 1999 meeting, the Committee appeared to have agreed that Rule 9027 should cover actions initiated after the filing of the bankruptcy case and then removed, without regard to the status of the bankruptcy case. Judge Gettleman said the words "under the Code" should be inserted following the word "case" in line 5 of the draft. Professor Resnick said the Committee Note should use the bracketed sentence. **A motion to adopt the draft amendment with the changes noted above passed with no objection.** Judge Gettleman added that the word "receipt," referring to a complaint or summons, in Rule 9027(a)(3) may soon be revisited by the Advisory Committee on Civil Rules as a result of a recent Supreme Court ruling that a party must be served with a summons or complaint before the time will begin to run for filing a notice of removal. He said he would recommend waiting for the civil rule to be amended before making any change to the bankruptcy rule.

Rule 2015(a)(5). The Reporter said the existing rule conflicts with 28 U.S.C. § 1930(a) and pending bankruptcy reform legislation might change the statutory language again. The draft amendment would be intended to conform the rule to the statute regardless of whether the statute is amended or remains as it is, he said. Professor Klee said he would like to see the rule amended to include in the events that cut off the obligation to make reports the closing of the case. Mr. Orr said it would be best to conform to the statute, which does not include the word "closed." Mr.

Frank asked the reason for the amendment when the rule already requires reports. Professor Resnick said the amendment is intended to make it clear that as long as the debtor must make quarterly payments the debtor also must file reports. He suggested that the amendment be redrafted to make the connection between reports and the debtor's payment obligations more explicit. The Committee approved the amendments in principle and asked the Reporter to present a redraft the following day. On the second day, the Committee reviewed the redraft and, at Mr. Orr's suggestion, changed the word "of" in line 1 to "after" and changed "the fee required pursuant to 28 U.S.C. § 1930(a)(6) that has been paid" to "the fee payable under 28 U.S.C. § 1930(a)(6)." The Committee also shorted the citation at the end of the Committee Note. **The consensus was to forward for publication the proposed amendments to Rule 2015(a)(15) as so revised.**

Notice of Confirmation of a Chapter 13 Plan. Rule 2002(f)(7) requires the clerk or other person as the court may direct to send notice to all creditors of the confirmation of a plan in a case under chapter 9, 11, or 12. A suggestion had been made to amend Rule 2002(f)(7) to add to the rule notice of the confirmation of a chapter 13 plan. The Reporter said it is puzzling why chapter 13 plan confirmations historically have been excepted from the notice requirement, but most likely it is because creditors expect confirmation in a chapter 13 case. Judge Walker said an amendment may not be necessary if, as he believed, all chapter 13 trustees can upload information about their cases to a central database accessible to creditors. Mr. Orr said such a central database is under development but is not yet available. He added that most of the trustees with large operations provide a dial-up service that creditors use to obtain information on the status of cases. Mr. Orr said a recent survey by his office indicated that 31 of the 88 chapter 13 trustees responding also send notice when a plan is confirmed. Four trustees had indicated that in their cases debtor's counsel sends a notice of confirmation, while the remaining trustees indicated that the practice is variable. He added that one company handles the automated systems for about 70 percent of the trustees and appears to have a central information service for its subscriber trustees. One competitor appears to serve the bulk of the other trustees, so that centralized information may already be obtainable through these private sources, he said. Mr. Heltzel noted that in many districts a creditor can have access to the actual plan and the order of confirmation by logging on to the court's website. **A motion to take no action was unopposed.**

Rule 8014. A suggestion had been received from a former Committee chairman to amend the rule to provide time limits for submitting and for objecting to a bill of costs related to an appeal to the district court or bankruptcy appellate panel, changes that would conform the rule more closely to Rule 39 of the Federal Rules of Appellate Procedure. Professor Resnick said he thought the rule should be more specific about which court and which clerk would act under the rule to achieve the same result as under Rule 39. Judge Roettger asked what would happen if an appeal were affirmed in part and reversed in part. There was a motion to re-commit the proposed amendments to the Reporter for re-drafting to track Rule 39, with underlining and striking out to indicate changes to existing Rule 8014, all to be considered at the next meeting. A member said the re-draft should state the source of substantive authority for taxing costs in a bankruptcy appeal, and another questioned the introduction of time limits, which are not in the existing rule,

especially when there is no provision for extending the times. A member noted that 28 U.S.C. § 1920 provides for taxing of costs by any court of the United States but that a bankruptcy appellate panel would not be included among such courts. **No vote was taken on the original motion, but a motion to take no action passed by a vote of 8 to 5.**

Rule 2004(c). The Reporter explained that the Committee previously had approved the proposed amendments and the only change being presented was in the Committee Note. At the suggestion of Mr. Kohn, he said, he had added a phrase from the Committee Note to Rule 45 of the Federal Rules of Civil Procedure stating that an attorney admitted in a district pro hac vice can issue a subpoena. A member noted that the spelling "haec," taken from the Committee Note to Rule 45 should be changed to "hac." Judge Torres questioned the authorization to issue a subpoena in a remote district, and Judge Robreno asked whether this rule would be sufficient to police attorney abuse of the subpoena power. Professor Resnick responded that this subdivision derives from Civil Rule 45, which contains no requirement for an order authorizing a deposition, while subdivision (a) of Rule 2004 requires a court order authorizing the examination for which the subpoena provisions of subdivision (c) would be used. Professor Klee noted that the amendments mention cases but not "proceedings," and Professor Resnick said the reference to Rule 9016, which does apply in "proceedings" indicates that Rule 2004(c) can be used in both cases and "proceedings." Professor Resnick also commented that the deviations in Rule 2004(c) from the exact wording of Rule 45 arise from the Standing Committee's requirement that all amendments follow the style guidelines issued in 1996. **A motion to adopt the amendment, including the addition to the Committee Note, passed without objection.**

Public Access and Privacy. Mrs. Ketchum introduced the discussion of this issue, which also is being examined by several Judicial Conference committees and in the legislative and executive branches of government. Five bankruptcy courts already accept filings electronically and many more "scan" or "image" all documents filed to produce an electronic record. Most, if not all, of these courts, also post these electronic documents on their websites, making them available 24 hours-a-day to anyone with access to the Internet, she said. Although court files always have been open to examination by the public, many in the judiciary have begun to question whether privacy interests of individuals may require some restrictions on access to electronic files. There also may be other methods by which the amount of private information potentially available from court files might be reduced. The Court Administration and Case Management Committee has established a subcommittee to study the issue, and liaisons have been appointed from other interested committees. In addition, the Bankruptcy Administration Committee, specifically, has requested the Committee to "consider whether the official Bankruptcy Forms should be modified to require less information to be filed and become part of the public record."

Mr. Heltzel said the schedules and other forms used to file a bankruptcy case contain most of the information privacy advocates are most concerned about, including a debtor's Social Security number. Judge Robreno suggested that lawyers should be more careful about the contents of documents and that some information currently filed could be labeled "administrative"

to restrict access. Professor Klee said the aliases or "other names used" provided in the petition are very valuable to creditors and that the petition, overall, is very basic and necessary to the case. He said the schedules also contain essential information that creditors need to know, especially in chapter 11 cases. The statement of financial affairs frequently contains sensitive information, he said, but it is information creditors need to participate in the case. He noted that § 521 of the Code does not require a debtor to file schedules and statements in every case but only "unless the court orders otherwise."

Mr. Orr drew a distinction between "data" and administrative information necessary to administer the case. He said the Committee might consider examining the uses of different types of filed information and consider changes such as filing with the United States trustee rather than the court based on those different uses. Judge Duplantier inquired whether documents submitted to the United States trustee are public. Mr. Orr said they are subject to the Freedom of Information Act but are not presumptively public as court filings are. Judge Duplantier said that fact might nullify the United States trustee's office as a solution. Mr. Smith suggested that the courts could leave cases filed by individuals off the Internet while posting the corporate cases. Any document filed in any court would be public but not necessarily on the Internet. Mr. Heltzel said his court has experienced a "tremendous" positive response to the posting of the files of consumer cases on the Internet. Concerning the proposal to limit access by issuing a password, he noted that he has no criteria for denying a password to anyone and that he has never denied such a request.

Mr. Rosen suggested that the Committee recommend a statute forbidding use of bankruptcy case information for commercial exploitation. Professor Resnick said he had attended a session on privacy sponsored by the Rand Corporation at which representatives of the credit card industry made it very clear they want the information contained in debtors' schedules and statements of financial affairs. He said it may be impossible to stop the flow of information to the Internet, because credit bureaus and other financial reporting organizations hire "stringers" to visit courthouses and gather information on bankruptcy filings which the organizations then publish on the Internet. Judge Duplantier said the Committee should look carefully at the Official Forms, because there may be some unnecessary items. Mr. Orr said the credit industry searches bankruptcy files for hypothecation paper, such as liens that can be bought or sold. Many understand, he said, that a discharged debtor is creditworthy, because the Code bars the debtor from receiving another discharge for seven years. Judge Torres said the bankruptcy system may be collecting more information than really is needed and that the Committee should consider whether any information that is needed should be separated from the public file. He said the Committee also should consider ways to limit or prohibit improper disclosure of information and keep in mind the administrative burden of caring for information.

Professor Morris suggested that § 107(a) may not be as broad as it looks initially, but that the Committee faces a difficult task because Congress, in the pending bankruptcy reform legislation, appears to be requiring more and more information from debtors. Mr. Heltzel said there appear to be two categories of information in bankruptcy cases: 1) information necessary to

effect notice and allow a creditor to identify the debtor correctly, and 2) the information in the schedules and statements that must be disclosed to the trustee to enable the trustee to administer the bankruptcy estate. It may be possible, he said, to put much of the information in the second category into a "trustee disclosure" mode, so that it would be provided to the trustee by "more traditional forms of disclosure." The financial data in the schedules and statement of financial affairs is crucial to trustees and creditors, he said, but neither group cares how they obtain the information as long as it is accurate, complete, and available. Judge Walker said one of the points made at the Bankruptcy Committee meeting is that privacy is a commodity. The proper question, the judges there said, is not whether an individual gives up privacy by filing bankruptcy or undertaking some other activity, but what the individual receives in return. There are other examples in modern life, he said, such as a Safeway club card that offers discounts as an inducement to allow the store to document a customer's purchases and the "cookies" that Internet merchandisers use to track those who visit their websites. The Chairman commented that the issue is a difficult one to which no solution is readily apparent. **He asked whether there was a consensus to examine the matter further and, hearing no objection, said he would appoint a subcommittee for that purpose.**

Feasibility of Setting Time Periods in the Rules in Multiples of Seven Days. The Reporter referred to his memorandum in which he described several problems with the suggestion to consider using seven days as a timing mechanism in the rules. The major obstacles, he said, are 1) the fact that the Code contains some deadlines that would conflict with a seven-day rules, 2) the fact that a case can be filed on a Sunday, causing all subsequent deadlines also to fall on a Sunday, and 3) the lack of popular outcry from the bankruptcy community over the existing time periods in the rules. Judge Gettleman said he is convinced that it would cause more trouble than it would create benefits to make the changes, effectively withdrawing the suggestion.

Subcommittee Report

Subcommittee on Forms. Judge Kressel reported that the subcommittee had considered the forms suggestions referred to it by the Committee at the last meeting. The subcommittee was recommending no action on the suggestions, even though many of the suggestions were good, because the forms at issue are still quite new. Mr. Heltzel repeated his request, made at the last meeting, that the subcommittee consider creating a separate or supplemental form filed only in business cases for the business questions on the Statement of Financial Affairs (Official Form 7). Mr. Kohn said he would not support any further delay in issuing the amendments to Form 7, which have been published and commented on; Mr. Heltzel said he did not intend his request to result in delay of the pending amendments. Judge Kressel said the bankruptcy system had separate business and non-business forms for many years and that he viewed dividing Form 7 as regressive. Mr. Heltzel also repeated he request that shading be eliminated from the forms, because it comes out looking black when a document is scanned, defeating the purpose of enhancing clarity. Judge Walker noted that the Committee probably will look at the forms again in connection with the electronic case filing project and that Mr. Heltzel's requests could be reconsidered in that context. Professor Klee said he favors eliminating shading on the forms.

The consensus was that shading is an artistic feature of the forms, not a substantive one, and that the shading on the amended Voluntary Petition (Official Form 1) approved for republication and further comment at the March 1999 meeting should be removed before the form is forwarded to the Standing Committee.

Information Item

Mr. Niemic reported that the Federal Judicial Center has been conducting a study of evidentiary issues related to electronic materials. He said there would be an update on the study available for the September 2000 meeting.

Administrative Matters

The Committee selected March 15-16 in New Orleans as the dates and location for its spring 2001 meeting.

Respectfully submitted,

Patricia S. Ketchum

Item 7A

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

ANTHONY J. SCIRICA
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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APPELLATE RULES

ADRIAN G. DUPLANTIER
BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

W. EUGENE DAVIS
CRIMINAL RULES

MILTON I. SHADUR
EVIDENCE RULES

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

From: **Paul V. Niemeyer, Chair, Advisory Committee on the Federal Rules of Civil Procedure**

Date: **May , 2000**

Re: **Report of the Civil Rules Advisory Committee**

Introduction

The Civil Rules Advisory Committee met on April 10 and 11, 2000, at the Administrative Office of the United States Courts in Washington, D.C. It voted to recommend adoption of rules amendments that were published for comment in August 1999, with some modifications in response to the public comments. Part I of this report details these recommendations with respect to two packages. The first package, covering electronic service of papers after initial process, includes changes in Rules 5(b), 6(e), and 77(d). The second package, covering abrogation of the obsolete Copyright Rules of Practice, includes abrogation of those rules, a new Rule 65(f), and a corresponding change in Rule 81(a)(1). A third proposal for adoption included in this package would make an overdue technical correction to Rule 82; it is recommended that it be adopted without publication for comment.

Part II describes the Advisory Committee recommendation to publish for comment three sets of amendments. The first proposes a new Rule 7.1 governing disclosure of information that supports a determination whether a judge is disqualified. This proposal is advanced for consideration with parallel proposals by other advisory committees. The second set proposes amendments to Civil Rules 54(d)(2) and 58. This proposal is advanced for consideration with parallel proposals to amend Appellate Rule 4(a). The final proposal would amend Rule 81(a)(2) to integrate better with the rules governing habeas corpus cases and § 2255 motions.

Part III summarizes ongoing Advisory Committee work, primarily

by noting the work of several subcommittees.

I Action Items: Amendments Proposed for Adoption

The Advisory Committee recommends that each of the amendments discussed in this section be transmitted to the Judicial Conference with recommendations for adoption. The electronic service and copyright proposals were published for comment in August 1999. The changes made in response to the public comments are described with each package. The technical conforming change to Rule 82 has not been published for comment, but is recommended for adoption without publication.

I A. Electronic and Other Service: Rules 5(b), 6(e), and 77(d)

The proposed amendments to Rules 5(b) and 77(d) were published for comment in August, 1999. The Advisory Committee had voted not to recommend any change in Rule 6(e), but also published as an "alternative proposal" the change that it now recommends for adoption.

Rule 5(b) is restyled. Rule 5(b)(1) is clarified by expressly limiting it to service under Rules 5(a) and 77(d). The restyling of Rule 5(b)(2)(A), (B), and (C) is intended to make no change in the meaning of the present rule.

Rule 5(b)(2)(D) is new. Although the proposal emerged from the work of the Standing Committee's Technology Subcommittee and was designed to authorize electronic service, it also reaches service by other means. Written consent of the person served is required.

Rule 6(e) would be amended to allow an additional 3 days to respond when service is made under Rule 5(b)(2)(C) by leaving a copy with the clerk of the court, or by any means consented to under Rule 5(b)(2)(D). This amendment extends the present provision that adds 3 days when service is made by mail.

Rule 77(d) is amended to allow the clerk of court to serve notice of an order or judgment in any manner provided for in Rule 5(b). The immediate purpose is to support notice by facsimile or computer.

The public comments suggested drafting changes that were adopted by the Advisory Committee. These changes are described in the Gap report.

In displaying the text of the revised Rules, new matter is underlined, deleted matter is overstricken, and matter added since publication is double-underlined.

The Advisory Committee deliberations are summarized at pages 4 to 9 of the draft Minutes.

Rule 5(b)

~~**(b) Same: How Made.** Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the party or attorney or by mailing it to the party or attorney at the attorney's or party's last known address or, if no address is~~

~~known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at the attorney's or party's office with a clerk or other person in charge thereof, or, if there is no one in charge, leaving it in a conspicuous place therein, or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.~~

(b) Making Service.

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

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

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

(i) handing it to the person;

(ii) leaving it at the person's office with a clerk or other person in charge, or if no one is in charge leaving it in a conspicuous place in the office; or

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

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

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

(D) Delivering a copy by any other means, including electronic means, consented to in writing by the person served. Service by electronic means is complete on transmission; service by other consented means is complete when the person making service delivers the copy to the agency designated to make delivery. If authorized by local rule, a party may make service under this subparagraph (D) through the court's transmission facilities.

(3) Service by electronic means under Rule 5(b)(2)(D) is not effective if the party making service learns that the attempted service did not reach the person to be served.

Committee Note

Rule 5(b) is restyled.

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

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

Subparagraph (D) of Rule 5(b)(2) is new. It authorizes service by electronic means or any other means, but only if consent is obtained from the person served. The consent must be express, and cannot be implied from conduct. Early experience with electronic filing as authorized by Rule 5(d) is positive, supporting service by electronic means as well. Consent is required, however, because it is not yet possible to assume universal entry into the world of electronic communication. Subparagraph (D) also authorizes service by nonelectronic means. The Rule 5(b)(2)(B) provision making mail service complete on mailing is extended in subparagraph (D) to make service by electronic means complete on transmission; transmission is effected when the sender does the last act that must be performed by the sender. ~~As with other modes of service, however, actual notice that the transmission was not received defeats the presumption of receipt that arises from the provision that service is complete on transmission. The sender must take additional steps to effect service.~~ Service by other agencies is complete on delivery to the designated agency.

Finally, subparagraph (D) authorizes adoption of local rules

providing for service through the court. Electronic case filing systems will come to include the capacity to make service by using the court's facilities to transmit all documents filed in the case. It may prove most efficient to establish an environment in which a party can file with the court, making use of the court's transmission facilities to serve the filed paper on all other parties. Transmission might be by such means as direct transmission of the paper, or by transmission of a notice of filing that includes an electronic link for direct access to the paper. Because service is under subparagraph (D), consent must be obtained from the persons served.

Consent to service under Rule 5(b)(2)(D) must be in writing, which can be provided by electronic means. Parties are encouraged to specify the scope and duration of the consent. The specification should include at least the persons to whom service should be made, the appropriate address or location for such service — such as the e-mail address or facsimile machine number, and the format to be used for attachments. A district court may establish a registry or other facility that allows advance consent to service by specified means for future actions.

~~Service under subparagraph (D) does not allow the additional time provided by Rule 16(e) when service is made by mail under subparagraph (B). Electronic service commonly is effected with great speed. A party should consent to receive service by electronic or other means only as to modes that are trusted to provide prompt actual notice. By giving consent, a party also accepts the responsibility to monitor the appropriate facility for receiving service.~~

Rule 6(e) is amended to allow additional time to respond when service is made under Rule 5(b)(2)(D). The additional time does not relieve a party who consents to service under Rule 5(b)(2)(D) of the responsibilities to monitor the facility designated for receiving service and to provide prompt notice of any address change.

Paragraph (3) addresses a question that may arise from a literal reading of the provision that service by electronic means is complete on transmission. Electronic communication is rapidly improving, but lawyers report continuing failures of transmission, particularly with respect to attachments. Ordinarily the risk of non-receipt falls on the person being served, who has consented to this form of service. But the risk should not extend to situations in which the person attempting service learns that the attempted service in fact did not reach the person to be served. Given actual knowledge that the attempt failed, service is not effected. The person attempting service must either try again or show circumstances that justify dispensing with service.

Paragraph (3) does not address the similar questions that may arise when a person attempting service learns that service by means other than electronic means in fact did not reach the person to be

served. Case law provides few illustrations of circumstances in which a person attempting service actually knows that the attempt failed but seeks to act as if service had been made. This negative history suggests there is no need to address these problems in Rule 5(b)(3). This silence does not imply any view on these issues, nor on the circumstances that justify various forms of judicial action even though service has not been made.

Summary of Comments

Hurshal C. Tummelson, Esq., 99-CV-002: Addressing his comments to Rules 5(b), 65, 77(d), and 81, focuses on the "consented to by the person served" element of proposed Rule 5(b)(2)(D). Suggests "some specific clarification with reference to this form of service" because "there are so many possible means of service electronically or otherwise which might be used that the end result could be very confusing."

Jack E. Horsley, Esq., 99-CV-004 (Nov. 2, 1999 installment): "[E]lectronic means" may not be clear to all readers. It might be expanded to read: "Internet, fax, computer transmittal or other electronic means." In the November 11 installment concludes that "authorizing service by electronic means is consistent with current developments."

Joseph W. Phebus, Esq., 99-CV-006: Relays information from the firm's computer specialist. The e-mail system used by the firm provides date and time stamping for incoming and outgoing mail. It also automatically provides notice that a message is not delivered. If the address is not valid, notice is provided immediately. If the address is valid, the system attempts delivery every 20 minutes for four hours, then every four hours for the next 48 hours; at the end of that period, notice is given if delivery could not be accomplished.

David E. Romine, Esq., 99-CV-007: Strongly favors the "complete on transmission" rule. This rule is clear. Clarity prevents doubts and ensuing disputes about the time for responding. If service were made complete only on receipt, every party would need to consult every other party to confirm the time of receipt, and then would feel compelled to send a written memorial of the understanding to every other party. "What a waste." The ambiguity will be even worse when — as often happens — electronic service is made on a Friday afternoon. "[T]here will be a four-day window of plausibility," and the window "would be extended by holidays, vacations, or even business trips * * *." Resolution of disputes, finally, would turn on fact disputes that will be burdensome to litigate.

Charles L. Schlumberger, Esq., 99-CV-008: Opposes electronic service, even with consent. Notes that he had difficulty transmitting these comments to the Administrative Office. Electronic service will be abused — as it is, attorneys often fax papers late in the evening. Is round-the-clock monitoring of fax

and e-mail to be required? Even from out-of-town? Must an attorney defeat the security system that prevents even staff from reading the attorney's e-mail? If papers contain sensitive or protected information, the e-mail system offers no reliable security unless the information is encrypted. There should be express provisions detailing whether consent can be open-ended for an entire action, specific for particular papers, or revoked. Filing by electronic means is proper, notice under Rule 77(d) by electronic means is proper, but not service by attorneys — "I trust the clerks but not the lawyers."

Hon. Susan Pierson Sonderby, 99-CV-010: Service by electronic means or fax "should be valid, irrespective of consent, where available to the recipient." If the recipient is not equipped to receive such messages, the person responsible for making service can resort to mail or personal service. At the least, Rule 5(b) should authorize local district rules that permit electronic service without consent of the person served. And the provision for "other means" is puzzling: commercial express carrier service is routine now, on the theory that delivery constitutes hand delivery.

J. Michael Schaefer, Esq., 99-CV-011: There should be a page limit on fax transmissions: "I have had 50 pages faxes dumped into my machine, creating a burden to deal with unattached bulk paper and dissipating a toner supply." And seems to urge that "any pleading exceeding 10 pages" should be permitted only with the specific consent of the recipient no matter what method of service is used.

Joanne Fitzgerald Ross, Esq., for State Bar of Michigan Committee of the United States Courts, 99-CV-012: Approves proposed Rule 5(b), but would amend the proposal to require simultaneous mailing of a clean copy of any document served by fax.

Committees of the Association of the Bar of the City of New York, 99-CV-013: Supports the basic proposal; the requirement of consent, and the exclusion of initial service of process, "provide adequate safeguards of due process rights." Something should be done to make it clear that consent can be given either for all service during an action or only for service of specified papers. Some recipients may be reluctant to commit to the obligation to monitor continually for electronic receipt, which "may require a technical office capacity that is currently unavailable to some practitioners." It would help to prepare a Consent Form that accommodates various forms of service, provides specific address information, and is filed with the court. The Consent Form would specify whether consent is for all purposes of the action or is more limited. It is proper to make service complete on transmission, but some additional time should be provided to respond because messages often "must travel through multiple servers, compounding the risk of technical failures." See the comment on Rule 6(e).

David W. Ogden, Acting Assistant Attorney General, Civil Division, United States Department of Justice, 99-CV-014: Fully supports use

of electronic service with consent of the person served. But there is a risk that implied consent will be found, even from such simple acts as listing a fax or e-mail address on a letterhead. Rule 5(b)(2)(D) should be amended to refer to "other means, including electronic means, consented to in writing by the person served." And the Committee Note should include this added language:

> To be valid under subparagraph (D), consent must be explicit and in writing, and may not be implied. Parties are encouraged to specify the scope and duration of the consent, including, at a minimum, the persons to whom service should be made, the appropriate address or location for such service (e.g., for electronic service, the e-mail address or fax machine number), the format to be used for attachments, and the filings within a lawsuit to which the consent applies (e.g., the consent applies to all filings, only certain filings, or all non-jurisdictional filings). Such written consent may be provided through electronic communication.

Ralph W. Brenner, Esq., David H. Marion, Esq., and Stephen A. Madva, Esq., 99-CV-015: Support Rule 5 and 77 proposals. The "increase in efficiency will allow for our office to provide for more prompt and less costly service for our clients."

Francis Patrick Newell, Esq., 99-CV-016: Supports the Rule 5 and 77 proposals in terms similar to 99-CV-015.

William A. Fenwick,Esq.; David M. Lisi, Esq.; David C. McIntyre, Esq.; Mitchell Zimmerman, Esq. for Fenwick & West, 99-CV-017: (1) As a matter of style, urges that in 5(b)(1) and 5(b)(2) the expression "service is made" be changed to "service shall be made"; the change eliminates ambiguity and indicates clearly "that this provision is mandatory." (2) The reference to "address" in 5(b)(2)(B) and (C) should specify home address, office address, or either [present Rule 5(b) does not provide this specification]. (3) The provision that service is complete on "transmission" is ambiguous. The rule or the Committee Note should state that "service is complete upon successfully serving the document from the sender's server to the e-mail address designated in court papers by recipient." And it should make clear that the proper e-mail address is the one specified in the consent or in court papers.

Mark D. Reed, Esq., 99-BK-005: Wholeheartedly approves electronic service "(i.e. facsimile)"; "this manner of service is more effective than ordinary mail."

Hon. Dean Whipple, 99-CV- : Chief Judge Whipple reports on experience in W.D.Mo. as a prototpye CM/ECF court. A lawyer who agrees to participate in the CM/ECF system signs a statement agreeing to receive service of electronic filing on behalf of the client by hand, facsimile, authorized e-mail, or first-class mail. The party served in this way can read or download the paper from

the court's system. An electronic notice of filing apparently includes a hyperlink to the paper, facilitating prompt access. Chief Judge Whipple suggests this change in the language proposed for Rule 5(b)(2)(D): "Delivering a copy by any other means, including electronic ~~means~~ notice, consented to * * *."

Gap Report

Rule 5(b)(2)(D) was changed to require that consent be "in writing."

Rule 5(b)(3) is new. The published proposal did not address the question of failed service in the text of the rule. Instead, the Committee Note included this statement: "As with other modes of service, however, actual notice that the transmission was not received defeats the presumption of receipt that arises from the provision that service is complete on transmission. The sender must take additional steps to effect service. Service by other agencies is complete on delivery to the designated agency." The addition of paragraph (3) was prompted by consideration of the draft Appellate Rule 25(c) that was prepared for the meeting of the Appellate Rules Advisory Committee. This draft provided: "Service by electronic means is complete on transmission, unless the party making service is notified that the paper was not received." Although Appellate Rule 25(c) is being prepared for publication and comment, while Civil Rule 5(b) has been published and otherwise is ready to recommend for adoption, it seemed desirable to achieve some parallel between the two rules.

The draft Rule 5(b)(3) submitted for consideration by the Advisory Committee covered all means of service except for leaving a copy with the clerk of the court when the person to be served has no known address. It was not limited to electronic service for fear that a provision limited to electronic service might generate unintended negative implications as to service by other means, particularly mail. This concern was strengthened by a small number of opinions that say that service by mail is effective, because complete on mailing, even when the person making service has prompt actual notice that the mail was not delivered. The Advisory Committee voted to limit Rule 5(b)(3) to service by electronic means because this means of service is relatively new, and seems likely to miscarry more frequently than service by post. It was suggested during the Advisory Committee meeting that the question of negative implication could be addressed in the Committee Note. There was little discussion of this possibility. The Committee Note submitted above includes a "no negative implications" paragraph prepared by the Reporter for consideration by the Standing Committee.

The Advisory Committee did not consider at all a question that was framed during the later meeting of the Appellate Rules Advisory Committee. As approved by the Advisory Committee, Rule 5(b)(3) defeats service by electronic means "if the party making service

learns that the attempted service did not reach the person to be served." It says nothing about the time relevant to learning of the failure. The omission may seem glaring. Curing the omission, however, requires selection of a time. As revised, proposed Appellate Rule 25(c) provides: "Service by electronic means is complete on transmission, unless the party making service is notified within 3 calendar days after transmission that the paper was not received by the party served." The Appellate Rules Advisory Committee will have the luxury of public comment and another year to consider the desirability of this short period. If Civil Rule 5(b) is to be recommended for adoption now, no such luxury is available. This issue deserves careful consideration by the Standing Committee.

Several changes are made in the Committee Note. (1) It requires that consent "be express, and cannot be implied from conduct." This addition reflects a more general concern stimulated by a reported ruling that an email address on a firm's letterhead implied consent to email service. (2) The paragraph discussing service through the court's facilities is expanded by describing alternative methods, including "electronic link." (3) There is a new paragraph that states that the requirement of written consent can be satisfied by electronic means, and that suggests matters that should be addressed by the consent. (4) A paragraph is added to note the additional response time provided by amended Rule 6(e). (5) The final two paragraphs address newly added Rule 5(b)(3). The first explains the rule that electronic service is not effective if the person making service learns that it did not reach the person to be served. The second paragraph seeks to defeat any negative implications that might arise from limiting Rule 5(b)(3) to electronic service, not mail, not other means consented to such as commercial express service, and not service on another person on behalf of the person to be served.

Rule 6(e)

The Advisory Committee recommended that no change be made in Civil Rule 6(e) to reflect the provisions of Civil Rule 5(b)(2)(D) that, with the consent of the person to be served, would allow service by electronic or other means. Absent change, service by these means would not affect the time for acting in response to the paper served. Comment was requested, however, on the alternative that would allow an additional 3 days to respond. The alternative Rule 6(e) amendments are cast in a form that permits ready incorporation in the Bankruptcy Rules. Several of the comments suggest that the added three days should be provided. Electronic transmission is not always instantaneous, and may fail for any of a number of reasons. It may take three days to arrange for transmission in readable form. Providing added time to respond will not discourage people from asking for consent to electronic transmission, and may encourage people to give consent. The more who consent, the quicker will come the improvements that will make electronic service ever more attractive. Consistency with the

Bankruptcy Rules will be a good thing, and the Bankruptcy Rules Advisory Committee believes the additional three days should be allowed.

Rule 6(e)

(e) Additional Time After Service ~~by Mail~~ under Rule 5(b)(2)(B), (C), or (D). Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party ~~by mail~~ under Rule 5(b)(2)(B), (C), or (D), 3 days shall be added to the prescribed period.

Committee Note

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

Summary of Comments

Rule 6(e)

Robert F. Baker, Esq., 99-CV-001: Favors extending the 3-day rule to "any method of service other than personal delivery. This would cover those situations where electronic service is made on week-ends or the recipient is away from their home or office for three days or less."

James E. Seibert, Esq., 99-CV-003: The 3-day rule should apply "to all service, other than personal delivery," so "there will be less confusion" and consistency with the bankruptcy rules.

John P. Calandra, Esq., 99-CV-005: Wants 3-days in electronic service cases. Electronic service late Friday might not be seen until Monday, or after a further week for vacation. "There are enough sources of pressure on our practices without imposing a new one."

Joseph W. Phebus, Esq., 99-CV-006: Relays the responses of the firm's computer specialist. The specialist, focusing on date and time stamping and eventual notice that a message is not delivered, believes there is no need for the extra three days.

David E. Romine, Esq., 99-CV-007: Favors the added three days. E-mail is not yet as reliable as postal delivery. Most firms now have the capacity to make or receive service by electronic means, but few actually do so. The fear stems from continuing experience

that some messages arrive in garbled or completely unusable form. It may take a few days to reach the other attorney and arrange for usable delivery. A party who is thinking of resort to electronic service is not likely to be deterred by a rule allowing an additional three days to respond — "[m]y decision as to method of service has never been driven by my opponent's response time," and the desire to shorten response time does not seem to affect other lawyers in deciding between personal service or mail service. The added three days, in short, will not discourage people from asking for consent to electronic service, and will encourage people to give consent.

Charles L. Schlumberger, Esq., 99-CV-008: The three-day rule should be dropped entirely; all current deadlines could be extended by three or five days. "But ultimately, who really cares? If someone needs three days, they're going to get the extension in just about every case, unless they've managed to badly get on the wrong side of the judge."

Hon. Susan Pierson Sonderby: agrees that Rule 6(e) should not be amended to provide an additional three days following service by electronic means. The three days allowed for service by mail reflects the typical period required for delivery by mail. Electronic service should "entail the presumption of same day delivery."

Joanne Fitzgerald Ross, Esq., for State Bar of Michigan Committee of the United States Courts, 99-CV-012: Recommends against extending the response time when service is made under Rule 5(b)(2)(D), in part because of the recommendation that Rule 5(b)(2)(D) should be amended to require that service by fax be supplemented by simultaneously mailing a clean copy of the document.

Committees of the Association of the Bar of the City of New York, 99-CV-013: Recommend that one additional day be allowed when service is made by electronic means or by overnight courier, and that three additional days be allowed when service is made by non-overnight courier service. This balances the incentives for the party asking for consent to alternative means of service and for the party asked to give consent.

David W. Ogden, Acting Assistant Attorney General, Civil Division, United States Department of Justice, 99-CV-014: Favors at least one added day. Current e-mail technology "is not always instantaneous and is not uniformly reliable." Few e-mail systems have "return receipt" mechanisms that are as reliable as those available for fax transmission. If large volumes of material are transmitted, the receiving equipment may lack the ability to store or print the material. Additional time also will encourage use of electronic service. Expanded use will encourage more rapid development of legal and technical standards, and will prompt lawyers to develop better methods for dealing with incoming materials. These developments will speed the migration toward electronic service.

Ralph W. Brenner, Esq., David H. Marion, Esq., Stephen A. Madva, Esq., 99-CV-015: Comments at the end that consistency between Civil Rules and Bankruptcy Rules "will enhance speedy and smooth processing of litigation." This comment may be intended to bear on the Rule 6(e) question. (The same comment is made by Francis Patrick Newell, 99-CV-016.)

William A. Fenwick,Esq.; David M. Lisi, Esq.; David C. McIntyre, Esq.; Mitchell Zimmerman, Esq. for Fenwick & West, 99-CV-017: The extra three days should be given. This will encourage consent; it reflects the potential for delay in transmission; and it will avoid any incentive to litigation gamesmanship.

Hon. Louise de Carl Adler, for Conference of Chief Bankruptcy Judges of Ninth Circuit, 99-BK-009: There are good arguments on both sides of the extra three-days question, but "we unanimously concluded that whatever policy is ultimately adopted, it should be the same for both the bankruptcy rules and the civil rules."

Martha L. Davis, Esq., for Executive Office for U.S. Trustees, 99-BK-012: Supports giving the additional three days. E-mail and other means of communication are still infants, and will experience technical difficulties. A transmitted message may be received after significant delay, and may not be intact; attached files may be corrupted and require retransmission; incompatible word-processing programs may create difficulties; offices with many lawyers may need to develop tracking systems. Consent will be encouraged by adding the three days. The three-day rule is familiar for mail service, and has not unduly delayed proceedings. If the three days are not allowed, parties may seek time extensions. And, looking to Civil Rule 6(e), uniformity between the bankruptcy and civil rules is important.

Gap Report

Proposed Rule 6(e) is the same as the "alternative proposal" that was published in August 1999.

Rule 77(d)

(d) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry ~~by mail~~ in the manner provided for in Rule 5(b) upon each party who is not in default for failure to appear, and shall make a note in the docket of the ~~mailing~~ service. Any party may in addition serve a notice of such entry in the manner provided in Rule 5(b) for the service of papers. * * *

Committee Note

Rule 77(d) is amended to reflect changes in Rule 5(b). A few

courts have experimented with serving Rule 77(d) notices by electronic means on parties who consent to this procedure. The success of these experiments warrants express authorization. Because service is made in the manner provided in Rule 5(b), party consent is required for service by electronic or other means described in Rule 5(b)(2)(D). The same provision is made for a party who wishes to ensure actual communication of the Rule 77(d) notice by also serving notice.

Summary of Comments

Rule 77(d)

Jack E. Horsley, Esq., 99-CV-004: Recommends adding these words: "the clerk shall serve a notice of the entry by hand or otherwise in the manner provided for in Rule 5(b) * * *."

Charles L. Schlumberger, Esq., 99-CV-008: Favors electronic notice from the clerk, although not among lawyers. The Eighth Circuit's VIA program seems to work satisfactorily.

Hon. Susan Pierson Sonderby, 99-CV-010: there is a drafting error at the end of the first sentence, to be corrected: "and shall make a note in the docket of the ~~mailing~~ service." (A similar suggestion is made by the Committees of the Association of the Bar of the City of New York, 99-CV-013, except that they would change "mailing" to "transmission." "Service" seems to fit better the general incorporation of Rule 5(b).)

William A. Fenwick,Esq.; David M. Lisi, Esq.; David C. McIntyre, Esq.; Mitchell Zimmerman, Esq. for Fenwick & West, 99-CV-017: They propose deleting the second sentence of present Rule 77(d), which authorizes a party to serve notice of the entry of judgment. This provision is characterized as "excess verbiage." The relationship of this sentence to Appellate Rule 4(a)(6)(A) is not noted.

Michael E. Kunz, Clerk of Court, E.D.Pa., 99-CV-018: Provides extensive statistics on the highly successful use of facsimile transmission to provide Rule 77(d) notice. The program "has been remarkably successful," effecting notice more rapidly and at lower cost than postal delivery. Mr. Kunz is pleased that his recommendation for amendments in Rule 5(b) and 77(d) has been endorsed by the Advisory Committee.

Gap Report

Rule 77(d) was amended to correct an oversight in the published version. The clerk is to note "service," not "mailing," on the docket.

I B. Abrogate Copyright Rules; Amend Rules 65(g), 81(a)(1)

The proposals published in August 1999 include a package that would abrogate the obsolete Copyright Rules of Practice adopted under the 1909 Copyright Act. A new Rule 65(f) would be added, confirming the common practice that has substituted Rule 65 preliminary relief procedures for the widely ignored Copyright Rules. Rule 81(a)(1) would be amended to delete the obsolete references to the Copyright Rules, and also to improve the expression of the relationship between the Civil Rules and the Bankruptcy Rules. Such little public comment as was provided on these changes was favorable. The Advisory Committee discussion is summarized at page 9 of the draft Minutes.

Rule 65. Injunctions

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

Committee Note

New subdivision (f) is added in conjunction with abrogation of the antiquated Copyright Rules of Practice adopted for proceedings under the 1909 Copyright Act. Courts have naturally turned to Rule 65 in response to the apparent inconsistency of the former Copyright Rules with the discretionary impoundment procedure adopted in 1976, 17 U.S.C. § 503(a). Rule 65 procedures also have assuaged well-founded doubts whether the Copyright Rules satisfy more contemporary requirements of due process. See, e.g., *Religious Technology Center v. Netcom On-Line Communications Servs., Inc.*, 923 F.Supp. 1231, 1260-1265 (N.D.Cal.1995); *Paramount Pictures Corp. v. Doe*, 821 F.Supp. 82 (E.D.N.Y.1993); *WPOW, Inc. v. MRLJ Enterprises*, 584 F.Supp. 132 (D.D.C.1984).

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

This new subdivision (f) does not limit use of trademark

procedures in cases that combine trademark and copyright claims. Some observers believe that trademark procedures should be adopted for all copyright cases, a proposal better considered by Congressional processes than by rulemaking processes.

Summary of Comments

The only comments are incidental to the brief comments on the Copyright Rules of Practice, set out below. They approve the proposal.

Gap Report

No change has been made.

Rule 81. Applicability in General

(a) ~~To What~~ Proceedings to which the Rules Apply~~icable.~~

(1) These rules do not apply to prize proceedings in admiralty governed by Title 10, U.S.C., §§ 7561-7681. They do ~~not~~ apply to proceedings in bankruptcy as provided by the Federal Rules of Bankruptcy Procedure ~~or to proceedings in copyright under Title 17, U.S.C., except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States. They do not apply to mental health proceedings in the United States District Court for the District of Columbia~~. * * *

Committee Note

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

The District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub.L. 91-358, 84 Stat. 473, transferred mental health proceedings formerly held in the United States District Court for the District of Columbia to local District of Columbia courts. The provision ~~applying~~ that the Civil Rules do not apply to these proceedings is deleted as superfluous.

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

Summary of Comments

Prof. Peter Lushing, 99-CV-009: The Committee Note to Rule 81 should say that the amendment deletes the provision that the rules do not apply in D.C. mental health proceedings.

Gap Report

The Committee Note was amended to correct the inadvertent

omission of a negative. As revised, it correctly reflects the language that is stricken from the rule.

RULES OF PRACTICE AS AMENDED

Rule 1

Proceedings in actions brought under section 25 of the Act of March 4, 1909, entitled "An Act to amend and consolidate the acts respecting copyright", including proceedings relating to the perfecting of appeals, shall be governed by the Rules of Civil Procedure, in so far as they are not inconsistent with these rules.

Rule 3

Upon the institution of any action, suit or proceeding, or at any time thereafter, and before the entry of final judgment or decree therein, the plaintiff or complainant, or his authorized agent or attorney, may file with the clerk of any court given jurisdiction under section 34 of the Act of March 4, 1909, an affidavit stating upon the best of his knowledge, information and belief, the number and location, as near as may be, of the alleged infringing copies, records, plates, molds, matrices, etc., or other means for making the copies alleged to infringe the copyright, and the value of the same, and with such affidavit shall file with the clerk a bond executed by at least two sureties and approved by the court or a commissioner thereof.

Rule 4

Such bond shall bind the sureties in a specified sum, to be fixed by the court, but not less than twice the reasonable value of such infringing copies, plates, records, molds, matrices, or other means for making such infringing copies, and be conditioned for the prompt prosecution of the action, suit or proceeding, for the return of said articles to the defendant, if they or any of them are adjudged not to be infringements, or if the action abates, or is discontinued before they are returned to the defendant, and for the payment to the defendant of any damages which the court may award to him against the plaintiff or complainant. Upon the filing of said affidavit and bond, and the approval of said bond, the clerk shall issue a writ directed to the marshal of the district where the said infringing copies, plates, records, molds, matrices, etc., or other means of making such infringing copies shall be stated in said affidavit to be located, and generally to any marshal of the United States, directing the said marshal to forthwith seize and hold the same subject to the order of the court issuing said writ, or of the court of the district in which the seizure shall be made.

Rule 5

The marshal shall thereupon seize said articles or any

smaller or larger part thereof he may then or thereafter find, using such force as may be reasonably necessary in the premises, and serve on the defendant a copy of the affidavit, writ, and bond by delivering the same to him personally, if he can be found within the district, or if he can not be found, to his agent, if any, or to the person from whose possession the articles are taken, or if the owner, agent, or such person can not be found within the district, by leaving said copy at the usual place of abode of such owner or agent, with a person of suitable age and discretion, or at the place where said articles are found, and shall make immediate return of such seizure, or attempted seizure, to the court. He shall also attach to said articles a tag or label stating the fact of such seizure and warning all persons from in any manner interfering therewith.

Rule 6

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

Rule 7

Within three days after the articles are seized, and a copy of the affidavit, writ and bond are served as hereinbefore provided, the defendant shall serve upon the clerk a notice that he excepts to the amount of the penalty of the bond, or to the sureties of the plaintiff or complainant, or both, otherwise he shall be deemed to have waived all objection to the amount of the penalty of the bond and the sufficiency of the sureties thereon. If the court sustain the exceptions it may order a new bond to be executed by the plaintiff or complainant, or in default thereof within a time to be named by the court, the property to be returned to the defendant.

Rule 8

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

Rule 9

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

~~Rule 10~~

~~Thereupon the court in its discretion, and after such hearing as it may direct, may order such return upon the filing by the defendant of a bond executed by at least two sureties, binding them in a specified sum to be fixed in the discretion of the court, and conditioned for the delivery of said specified articles to abide the order of the court. The plaintiff or complainant may require such sureties to justify within ten days of the filing of such bond.~~

~~Rule 11~~

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

~~Rule 12~~

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

~~Rule 13~~

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

Summary of Comments

Jack E. Horsley, Esq., 99-CV-004 (Nov. 2 installment): The observation that the Copyright Rules are antiquated is "well taken." But is concerned that perhaps Copyright Rule 13 should be renumbered and preserved in some form because there is "nothing else which would address the matter of service in disputes involving the marshal or their being entitlement to the same fees as those allowed for similar services."

Charles L. Schlumberger, Esq., 99-CV-008: "Wholeheartedly" agrees with abrogation and the corresponding changes in Rules 65(f) and 81. Not only are some lawyers unaware of the Copyright Rules; "there are some judges who fall into that category, too!"

William A. Fenwick,Esq,; David M. Lisi, Esq.; David C. McIntyre, Esq.; Mitchell Zimmerman, Esq. for Fenwick & West, 99-CV-017: The firm specializes in high technology law, including copyright law. They "fully support" abrogation of the copyright rules and the corresponding changes in Rules 65(f) and 81. "[T]he Copyright Rules of Practice are arcane and fundamentally unfair."

Gap Report

No change has been made.

I C. Rule 82

Rule 82 concludes by referring to 28 U.S.C. §§ 1391 to 1393. Section 1393 was repealed in 1988. The Advisory Committee recommends correction of the anomaly as a technical conforming change that can be adopted without publication for comment. As revised, the final sentence of Rule 82 would read:

> An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C. §§ 1391-~~93~~1392.

Committee Note

The final sentence of Rule 82 is amended to delete the reference to 28 U.S.C. § 1393, which has been repealed.

Style Comment

The recommendation that the change be made without publication carries with it a recommendation that style changes not be made. Styling would carry considerable risks. The first sentence of Rule 82, for example, states that the Civil Rules do not "extend or limit the jurisdiction of the United States district courts." That sentence is a flat lie if "jurisdiction" includes personal or quasi-in rem jurisdiction. The styling project on this rule requires publication and comment.

II Action Items: Proposals for Publication

Each of the three proposals to publish amendments for comment is the result of work coordinated with other advisory committees. The disqualification disclosure proposal involves several other committees. The proposal on entry of judgment involves the Appellate Rules Advisory Committee. The Rule 81(a)(2) proposal involves the Criminal Rules Committee.

II A: Disqualification Disclosure

The question of financial disclosure has been raised by the Committee on Codes of Conduct and was delegated to the several advisory committees by the Standing Committee. The Appellate Rules have, in Rule 26.1, the only present national rule on disclosure. Most of the circuits also have local rules that supplement the requirements of Rule 26.1. Disclosure requirements in the district courts are established by practice or local rule. The local circuit and district rules differ substantially among themselves. Substantial concern has arisen from two well-publicized newspaper accounts of situations in which federal judges failed to recognize investment conflicts that should have led to recusal. It may be desirable to respond to these pressures by publishing for comment a uniform disclosure rule that would apply to civil and criminal proceedings in the district courts, and to all proceedings in the courts of appeals. The uniform rule may also provide the template for a Bankruptcy Rule, but there are special problems that most likely will require development of special provisions that distinguish the Bankruptcy Rule from the uniform rule.

Two central needs must be recognized. The first is to get information from the parties to all actions. The second is to bring this information home to each judge who acts in a case. Although a national rule can direct that the clerk provide the information to each judge — and such a direction is included in draft Rule 7.1 — this problem is an internal administrative problem to be handled primarily within each court. The central focus of a national rule will be the need to get information from the parties. It is not entirely clear that even this subject should be addressed by a Rule of Appellate, Bankruptcy, Civil, or Criminal Procedure. The subject seems within the scope of the Enabling Act, however, and Appellate Rule 26.1 has already set an example.

If there is to be a national rule that requires some measure of uniform disclosure, the extent of the disclosure must be chosen. No one believes that a national rule can require disclosure of all the information that might be relevant to a recusal decision. Nor does anyone claim to know what reduced level of disclosure would reach the most common and important grounds for recusal. It is generally agreed that Appellate Rule 26.1 disclosure will cover a major fraction of the circumstances that actually call for disclosure, but no one can say whether the proportion is 60%, 90%,

or some more reassuring number. Few have suggested that a national rule should require disclosure about the attorneys who appear in a case; the focus commonly is on parties, excluding even amici curiae. (An addition might be made in the criminal rules to require disclosure of any corporation that may benefit from a restitution award.) As to parties, the focus commonly is on financial information, not on personal information. Appellate Rule 26.1 narrows this focus still further, addressing only parties that are nongovernmental corporations, and requiring information only about "parent corporations and * * * any publicly held company that owns 10% or more of" the corporation's stock.

Appellate Rule 26.1 is about as narrow a financial disclosure rule as could be drafted. When a somewhat broader form of Rule 26.1 was adopted in 1989, the Committee Note recognized the rule represented "minimum disclosure requirements" and observed that a court of appeals could "require additional information * * * by local rule." Although many local circuit rules do require additional information, there is no common pattern. Some require only modest additional disclosures; some require a great deal of additional information. These rules, and local district rules, are described in the Federal Judicial Center materials that accompany the present drafts.

The Civil Rules Advisory Committee considered draft rules that embodied several different approaches to disclosure, along with many different draft Committee Note provisions. The discussion is summarized at pages 9 to 15 of the draft Minutes. Two major questions were emphasized. The first is whether the time has come to require more extensive disclosures than Appellate Rule 26.1 requires. The Committee on Codes of Conduct believes that the best approach is simply to adopt Appellate Rule 26.1 in the rules that govern the district courts. The Advisory Committee agreed that it would not be wise to attempt to enshrine more detailed requirements in the Rules of Appellate, Bankruptcy, Civil, or Criminal Procedure. But it also concluded that it is desirable to leave the way open for adoption of additional disclosure requirements by a procedure that is more flexible than the Rules Enabling Act procedure. Inspiration for additional disclosure requirements may arise from at least two sources. Many courts, both circuit and district, require disclosures that extend beyond Appellate Rule 26.1. Experience with these local requirements may support development of more detailed national requirements. A second source of support for more detailed rules may be the continuing development of judicial support software. As computer systems become ever more powerful, it may prove feasible to bring together more complicated bodies of information about individual judges and about those involved in litigation. Draft Rule 7.1 leaves the way open to take advantage of these possible developments by authorizing adoption of a disclosure form by the Judicial Conference. There is no mandate that a form be developed. But there was strong support for the conclusion that if additional

disclosures are to be required, the best procedure for developing the requirements lies in the Judicial Conference. The Judicial Conference can act with the support of the Codes of Conduct Committee and the Administrative Office, and can adjust any form that may be adopted with greater facility than the Enabling Act permits.

The second question was whether the national rules should be framed to preempt local rules. This question is made difficult by competing considerations. Preemption of local rules can be easily supported. There is no apparent reason to believe that there is any local variation in the circumstances that affect the desirable level of disclosure. If the proposed model is the best disclosure rule, national uniformity has important advantages. One advantage is adherence to the Enabling Act ideal that there be uniform federal procedures. A second advantage is that parties and law firms that regularly appear in different federal courts are spared the burden of learning local rules and generating the different sets of information required by different local rules. Continued recognition of local rules, however, also can be easily supported. The Appellate Rules Advisory Committee recognized the role of local circuit rules when it first drafted Appellate Rule 26.1 in a form that required greater disclosure than the more recently amended version of Rule 26.1. This recognition reflected the drafting history, which began with more detailed disclosure requirements but receded in the face of substantial opposition. Most of the circuits have in fact adopted local rules that require disclosures more detailed than Rule 26.1 requires. Some district courts, acting in the absence of any national rule, also have adopted local rules that require disclosures more detailed than Rule 26.1 disclosure. This experience suggests that the minimal requirements of Rule 26.1 may not embody the best long-range approach. The compromise embodied in draft Rule 7.1 is to address local rules only in the Committee Note. The final paragraph of the Committee Note states that Rule 7.1 does not prohibit local rules unless the Judicial Conference adopts a disclosure form that preempts local rules.

Proposed Rule 7.1(c), which directs the clerk to deliver a copy of the Rule 7.1(a) disclosure to each judge acting in the action or proceeding, does not have a parallel in the drafts of Appellate Rule 26.1 and Criminal Rule 12.4. The Civil Rules Advisory Committee believes that there are justifications that distinguish the Civil Rules from the Appellate Rules and Criminal Rules on this matter. The experience of some committee members is that disclosure information does not always come promptly to the district judge. An express direction to the clerk will help ensure that the disclosure accomplishes the intended function. The other rules address different circumstances. Appellate Rule 26.1(b) requires that the disclosure be included in a party's principal brief, assuring that it will come to the attention of each judge who considers the appeal on the merits. The occasions for action

by a circuit judge before the principal briefs are filed are not so frequent as to require a direction to the clerk. Relatively few criminal cases involve corporate parties, and not many involve likely corporate restitution recipients.

Rule 7.1 Disclosure

(a) Required Disclosure. A party to [that appears in] an action or proceeding in a district court must:

(1) if it is a nongovernmental corporation, file two copies of a statement that

(A) identifies all its parent corporations [companies?] and also identifies any publicly held company [corporation?] that owns 10% or more of its stock, or

(B) states that there is nothing to report under Rule 7(a)(1)(A); and

(2) file two copies of a form providing any additional information required by the Judicial Conference of the United States.

(b) Time for Filing. A party must file the Rule 7.1(a) statement or form with its first appearance, pleading, petition, motion, response, or other request addressed to the court. A supplemental statement or form must be filed promptly upon any change in the circumstances that Rule 7.1(a) requires the party to identify.

(c) Form Delivered to Judge. The clerk must deliver a copy of the Rule 7.1(a) disclosure to each judge acting in the action or proceeding.

Committee Note

Rule 7.1 is drawn from Rule 26.1 of the Federal Rules of Appellate Procedure, with changes to adapt to the circumstances of district courts that dictate different provisions for the time of filing, number of copies, and the like. The information required by Rule 7.1(a)(1) reflects the "financial interest" standard of Canon 3C(1)(c) of the Code of Conduct for United States Judges. This information will support properly informed disqualification decisions in situations that call for automatic disqualification under Canon 3C(1)(c). It does not cover all of the circumstances that may call for disqualification under the subjective financial interest standard, and does not deal at all with other circumstances that may call for disqualification.

Although the disclosures required by Rule 7.1(a)(1) may seem limited, they are calculated to reach a majority of the circumstances that are likely to call for disqualification on the

basis of financial information that a judge may not know or recollect. Framing a rule that calls for more detailed disclosure will be difficult. Unnecessary disclosure requirements place a burden on the parties and on courts. Unnecessary disclosure of vast volumes of information may create a risk that a judge will overlook the one bit of information that might require disqualification, and also may create a risk that unnecessary disqualifications will be made rather than attempt to unravel a potentially difficult question. It has not been feasible to dictate more detailed disclosure requirements in Rule 7.1(a)(1).

Despite the difficulty of framing more detailed disclosure requirements, developing experience with divergent disclosure practices and with improving technology may provide the foundations for exacting additional requirements. The Judicial Conference, supported by the committees that work regularly with the Codes of Judicial Conduct and by the Administrative Office of the United States Courts, is in the best position to develop any additional requirements and to keep them adjusted to new information. Rule 7.1(a)(2) authorizes adoption of additional disclosure requirements by the Judicial Conference, to be embodied in a uniform form that can be used by all courts.

Rule 7.1(a)(2) requires every party to file a disclosure form if the Judicial Conference acts to adopt a form that reaches a party that is not a nongovernmental corporation. It cannot be predicted what information will be required, of what parties, if the Judicial Conference adopts a form. The Judicial Conference may adopt a form that applies only to some, not all parties. In that case, only the designated parties need file. Even if the form applies to all parties, it seems likely that many parties, and particularly individual parties, will not have any information that falls within the required categories. In that case, the Rule 7.1(a)(2) requirement is satisfied by filing a form that indicates that there is nothing to disclose as to any of the required categories.

Rule 7.1 does not prohibit local district or circuit rules that require disclosures in addition to those required by Rule 7.1 unless the Judicial Conference adopts a form that [expressly] preempts additional disclosures.

II B: Rules 54 and 58: Entry of Judgment

The Civil Rules Advisory Committee became involved with the entry-of-judgment question at the January 2000 Standing Committee meeting. The Appellate Rules Advisory Committee raised for discussion the problems that arise from the interplay of Appellate Rule 4 with Civil Rule 58. Appellate Rule 4 sets appeal time from the entry of judgment. Civil Rule 58 requires that a judgment be set forth on a separate document. The combination of these two rules has created a problem because district courts frequently ignore the separate document requirement. Failure to enter the final judgment on a separate document means that appeal time never starts to run. The Appellate Rules Advisory Committee is concerned that the judicial landscape is littered with many "time bombs" in the form of years-old judgments that at any time could explode into an appeal, shattering the victors' repose and potentially burdening the courts with further proceedings in disputes that have become stale if not petrified.

A satisfactory solution to this problem cannot be found in the Appellate Rules alone. The obvious strategy of decoupling Appellate Rule 4 from Civil Rule 58 creates real problems because the time for post-judgment motions in the district court would remain coupled to Rule 58. Civil Rules 50, 52, and 59 all require that motions be filed within 10 days after entry of judgment. The time for a motion to vacate under Civil Rule 60(b)(1), (2), or (3) also is geared to the time judgment is entered. If Appellate Rule 4 were to approach the problem in isolation, the result would be that appeal time could expire before the time had begun to run for motions for judgment as a matter of law, to amend findings of fact, for a new trial, or to alter or amend the judgment. Disposition of a post-appeal time motion could in turn lead to a timely appeal from denial or from an amended judgment.

Several approaches could be taken in joint consideration of these problems. One would begin with the definition of "judgment" in Civil Rule 54(a). The Civil Rules Advisory Committee put this approach aside with little discussion because the Rule 54(a) definition presents many horrid theoretical problems that in practice seem to have caused no real difficulty. A second approach would be to abandon the separate document requirement, which was added to the rules to provide a clear signal for the running of appeal time. The Civil Rules Advisory Committee resisted this approach in the belief that the separate document requirement remains valuable. A clear starting point is desirable not only for appeal time but also for the unalterable (Civil Rule 6(b)) time limits for the several post-judgment motions that are geared to the entry of judgment. Adherence to the separate judgment requirement, moreover, is simple. These considerations are not overwhelming, however, and the Advisory Committee recommends that if proposed Rule 58 is published, comments be solicited on the question whether the separate document requirement should be abandoned. A third approach might be to abandon the "mandatory and jurisdictional"

character of appeal time limits, a complex undertaking that need not be approached if a simpler solution can be found.

The resolution recommended for publication amends Civil Rule 58. Rule 58(a) retains the separate document requirement, but makes exceptions for orders disposing of any of the several motions that, under Appellate Rule 4, suspend appeal time. These exceptions respond to one of the problems explored by the Appellate Rules Advisory Committee. The courts of appeals have generated a confused body of discordant rulings on the need to use a separate document to set forth an order disposing of one of these motions. The exceptions are drafted in terms more general than the Appellate Rule 4 provisions for the sake of simplicity. Appellate Rule 4(a)(4)(A)(iii), for example, suspends appeal time on timely motion for attorney fees only if the district court acts under Civil Rule 58 to extend appeal time. Draft Rule 58(a)(1)(C) deletes the qualification in the belief that if district courts now overlook the separate document requirement with some frequency, it is too much to ask that a separate document be created for disposition of a motion for attorney fees if, but only if, appeal time has been extended.

The central feature for resolving the "time bomb" problem is Rule 58(b). As now, entry of judgment requires entry on the civil docket. If Rule 58(a) requires that the judgment be set forth on a separate document, the time of entry for purposes of Rules 50, 52, 54(d)(2)(B), 59, 60, and 62 occurs on one of two events: the judgment is set forth on a separate document and entered on the civil docket, or the judgment is entered on the civil docket and 60 days expire without setting the judgment forth on a separate document. The fuse that now can be ignited only by setting the judgment forth in a separate document is replaced by a relatively fast fuse that automatically starts to burn 60 days after judgment is entered on a separate document. A party anxious to avoid this 60-day delay, moreover, is encouraged by draft Rule 58(d) to request entry on a separate document.

Draft Appellate Rule 4(a)(7) completes the solution by adopting draft Civil Rule 58 for appeal-time purposes.

A conforming change is proposed for Rule 54(d)(2)(C), deleting the separate document requirement. This proposal also includes a minor change that would conform the time requirement in Rule 54(d)(2)(B) to the requirement recently made uniform in Rules 50, 52, and 59 — the motion for attorney fees must be filed no later than 14 days after entry of judgment, not both filed and served.

The Advisory Committee discussion of Rules 54 and 58 is summarized at pages 15 to 20 of the draft Minutes.

Rule 58. Entry of Judgment

~~Subject to the provisions of Rule 54(b): (1) upon a general~~

~~verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court, (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the clerk shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except that, when a timely motion for attorneys' fees is made under Rule 54(d)(2), the court, before a notice of appeal has been filed and has become effective, may order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.~~

(a) Separate Document.

(1) Every judgment and amended judgment must be set forth on a separate document, but a separate document is not required for an order disposing of a motion:

(A) for judgment under Rule 50(b);

(B) to amend or make additional findings of fact under Rule 52(b);

(C) for attorney fees under Rule 54;

(D) for a new trial, or to alter or amend the judgment, under Rule 59; or

(E) for relief under Rule 60.

(2) Subject to [the provisions of] Rule 54(b):

(A) the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when:

(i) the jury returns a general verdict, or

(ii) the court awards only costs or a sum certain, or denies all relief;

(B) the court must promptly approve the form of the judgment, which the clerk must promptly enter, when:

(i) the jury returns a special verdict or a general verdict accompanied by interrogatories, or

(ii) the court grants other relief not described in Rule 58(a)(2).

(b) Time of Entry. Judgment is entered for purposes of Rules 50, 52, 54(d)(2)(B), 59, 60, and 62:

(1) when it is entered in the civil docket under Rule 79(a), and

(2) if a separate document is required by Rule 58(a)(1), upon the earlier of these events:

(A) when it is set forth on a separate document, or

(B) when 60 days have run [expired] from entry on the civil docket under Rule 79(a).

(c) Cost or Fee Awards.

(1) Entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except as provided in Rule 58(c)(2).

(2) When a timely motion for attorney fees is made under Rule 54(d)(2) the court may act before a notice of appeal has been filed and has become effective to order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59.

(d) Request for Entry. A party may request that judgment be set forth on a separate document as required by Rule 58(a)(1).

Committee Note

Rule 58 has provided that a judgment is effective only when set forth on a separate document and entered as provided in Rule 79(a). This simple requirement has been ignored in many cases. The result of failure to enter judgment is that the time for making motions under Rules 50, 52, 54(d)(2)(B), 59, and some motions under Rule 60, never begins to run. The time to appeal under Appellate Rule 4(a) also does not begin to run. There have been few visible problems with respect to Rule 50, 52, 54(d)(2)(B), 59, or 60 motions, but there have been many and horridly confused problems under Appellate Rule 4(a). These amendments are designed to work in conjunction with Appellate Rule 4(a) to ensure that appeal time does not linger on indefinitely, and to maintain the integration of the time periods set for Rules 50, 52, 54(d)(2)(B), 59, and 60 with Appellate Rule 4(a).

Rule 58(a) preserves the core of the present separate document requirement, both for the initial judgment and for any amended judgment. No attempt is made to sort through the confusion that some courts have found in addressing the elements of a separate document. It is easy to prepare a separate document that recites the terms of the judgment without offering additional explanation or citation of authority. Forms 31 and 32 provide examples.

Rule 58(a) is amended, however, to address a problem that arises under Appellate Rule 4(a). Some courts treat such orders as those that deny a motion for new trial as a "judgment," so that appeal time does not start to run until the order is entered on a separate document. Without attempting to address the question whether such orders are appealable, and thus judgments as defined by Rule 54(a), the amendment provides that entry on a separate document is not required for an order disposing of the motions listed in Appellate Rule 4(a). The enumeration of motions drawn from the Appellate Rule 4(a) list is generalized by omitting details that are important for appeal time purposes but that would unnecessarily complicate the separate document requirement. As one example, it is not required that any of the enumerated motions be timely. Many of the enumerated motions are frequently made before judgment is entered. The exemption of the order disposing of the motion does not excuse the obligation to set forth the judgment itself on a separate document.

Rule 58(b) discards the attempt to define the time when a judgment becomes "effective." Taken in conjunction with the Rule 54(a) definition of a judgment to include "any order from which an appeal lies," the former Rule 58 definition of effectiveness could cause strange difficulties in implementing pretrial orders that are appealable under interlocutory appeal provisions or under expansive theories of finality. Rule 58(b) replaces the definition of effectiveness with a new provision aimed directly at the time for making post-trial and post-judgment motions. If judgment is promptly set forth on a separate document, as should be done, the new provision will not change the effect of Rule 58. But in the cases in which court and clerk fail to comply with this simple requirement, the motion time periods set by Rules 50, 52, 54, 59, and 60 begin to run after expiration of 60 days from entry of the judgment on the civil docket as required by Rule 79(a).

A companion amendment of Appellate Rule 4(a)(7) integrates these changes with the time to appeal.

Rule 58(b) also defines entry of judgment for purposes of Rule 62. There is no reason to believe that the Rule 62(a) stay of execution and enforcement has encountered any of the difficulties that have emerged with respect to appeal time. It seems better, however, to have a single time of entry for motions, appeal, and enforcement.

This Rule 58(b) amendment defines "time of entry" only for purposes of Rules 50, 52, 54, 59, 60, and 62. This limit reflects

the problems that have arisen with respect to appeal time periods, and the belief that Rule 62 should be coordinated with Rules 50, 52, 59, and 60. In this form, the amendment does not resolve all of the perplexities that arise from the literal interplay of Rule 54(a) with Rule 58. In theory, the separate document requirement continues to apply, for example, to an interlocutory order that is appealable as a final decision under collateral-order doctrine. Appealability under collateral-order doctrine should not be complicated by failure to enter the order as a judgment on a separate document — there is little reason to force trial judges to speculate about the potential appealability of every order, and there is no means to ensure that the trial judge will always reach the same conclusion as the court of appeals. Appeal time should start to run when the collateral order is entered without regard to creation of a separate document and without awaiting expiration of the 60 days provided by Rule 58(b)(2). Drastic surgery on Rules 54(a) and 58 would be required to address this and related issues, however, and it is better to leave this conundrum to the pragmatic disregard that seems its present fate. The present amendments do not seem to make matters worse, apart from one false appearance. If a pretrial order is set forth on a separate document that meets the requirements of Rule 58(b), the time to move for reconsideration seems to begin to run, perhaps years before final judgment. And even if there is no separate document, the time to move for reconsideration seems to begin 60 days after entry on the civil docket. This apparent problem is resolved by Rule 54(b), which expressly permits revision of all orders not made final under Rule 54(b) "at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

New Rule 58(d) replaces the provision that attorneys shall not submit forms of judgment except on direction of the court. This provision was added to Rule 58 to avoid the delays that were frequently encountered by the former practice of directing the attorneys for the prevailing party to prepare a form of judgment, and also to avoid the occasionally inept drafting that resulted from attorney-prepared judgments. See *11 Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d*, § 2786. The express direction in Rule 58(a)(2) for prompt action by the clerk, and by the court if court action is required, addresses this concern. The new provision allowing any party to move for entry of judgment on a separate document will protect all needs for prompt commencement of the periods for motions, appeals, and execution or other enforcement.

Rule 54. Judgments; Costs

* * *

(d) Costs; Attorneys' Fees.

* * *

(2) *Attorneys' Fees.*

(A) Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.

(B) Unless otherwise provided by statute or order of the court, the motion must be filed ~~and served~~ no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.

(C) On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion in accordance with Rule 43(e) or Rule 78. The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which liability is imposed by the court. The court shall find the facts and state its conclusions of law as provided in Rule 52(a)~~, and a judgment shall be set forth in a separate document as provided in Rule 58~~.

* * *

Committee Note

Subdivision (d)(2)(C) is amended to delete the requirement that judgment on a motion for attorney fees be set forth in a separate document. This change complements the amendment of Rule 58(a)(1), which deletes the separate document requirement for an order disposing of a motion for attorney fees under Rule 54. These changes are made to support amendment of Rule 4 of the Federal Rules of Appellate Procedure. It continues to be important that a district court make clear its meaning when it intends an order to be the final disposition of a motion for attorney fees.

The requirement in subdivision (d)(2)(B) that a motion for attorney fees be not only filed but also served no later than 14 days after entry of judgment is changed to require filing only, to establish a parallel with Rules 50, 52, and 59. Service continues to be required under Rule 5(a).

II C: Rule 81(a)(2)

Rule 81(a)(2) now includes provisions governing the time to make a return to a petition for habeas corpus. These provisions are inconsistent with statutory provisions, and also are inconsistent with provisions in the separate sets of habeas corpus rules that are still more inconsistent with the statutory provisions. The Criminal Rules Committee will propose some changes in the rules that govern habeas corpus proceedings and those that govern 28 U.S.C. § 2255 motions to vacate sentence. The Criminal Rules Advisory Committee has recommended that all reference to these matters should be stricken from Rule 81(a)(2). The Civil Rules Advisory Committee agreed, recommending publication of the draft Rule 81(a)(2) revision set out below at the same time as the parallel Criminal Rules Committee proposals are published.

Rule 81. Applicability in General

(a) To What Proceedings Applicable.

* * *

(2) These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that the practice in such proceedings is not set forth in statutes of the United States, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings, and has heretofore conformed to the practice in civil actions. ~~The writ of habeas corpus, or order to show cause, shall be directed to the person having custody of the person detained. It shall be returned within 3 days unless for good cause shown additional time is allowed which in cases brought under 28 U.S.C. § 2254 shall not exceed 40 days, and in all other cases shall not exceed 20 days.~~

Committee Note

This amendment brings Rule 81(a)(2) into accord with the Rules governing § 2254 and § 2255 proceedings; those rules govern as well habeas corpus proceedings under § 2241. In its present form, Rule 81(a)(2) includes return-time provisions that are inconsistent with the provisions in the Rules Governing §§ 2254 and 2255. The inconsistency should be eliminated, and it is better that the time provisions continue to be set out in the other rules without duplication in Rule 81. Rule 81 also directs that the writ be directed to the person having custody of the person detained. Similar directions exist in the § 2254 and § 2255 rules, providing additional detail for applicants subject to future custody. There is no need for partial duplication in Rule 81.

The provision that the Civil Rules apply to the extent that practice is not set forth in the § 2254 and § 2255 rules dovetails with the provisions in Rule 11 of the § 2254 Rules and Rule 12 of

the § 2255 Rules.

III Pending Projects

Several ambitious projects remain on the Advisory Committee agenda. Most are confided to subcommittees for initial deliberations and recommendations to the full committee. Summaries of the subcommittee reports provide useful pictures of major topics that will command committee attention over the next few years.

Discovery

The Report of the Discovery Subcommittee is summarized at pages 22 to 29 of the draft Minutes. The subcommittee guided the work that led to the discovery rules amendments that the Supreme Court transmitted to Congress in April. Important questions remain with the subcommittee, however, including discovery of computer-based information and a related question of protecting against inadvertent privilege waiver in discovery.

The subcommittee arranged a meeting to hear from lawyers, judges, and forensic computer specialists about the problems that have been encountered with discovery of computer-based information. The broad question is whether there is something unique about discovery of computer-based information that distinguishes it from discovery of other forms of information. If indeed there are unique problems, the next question is whether these problems should be addressed by amending the discovery rules. It may be that any special problems can be handled within the framework of the present rules, perhaps with assistance from a special manual and from programs to educate the bench and bar. More specific questions underlie these broad questions, and were well illuminated by the discussion.

It is possible that computer generation and storage of information is distinctive because the sheer volume of hard information, protected against the fallibility of human memory, is so great. This distinction, if it holds true, may nonetheless be offset by the ability to search computer-stored information with the aid of the computer.

Apart from sheer volumes of information, many distinctive questions may emerge. One set of questions arises from the ability to use a computer to search computer-based information. The person who has the information may have strong preferences about the form of production. At times, the preference will favor production in "hard" copy form after the person who has the information conducts the computer search. At other times, the preference will favor production in computer form, so that the burden of searching falls on the requesting party. The preferences may be influenced by conflicting desires. Some of the desires are clearly legitimate. It is easier to avoid production of irrelevant, protected, or privileged information if the search is done by the party who has the information. The burden of the search may be considerable,

however, and it may seem better to let the burden fall on the party who wants the information. Other desires may not be so clearly legitimate. A search by the party who has the information may not be as thorough; a search by the party who requests the information may be made unnecessarily difficult by lack of familiarity with the methods of storing and retrieving the information. A discovery response that allows access to a computer information system may be the equivalent of the "boxcar" responses to document production that led to the adoption of the final paragraph of Rule 34(b).

The method of production question is matched by the method of inquiry question. The party requesting information may seek to learn enough about the computer storage and retrieval methods to be able to formulate the search questions. Even this desire may be resisted on the ground that the computer system itself represents valuable computer information. Actual execution of the search raises further questions. The demanding party may prefer to execute the search, but often that will present a risk of access to protectible information.

Other questions emerge from peculiarities of computer-based storage methods that seem relatively benign until discovery comes around. Cumulatively, these peculiarities can greatly increase the cost of a thorough search for all information that is available somewhere, somehow, within an organization. Computer users routinely delete information, but the deleted information commonly remains in the system until it is overwritten at random. Much computer information is duplicated on "back-up" devices, commonly tapes, but in a completely unsystematic way. Back-up tapes may be retained for brief periods, or for long periods. The cost of searching through masses of unorganized data can be staggering. The old days of concentrated and managed central computer systems are yielding to an incredible dispersion of desktop and laptop computers, with huge amounts of information distributed wholesale and retained indefinitely in one place or another. The very act of creating or storing computer-based information commonly generates additional information — the "embedded" information — that is quite unknown to the person working on the computer. The only way to know what information is available to an organization is to examine all of these sources. The examination, moreover, must be undertaken immediately, at least in the form of data preservation, lest continuing operation of the computer system in the ordinary course destroy at-risk information that was earlier deleted but remains subject to recovery until it is overwritten.

Still other problems arise from the common use of computer systems for multiple purposes. Individuals within organizations commonly use organization computer facilities for personal activities, generating privacy issues that may further complicate the process of protecting against untoward revelations.

There is much more to be learned before the subcommittee can begin careful deliberation of the question whether there is any

need to revise the discovery rules to address distinctive problems arising from demands for computer-based information. A number of ideas have been considered, ranging from modest changes to more dramatic innovations. Some of the ideas are familiar. It has been urged that discovery of computer-based information provides special reason to consider a more limited form of the general cost-bearing proposal that was rejected by the Judicial Conference last September. The long-standing interest in devising a means to reduce the costs of protecting against inadvertent privilege waiver is given new meaning by computer-based discovery. Other ideas are more novel. It might be possible, for example, to provide that intentional deletion of information is the equivalent of shredding a paper document, or to establish presumptive limits on any obligation to search back-up information sources.

The subcommittee will continue to gather information. Part of its inquiry will be another informal conference, probably this September, as a sequel to the March conference. All Advisory Committee members will be invited to the conference.

Class Actions

The Mass Torts Working Group finished its appointed chores by presenting its Report in February 1999. It does not seem likely that a successor ad hoc committee will be appointed to carry forward the cross-committee work initiated by the Working Group. Each of the several Judicial Conference Committees that works in this area will continue to coordinate their efforts. The work of the Civil Rules Advisory Committee will focus on Rule 23. The Rule 23 Subcommittee will begin with the fruits of the work that has been ongoing since 1991. Tangible embodiments of this work include a four-volume set of working papers and a study done by the Federal Judicial Center for the Advisory Committee. Additional material is provided by the Report of the Mass Torts Working Group, including papers by the Federal Judicial Center and a number of draft proposals.

The Subcommittee report to the Advisory Committee is summarized at pages 29 to 39 of the draft Minutes. The Subcommittee recommended that the basic structure of Rule 23 should not be reconsidered, and that it is better not to pursue further many of the earlier proposals that stirred substantial controversy.

Much of the Subcommittee's report and Advisory Committee discussion focused on the question whether Rule 23 should be amended to address directly the problems considered in Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997), and touched upon in Ortiz v. Fibreboard Corp., 119 S.Ct. 2295 (1999). Rough drafts were submitted to illustrate the questions that must be faced if an attempt were made to approve certification of settlement classes in circumstances that are not permitted by the Amchem and Ortiz decisions. Other drafts were submitted to illustrate the ways in which Rule 23 might be amended simply to express the settlement-

class rules established by these decisions. All of the drafts address class actions in general, rather than "mass torts" classes alone. The drafts that go beyond the Amchem and Ortiz decisions raise particularly troubling questions about the theory of representation, settlement, federalism, and substantive law. The Advisory Committee concluded that at least for the time being, the Subcommittee should put aside the drafts that would go beyond present settlement-class limits. The question whether to articulate present limits in the text of Rule 23, taking account of the ways in which lower courts have developed the Amchem decision, was left open. If other changes are adopted that make it seem desirable to address certification for settlement only in Rule 23, the question will be considered further.

The Subcommittee will focus attention on a manageable number of proposals to improve the process of administering class actions. The proposals will seek to embody the best lessons of present practice, drawing from the most successful approaches to facilitate general adoption.

The process of reviewing proposed class-action settlements will be one major topic for consideration. A detailed draft Rule 23(e) has been prepared to illustrate topics that deserve study; not every topic in the present draft is likely to survive. Two central themes of the draft involve objections to a proposed settlement and factors for review. Objections are approached with the view that objections interposed in good faith provide a valuable source of information, often helping to overcome the phenomenon that adversary presentation fails when plaintiffs and defendants join in pursuing the approval of their settlement agreement. Support for objections is provided by way of discovery and a discretionary power to award expenses and fees incurred to support a successful objection. At the same time, it is recognized that objections may not always be advanced with a good-faith view to improve the settlement for the benefit of class members. It can be difficult to distinguish between objections made to advance the purposes of Rule 23 and objections made to seize the strategic value of threats to derail the settlement. The draft makes only gingerly approaches to the problem of "bad" objections, recognizing the danger that "good" objections might be deterred.

The Rule 23(e) draft includes a long list of factors to be considered in reviewing a proposed settlement. The factors are drawn from the welter of opinions that, together, say the same things.

Two other aspects of draft Rule 23(e) have survived for continuing study, but face certain controversy. The first would require that class members be allowed to opt out of the class — including an otherwise mandatory class — after the settlement terms are announced. This provision appears only in brackets, indicating a Subcommittee disposition to reject the proposal. The second would authorize appointment of a magistrate judge or other person

to make "an independent investigation and report to the court on the fairness of" the settlement. This proposal would involve the court system in a move outside its traditional reliance on adversary investigation and presentation. In the end, reliance may have to be placed on objectors alone.

Yet other aspects of class-action settlement remain to be developed by further Subcommittee work. One proposal is that neither would-be representatives nor would-be class counsel may do anything on behalf of a putative class until the class is certified. One of the central purposes of this proposal is to prohibit any settlement discussions, however tentative.

The Subcommittee also is considering questions of appointment and compensation of class counsel. These questions are highly controversial now. Any proposal to address them will go to the heart of many contemporary complaints about class-action practice, but also will go to the heart of many contemporary enthusiasms for class-action practice. Very rough drafts have been prepared that would require an application for appointment as class counsel even when only one contender appears, and that would address the procedure and criteria for awarding fees. The Advisory Committee recognizes that these issues will provoke hot disputes, but concluded that the Subcommittee should develop more detailed proposals.

Other Rule 23 topics will be considered as well. One will develop earlier draft proposals to address notice issues. The Federal Judicial Center will support work on notice by gathering model notice forms for a number of topics and types of class actions.

Rule 53: Special Masters

In 1994 the Advisory Committee briefly considered a draft that comprehensively revises Rule 53. Rule 53 now focuses on the use of special masters to support fact determinations at trial or to accomplish detailed matters of accounting. The draft seeks to bring into Rule 53 the developing practices that appoint masters for a variety of pretrial and post-judgment purposes. A Rule 53 Subcommittee was appointed to study these questions and as its first order of business requested the Federal Judicial Center to undertake a study of current practices.

The Federal Judicial Center study has been completed and was presented to the Advisory Committee. The first observation is that the question whether to appoint a special master arises in only a fraction of one percent of all federal cases, but even this fraction amounts to several hundred cases a year. Often the question was raised by the court, and more often than not there was no objection to the suggestion that a master be appointed. Consent, indeed, seems to play an important role in the decision whether to appoint a master, although at times apparent consent may conceal unvoiced misgivings. Generally judges, masters, and

attorneys agreed that actual experience with a master was successful. The greatest concern was not accomplishment of the intended purposes but the cost of paying for the master's services.

The study confirms the perception that pretrial and post-judgment appointments have become important. Pretrial appointments are made for a variety of purposes, including mediation and settlement. Discovery masters seem to be appointed when the parties have proved unable to manage discovery themselves. A master also may be appointed to assist the court in a case involving highly technical subject-matter; this use may overlap appointment of an expert under Evidence Rule 706, although use of Rule 706 is much less frequent than use of Civil Rule 53. Post-judgment masters tend to be appointed not merely for the traditional complicated accounting purpose but also for the modern purpose of monitoring implementation of institutional reform decrees or administering class-action judgments.

Two sets of problems were commonly encountered in the study. Concerns were often expressed about the method of selecting the person to be appointed as master. And the question of ex parte communications with parties or judge was frequently encountered. Appointments for administrative, procedural, or settlement purposes may virtually require ex parte communications with the parties. Other appointments may benefit from the ability of the master to have confidential communications with the judge. But ex parte communications with a person discharging a judicial function are always worrisome. Some orders prohibited ex parte communications; one judge explained that the master should not be subject to lobbying by the parties.

Interviews with judges, masters, and attorneys found reservations about the prospect of revising Rule 53, but several suggestions for ways in which Rule 53 could be improved. Perhaps the starting point is that Rule 53 was expressly noted in only a minority of the cases involving appointment of a master; it was as common to cite no authority at all as to cite Rule 53. A judge with particularly rich experience in the successful use of special masters expressed the dilemma: without revision, much present practice may have only tenuous support in Rule 53 or inherent authority, but revision runs the risk of encouraging undesirable expansion or discouraging desirable expansion.

Judge Scheindlin presented the Subcommittee report in conjunction with the report of the Federal Judicial Center study. The summary appears at pages 39 to 43 of the draft Minutes. Informal surveys duplicate the findings of the formal study. Special masters are used in many ways that are not reflected in Rule 53. Many of these uses are highly desirable. But there are problems that need to be studied. Standards for appointment need to be articulated. Explicit provisions may be useful to protect against conflicts of interest. Standards of review by the court should be considered. The relationship between the use of special

masters and reliance on magistrate judges needs further thought. Ex parte communications should be addressed directly in Rule 53, perhaps by requiring that the issue be resolved in the order of appointment. Still other issues will be considered.

The Advisory Committee directed the Subcommittee to develop a draft revised Rule 53 for consideration by the committee.

Simplified Procedure

The simplified procedure project remains in an early stage. Various groups of district judges have expressed enthusiasm about the project to create an alternative set of simplified procedures for some actions. A first draft has been prepared that seeks to simplify regular procedure by expanding the emphasis on pleading and disclosure, while scaling back on discovery. Motion practice would be curtailed. The draft also would require an early and firm trial date. Many questions remain to be addressed: should application of the rules require consent of all parties, or should some cases be assigned by other means? More generally, what kinds of cases would benefit from a procedures that lack the open-ended potential for great expense that may characterize the general rules? Will cases that would benefit come to the federal courts in greater numbers if an alternative procedure system is devised? Is it desirable to devote limited judicial resources to these cases? How would simplified rules relate to the many different systems that are used by many districts to assign cases to different procedural tracks? Is there a risk of interference with alternate dispute resolution mechanisms? All of these questions affect the design of a simplified system. If consent of all parties is required, for example, it is possible to consider waiver of jury trial, agreement that a firm trial date will be held even if that requires trial before a magistrate judge, and so on.

The Simplified Procedure Subcommittee hopes to identify a small group of lawyers who have experience relevant to these and other questions raised by the simplified procedure project. When a group is identified, the Subcommittee will meet with them to seek inspiration and advice.

Other Continuing Work

The Advisory Committee plans to continue coordination and cooperation with other Judicial Conference committees that are considering questions relevant to mass torts litigation. The chairs of several committees have agreed to keep each other advised of the committees' work, and to meet in conjunction with Judicial Conference sessions. This effort will seek to carry forward, albeit in a less integrated way, the projects of the Mass Torts Working Group.

The Agenda Subcommittee has developed a system for reviewing and making recommendations on public suggestions for rules changes. The system is working well in assigning projects for immediate

action, more detailed study, long-run coordination with other projects, or other disposition.

Item 7C

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

April 10 and 11, 2000

The Civil Rules Advisory Committee met on April 10 and 11, 2000, at the Administrative Office of the United States Courts in Washington, D.C. The meeting was attended by Judge Paul V. Niemeyer, Chair; Sheila Birnbaum, Esq.; Judge John L. Carroll; Justice Christine M. Durham; Professor John C. Jeffries, Jr.; Mark O. Kasanin, Esq.; Judge Richard H. Kyle; Judge David F. Levi; Professor Myles V. Lynk; Acting Assistant Attorney General David W. Ogden; Judge Lee H. Rosenthal; Judge Shira Ann Scheindlin; and Andrew M. Scherffius, Esq.. Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus was present as Special Reporter for the Discovery Subcommittee. Judge Anthony J. Scirica attended as Chair of the Standing Committee on Rules of Practice and Procedure, Judge Michael Boudin attended as liaison from the Standing Committee, and Professor Daniel R. Coquillette attended as Standing Committee Reporter. Judge Norman C. Roettger attended as liaison member from the Bankruptcy Rules Advisory Committee. Professor Patrick J. Schiltz attended as Reporter for the Appellate Rules Advisory Committee. Marilyn Holmes, Peter G. McCabe, Nancy Miller, John K. Rabiej, and Mark Shapiro represented the Administrative Office. Joseph F. Spaniol, Jr., attended as Consultant to the Standing Committee. Thomas E. Willging, Laural Hooper, Marie Leary, Robert Niemic, and Molly Treadway-Johnson represented the Federal Judicial Center; Kenneth Withers also attended for the Judicial Center. Observers included Scott J. Atlas (ABA Litigation Section); John Beisner; Alfred W. Cortese, Jr.; Francis Fox (American College of Trial Lawyers); Jeffrey Greenbaum (ABA Litigation Section — class actions); James Rooks (ATLA); and Fred Souk.

Judge Niemeyer greeted Professor Jeffries to his first meeting, and expressed appreciation for the life and regret on the passing of Edward H. Levi.

Introduction

Judge Niemeyer noted that the discovery proposals sent forward last year are now before the Supreme Court, as transmitted from the Judicial Conference. It is hoped that the Supreme Court will act by the end of the month to transmit the proposals to Congress.

If the discovery amendments take effect December 1, the process will have taken rather more than four years. The deliberate pace of the rulemaking process may at times seem frustrating, but it seems better than a process that, with greater efficiency, might efficiently make troubling mistakes.

Judge Scirica said that the Civil Rules Committee will have to start thinking about the style project. The project to rewrite the rules of procedure into clearer language goes back a full decade. The Appellate Rules have been completed, adopted, and applied in

practice. That experience is a success. The Criminal Rules should be submitted to the Standing Committee in June with a recommendation for publication this August. If the Criminal Rules restyling is successful, the Civil Rules will be next in line. It is accepted that the Evidence Rules will not be restyled.

Judge Niemeyer responded that the style project will be an enormous undertaking. The benefits of consistency and clarity are real. But early work has proved the difficulty of making changes that affect style only, not substance. This difficulty is particularly acute when the present text is ambiguous; resolving uncertainty as to present meaning can easily change the meaning. It is possible to identify the "gaps and inconsistencies" separately, asking comment whether there is a change in meaning and whether the change is desirable. But the sheer number of these problems may hamper the public comment process that will be indispensable to successful completion of the project. Some well-established phrases, moreover, should remain sacrosanct, whatever their stylistic sins may be. The difference between "transaction or occurrence" and "conduct, transaction, or occurrence" may seem elusive, but it would be a mistake to adopt a single phrase to replace all of the variations that presently appear in the rules. Even the numbers of the rules are important. Renumbering Rule 12(b)(6), Rule 56, and like familiar rules could complicate research and confuse newer generations of lawyers as they come to earlier cases.

Judge Scirica noted that the Style Project has been coordinated with the expectation that the separate sets of Rules will be done in sequence.

Judge Niemeyer turned to mass torts problems. This committee has worked with Rule 23 for many years. It has come to seem that many of the questions surrounding Rule 23 are better addressed by legislation than by rulemaking. The desirability of legislative solutions seems particularly clear with respect to mass torts. The Mass Torts Working Group was formed to bring in the contributions of other Judicial Conference committees. The Working Group recommended creation of an ad hoc committee constituted by members of several other committees, but that recommendation has not been taken up. The other committees, however, can continue to coordinate their efforts. The chairs of other committees attended the mass torts symposium at the University of Pennsylvania Law School last November. They expressed willingness to work together. The chairs and other representatives met at the March Judicial Conference, and agreed to maintain coordination, in part by meeting at each Judicial Conference. The efforts of this committee and the work of the Mass Torts Working Group have generated much good learning. Major portions of the fruits are preserved in documentary form. The Federal Judicial Center, and Thomas Willging, help to provide continuity and consistency.

Judge Scirica agreed that mass tort issues involve the need to consider procedure, substance, court management, and judicial education. The Federal-State Jurisdiction Committee is working actively in this area, considering such bills as the venerable single-event mass tort bill, state class-action bills, a bill to supersede the Lexecon decision by expanding § 1407 to permit transfer and consolidation for trial, and asbestos bills. The Court Administration and Case Management Committee, Bankruptcy Committee, and Judicial Panel on Multidistrict Litigation are all involved as well. The Federal Judicial Center is rewriting the Manual for Complex Litigation. All of these forces will share continual information about their work. Coordination by this means will prove more difficult than it would be through an ad hoc committee, but it can achieve real results. It is time to put to use all of the knowledge that has been accumulated.

Judge Niemeyer introduced the legislation report by noting that Congress is interested in many civil-procedure topics. Bills are regularly introduced to amend one rule or another by direct legislative action. With the help of the Rules Committee Support Office, coordinating with the legislation staff of the Administrative Office, we attempt to have the underlying issues and concerns rerouted into the Enabling Act process.

John Rabiej gave the legislation report. The Support Office is currently monitoring some 30 bills, which are listed in the agenda materials. The asbestos bill reported out by the House Judiciary Committee is modeled on the Georgine settlement; it is being considered by the Federal-State Jurisdiction Committee. The Support Office has been interested in a provision that, as first drafted, would severely limit the aggregation of parties or claims. The bill's sponsors were persuaded to ameliorate this provision quite extensively. There also is a peculiar class-action provision that seems to be an artifact of the structure that was adopted for the aggregation provision, but that might be read to prohibit a request to be excluded from a Rule 23(b)(3) class. Efforts are being made to win clarification of this provision. The bill, and indeed the problems of asbestos litigation in general, are quite contentious in Congress.

Another rules topic in Congress involves the Marshal's Service. Congress came close to passing a bill that would virtually require a judge to approve any service by a marshal. This provision was reduced in conference to a requirement that a report be made. The Marshal's Service wants to eliminate the provision in Rule 4(c)(2) that requires a direction for service by a marshal or other specially appointed person when the plaintiff is authorized to proceed in forma pauperis or as a seaman. They proposed a bill to amend Rule 4. It now seems likely that the Service will instead request that the question be considered by this committee.

The Minutes of the October 1999 meeting were approved with

correction of a typographical error.

Rules 5(b), 6(e), 77(d) Recommended for Adoption

Amendments to Rules 5(b) and 77(d) were published for comment in August 1999, along with a request for comment on a possible related amendment of Rule 6(e). The proposals were designed to open the way for electronic service of papers other than initial process. Other means of service were added as well. Parallel proposals were published for comment by other advisory committees.

Rule 5(b) is restyled. Rule 5(b)(2)(D) is entirely new. It provides for service by any means not listed in subparagraphs (A), (B), or (C), with the consent of the person served. Service by electronic means would be complete on transmission.

In response to public comments, possible changes were prepared for the text of the rule and for the Committee Note. Rule 5(b)(2)(D) would require that the consent to service by electronic or other means be in writing. A new paragraph (3) would provide that service under Rule 5(b)(2)(A), (B), or (D) is not effective if the party making service learns that the attempted service did not reach the person to be served and the person to be served did not deliberately defeat the attempted service. The Note might be expanded by stating that the consent must be express, not implied; by observing that service through a court's facilities might include a notice of filing with an electronic link that allows viewing, downloading, or printing; and making suggestions about the information that should be provided on giving consent.

Discussion began with the observation that Department of Justice concerns would be substantially satisfied by adding to the Rule a requirement that consent be in writing, and by one version of the draft note on the information to be provided in giving consent. A Note statement that consent must be express, not implied, also is useful. There has been at least one instance in which a court took an e-mail address on a letterhead to imply consent to receive electronic service, an approach that should not be condoned by the rule. A motion was made to add the writing requirement to the rule, and to add to the Note the statement that consent must be express and the advice on the information to be provided on giving consent.

Nancy Miller is working on implementation of the electronic case files project. She noted that the project is now operating in four district courts and five bankruptcy courts; the District of New Mexico also is operating an electronic filing system. The number of courts will increase gradually over the next few years. The project will take filings over the internet. Rule 5(b) electronic service will, for the next several years, occur in two distinct contexts. In many courts, parties will be serving each other electronically even though they are not filing

electronically. In other courts, the parties will both file and serve electronically. The capability to effect electronic service through the court's system is built into the CM/ECF system. Adoption of this system, however, will be optional with each district. She urged that the Committee Note should include the statement, made in one of the alternative versions, that a district court may establish a registry that allows advance consent to receive electronic service in future actions.

It was noted that the District Court for the District of Columbia automatically sends out a form that becomes an electronic directory. Whenever a lawyer fills out the form, the lawyer can be found in the directory for purposes of all future actions.

Responding to experience in the Western District of Missouri, one of the present electronic filing courts, a sentence was added to the Committee Note stating that electronic service through court facilities can be accomplished by a notice that provides a link to the filed paper. The initial draft referred to this as a "hyperlink"; concern was expressed that the term may be as evanescent as so much computer technology has been, and the more generic "electronic link" was substituted.

The sentence referring to a district court registry was first drafted to refer to establishment of a registry by local rule. It was observed that the bankruptcy rules have a similar provision for electronic notice that does not require a local rule. There is no apparent reason to require a local rule for this purpose. The reference to local rules was deleted by common consent.

The draft also refers to description of the "format" for consented service. It was asked whether this term is universally accepted. One response was that much depends on the mode of "electronic" service. Facsimile transmission needs only the telephone number as "format." Internet messages may be little more complicated. Attachments, however, can present real problems as different word-processing systems are used. The extent of these problems depends again on context. The electronic case filing system uses a portable document format that is designed to preserve the original paging system for all users; it is a major inconvenience if different users cannot readily refer to the location of items in the document by a common page number. It was suggested that when the court system is up and running, every user will have adopted a uniform capacity. But for the time being, it is desirable to suggest in the Committee Note that a person consenting to electronic service should specify the format in which attachments can be received.

The court registry for electronic service is likely to be a registry of attorneys, rather than parties. Consent under Rule 5(b)(2)(D) is to be consent of the person served; carrying forward the long-standing provisions of Rule 5(b), Rule 5(b)(1) will continue to provide that service on a party represented by an

attorney is made on the attorney. But there are circumstances in which the distinction between attorney and party is ambiguous — the United States employs its own attorneys, as do many corporations. If an Assistant United States Attorney or a member of a corporate counsel office registers for electronic service, does that bind the party? May law firms encounter similar problems? This discussion was curtailed by the observation that electronic service is happening already. Every effort should be made to keep the process simple and to encourage people to use it. Courts should be able to develop their own registries or similar systems without the questionable help that might be supplied by the dubious foresight of this or any other committee familiar only with current technology. What is important is that a court adopting a system make it clear to those who sign on just what the system means.

The committee then agreed to recommend Rule 5(b) to the committee with several particular changes. Consent under Rule 5(b)(2)(D) must be in writing; the Note will observe that the writing can be provided by electronic means. Reference will be made to local district registries and like means to facilitate advance consent to electronic service. Reference will be made to electronic notice from the court with an electronic link to the paper electronically filed with the court. The second sentence of the Department of Justice recommended Note language, set out at page 8 of the agenda materials, will be incorporated in the Note with minor revisions.

It also was agreed that the Committee will consider adding consent to electronic service as an item in the Form 35 Report of Parties' Planning Meeting.

In deliberating the draft Rule 5(b) that was proposed for publication, this committee considered whether the rule should address the problem that arises when a person who has attempted to make electronic service learns that service was not completed. The published proposal provides that service is complete on transmission. But notice of nondelivery may be received after transmission. The committee concluded then that this problem could be addressed in the Committee Note. Virtually all lawyers who learn that attempted service was not made will do whatever is required to correct the failure. It was believed that no court would hold that service is effective when the party attempting to make service actually knows that the attempt had failed. The Committee Note, as published, observed that "actual notice that the transmission was not received defeats the presumption of receipt that arises from the provision that service is complete on transmission. The sender must take additional steps to effect service."

The Appellate Rules Advisory Committee is considering a rule provision, supported by the committee chair, that would read: "Service by electronic means is complete on transmission, unless the party making service is notified that the paper was not

received." This divergence from the proposed Civil Rule raises the question whether this committee should reconsider. Draft Rule 5(b)(3), offered for consideration, would apply to all methods of service other than leaving a copy with the clerk for a person who has no known address. It would provide that attempted service is not effective if the party making service learns that the attempted service did not reach the person to be served and the person to be served did not deliberately defeat the attempted service.

The first observation was that if Rule 5(b) is to address the question of knowledge that attempted service has failed, it should address it for ordinary mail as well as electronic mail, facsimile, and even — for the bizarre situations that at least can be imagined — personal service. A provision that speaks only to electronic service might create unintended negative implications for other modes of service.

It was asked whether it is prudent to propose an addition to the rule without publication and comment. There are a number of significant questions that need to be addressed. A litigant is supposed to keep the clerk informed of a current address. If a party moves and does not tell the court, the unsuccessful attempt at mail service should count as effective service. At least if we are going to address failures of ordinary mail, this should be published for comment. There may be far-reaching practical consequences that we do not fully understand.

The discussion turned to the variety of problems that may be encountered. One is the party who fails to provide an effective address; mail or other modes of service cannot be made. Another arises when an effort to reach a valid address fails — paper mail is mangled in postal machinery or meets a physical accident en route, and is returned to the sender for want of a workable address; an electronic message is bounced back as undelivered; an office worker served on behalf of an employer brings it back to the serving party objecting to any obligation to deliver it. It is important to distinguish two separate problems. One is whether an attempt to make service counts as effective. The other is whether, after an unsuccessful attempt to make service, a duty remains to try again. The duty to serve may be excused in some circumstances, as when a party has failed to maintain a current address with the court clerk. There also may be circumstances in which a person to be served deliberately seeks to avoid service.

The view was repeated that if these topics are to be addressed, they should be addressed at least to postal mail as well as electronic mail. The combined topics, however, are too complex to take on without publication for comment. The proposal should be sent to the Standing Committee with a recommendation for adoption without any provision that addresses a party's actual knowledge that attempted service has failed. The problem of failed service can then be studied more carefully.

Professor Schiltz noted that the Appellate Rules Committee felt that something should be said about electronic service because e-mail "so often comes back." For postal mail, the problem almost never arises. There is a danger that if the rule speaks to the problem in general terms, people will seek to take unfair advantage of the opportunity for creating confusion.

Rule 5(b)(3) could be revised to address only electronic mail. It was protested again that this approach would create negative implications for other failed methods of service. But it was rejoined that the Committee Note can say that no negative implications are intended.

A motion was made to recommend Rule 5(b)(3) to the Standing Committee, limited to electronic service. The motion was supported with the observation that in the real world there has been no problem with ordinary mail. But it was agreed that the problem of deliberate efforts to defeat service need not be addressed; this portion of the draft was deleted. As changed, the motion was adopted.

At the April 1999 meeting the committee considered a proposal to amend Rule 6(e) to treat electronic service in the same way as postal service. Rule 6(e) now allows an additional 3 days to respond when service is made by mail. The committee was divided on the question. The conclusion was a recommendation that Rule 6(e) not be amended, but that a revised Rule 6(e) be published with a request for comment on the need for revision. Public comments were divided, but several comments suggested that additional time should be allowed. The essence of these comments ran in at least three directions. The popular image of e-mail as instantaneous is exaggerated; often there are substantial delays in transmission. In addition, messages are often received in garbled form, a problem that arises most commonly with attachments; it can take a few days to arrange for delivery in intelligible form. Finally, the added time to respond is likely to encourage use of electronic service — the added time is not likely to deter a party from seeking consent to electronic service, and it is likely to encourage some parties to give consent. It might be possible to add only one day for electronic service; one proposal was to add one day for electronic service or service by overnight courier, and three days for ordinary courier delivery. The Department of Justice is among those urging that at least some additional time be allowed to respond after electronic service.

The Bankruptcy Rules Committee clearly favors allowing the additional three days. It also believes that it is important to maintain consistency between the Civil Rules and the Bankruptcy Rules on this question.

A motion was made to recommend to the Standing Committee adoption of the revised Rule 6(e) as it was presented for public comment. Support of the motion was voiced by Judge Roettger, who

noted that the Bankruptcy Rules Committee unanimously favored a 3-day extension. A practitioner observed that his firm regularly receives electronic messages that can be deciphered only with the assistance of the firm "help desk," if at all. And it was noted that there are likely to be cases in which different parties are served by different means, and perhaps at different times, destroying any uniform response time anyway.

The motion to recommend adoption of the revised Rule 6(e) was adopted.

Rule 77(d) was published in a form that would allow the clerk to serve an order or judgment in the manner provided for in Rule 5(b). The published version failed to change the provision for a docket note to refer to "service" rather than "mail." This change was agreed upon. A Committee Note reference to local rules that should have been deleted before publication also was deleted. With these changes, the committee voted to recommend adoption of the Rule 77(d) amendments to the Standing Committee.

Copyright Rules, Rule 65(f), and Rule 81(a)(1): Recommended for Adoption

The proposals published in August 1999 include a second package that would abrogate the obsolete Copyright Rules of Practice adopted under the 1909 Copyright Act. A new Rule 65(f) would be adopted, confirming the common practice that has substituted Rule 65 preliminary relief procedures for the widely ignored Copyright Rules. Rule 81(a)(1) would be amended to delete the obsolete references to copyright rules, and also to improve the expression of the relationship between the Civil Rules and the Bankruptcy Rules. Such little public comment as was provided on these changes was favorable. The committee voted to recommend the changes for approval by the Standing Committee and transmission to the Judicial Conference.

Rule 82 Recommended for Adoption

The final sentence of Rule 82 provides that an admiralty or maritime claim "shall not be treated as a civil action for the purposes of Title 28, U.S.C. §§ 1391-93." A member of the public has suggested that since § 1393 was repealed in 1988, Rule 82 should be amended to refer to §§ 1391-1392." The committee approved this suggestion, and decided to recommend to the Standing Committee that the amendment be transmitted to the Judicial Conference as a technical and conforming change that does not require publication for comment.

Rule 7.1: Recommendation for Publication

Judge Niemeyer opened discussion of the draft Rule 7.1 on disclosure by observing that there have been news reports of cases in which judges have inadvertently failed to disqualify themselves because of a failure to connect with financial information that

requires disqualification. The Codes of Conduct Committee is working on these problems, and has urged the Standing Committee to adopt procedural rules governing disclosure. Marilyn Holmes, who provides staff support for the Codes of Conduct Committee, is attending this meeting to help the discussion. At present, Appellate Rule 26.1 is the only procedural rule that addresses financial disclosure. The Codes of Conduct Committee believes that Rule 26.1 is a satisfactory model for the district courts. The Standing Committee is taking the lead on this topic, because coordination is required among four advisory committees; only the Evidence Rules Committee can disclaim any interest.

Judge Scirica agreed that this project has, in part, come "from the top down," contrary to the usual Standing Committee policy of waiting for proposals to originate in the advisory committees. It makes sense to have the same provision for the Civil and Criminal Rules. There are special concerns that may justify different provisions in the Bankruptcy Rules. If the district court rules head in a different direction from present Appellate Rule 26.1, a process that seems to be developing as to some details, the Appellate Rules Committee must become involved as well. John Rabiej and Marilyn Holmes brought the chairs of the Standing Committee and the Codes of Conduct Committee together to seek a common approach.

There have been two recent waves of embarrassing publicity about inadvertent failures to recuse. Congress is sensitive to the problem. Members of Congress understand that the failures were inadvertent, but do not want the problem to recur. They would prefer that the Judicial Conference come up with an answer, and the rules process seems to provide the best available Judicial Conference approach.

The Standing Committee hopes the Advisory Committees will develop the same proposal, or at least very similar proposals, so that in June the Standing Committee can frame a common proposal. The proposals would be published for public comment in August.

There is a persuasive argument that this topic is one that should not be addressed in the rules of procedure. But there is strong reason to act. And Appellate Rule 26.1 has opened the door. The Committee Note to Rule 26.1, which was first adopted in 1989, recognizes that some courts may wish to exact more detailed disclosures by local circuit rule. This approach may be the most satisfactory means of establishing a national policy.

Adoption of rules for the district courts similar to Appellate Rule 26.1 will not address the specific incidents of implementation. Development of the right software for computer matching, and judicial alertness, are critical to successful implementation.

It must be recognized, further, that district judges face problems distinct from those commonly encountered in the courts of

appeals. Default judgments, dismissals, and requests for emergency or routine administrative action often come before the judge with little warning and little occasion for deliberation or inquiry. Judicial action is routine in many matters.

The Federal Judicial Center study shows that many circuits have expanded on the requirements of Appellate Rule 26.1. They broaden the scope of disclosures, and the character of the parties that must make disclosures. (Appellate Rule 26.1 applies only to nongovernmental corporations.) And, although there is no rule for the district courts akin to Rule 26.1, several districts have adopted their own local disclosure rules, often requiring more extensive disclosure than that mandated by Rule 26.1. And of course disclosures are required by a variety of other district court practices.

There is a difficult question whether local rules should be prohibited when a national rule is adopted. The Committee on Codes of Conduct is inclined to the view that local rules should be prohibited. But there are at least two concerns that must be considered. First, disqualification decisions are a matter of great sensitivity. Judges are anxious to have all the information needed to protect their own integrity and the integrity of their courts. Second, some of the local variations may be valuable; allowing local practices to continue may generate information that can be useful in expanding the approach of Appellate Rule 26.1.

There also is a question, framed by draft Rule 7.1., whether expansion of the Appellate Rule 26.1 model of disclosure should be accomplished only through the protracted and cumbersome Enabling Act process. The draft rule provides for adoption of disclosure forms by the Judicial Conference if greater disclosure seems desirable.

Professor Coquillette reported on the deliberations of the Bankruptcy Rules Committee. That committee reached several conclusions. There should be a national rule for the district courts modeled on Appellate Rule 26.1. The rule might well allow the Judicial Conference to adopt forms requiring greater disclosure if the Judicial Conference comes to believe that greater disclosure is desirable. The Judicial Conference process could allow more frequent and smaller adjustments than can be accomplished by continually revising national court rules. The Judicial Conference should have sole discretion whether to adopt any form at all. Local rules should be permitted. But — and perhaps most important — room should be left to adopt distinctive Bankruptcy Rules. Bankruptcy practice often involves thousands of parties in a single proceeding, and some adjustments may be required to reflect this fact. Judge Roettger seconded the observation that bankruptcy practice encounters unique problems that may require a unique rule.

Professor Schiltz observed that the Appellate Rules Committee continues to support Appellate Rule 26.1. Over time the Appellate

Rules Committee has tried to require more expansive disclosures than Rule 26.1 now requires, but that has proved impossible to "sell." The Appellate Rules Committee supports local rules. It seems likely that the Appellate Rules Committee will support amendment of Rule 26.1 to authorize development of disclosure forms by the Judicial Conference, in terms similar to draft Rule 7.1, and also will support amendment of Rule 26.1 to require supplementation when there is a change in the circumstances reflected in the initial disclosure statement.

Marilyn Holmes agreed with the common observation that Appellate Rule 26.1, and the parallel draft Rule 7.1(a)(1), is a narrow rule. The rule reaches only financial interests, and not all of those. The Committee on Codes of Conduct is interested only in disclosure of financial information that automatically disqualifies a judge. Thus it would like to discourage local rules. The local rules do not seem to work well. Additional information would, to be sure, lead at times to disqualification. But the Committee is interested in developing conflicts screening software; a similar program will be built into the electronic case filing program that the Administrative Office is developing. Information will be put into the system as the parties and firms involved in any particular litigation supply it; the system then will compare this information to all of the information the judge has put into the system.

The draft Rule 7.1 was then introduced. The agenda materials include several different model rules, and a variety of Committee Note drafts. Provisions from the different rules and paragraphs from the different Notes could be mixed and combined in many different ways. The model that seems to command the greatest support, however, is the one that is put first. This model is based on Appellate Rule 26.1. The core disclosure requirement is the same as Rule 26.1. But there are several variations. The first variation requires a nongovernmental corporation to file a "null" report when it has no information to report. This provision was added to the draft at the suggestion of the Codes of Conduct Committee, and should prove helpful to show that the lack of any disclosure information reflects a lack of information to disclose rather than inadvertent failure to file. The task of court clerks will be considerably eased by this provision. A duty to supplement the initial disclosure is added. Other variations reflect differences in the circumstances of the district courts as compared to the courts of appeals. Because district judges often are called upon to act immediately on filing, or soon after, the time for filing provision is made more demanding. The number of required copies is reduced to two because district courts rarely act in panels of three. And a provision is added to require the clerk to transmit the disclosure information to the judge assigned to the case.

The most important departure of this model from Appellate Rule 26.1 is Rule 7.1(a)(2). This provision requires all parties to

file a form providing any additional information required by the Judicial Conference. The prospect that additional disclosures may be found desirable seems supported by the fact that most of the courts of appeals have adopted local rules that expand on the requirements of Rule 26.1.

Unlike some of the other models, this draft rule does not speak to the local rules question. A number of different approaches to local rules are reflected throughout the other drafts. Some of these approaches explicitly note the part of the Note to the original Appellate Rule 26.1 that recognizes that the circuits may wish to require additional disclosures by local rule.

Judge Niemeyer observed that the question requires sensitive accommodation to the views of the other advisory committees, the Standing Committee, and the Codes of Conduct Committee. The question whether to require more information than Appellate Rule 26.1 requires may be compromised by adopting Rule 26.1 but providing a discretionary power to supplement by Judicial Conference form if the Judicial Conference comes to believe that supplementation is desirable. The means of accomplishing disclosure remains essentially a matter of court administration, not procedure, and action by the Judicial Conference with the support of the Codes of Conduct Committee and the Administrative Office may prove more flexible than the Enabling Act process. This approach does not mandate any additional disclosures, but leaves the path open.

Judge Niemeyer further observed that the question of local rules is particularly difficult. Over the years this committee has tried to preserve the view that national problems deserve answer by uniform national rules. Local rules are appropriate only when there is a reasonable prospect that variations in local conditions warrant divergent rules. Local rules are a hardy species, however, and constant vigilance is required. It is uncomfortable to adopt a national rule and, at the same time, to countenance local rules without any hint of different local circumstances that might justify disuniformity. But at the same time, it will be difficult to require abandonment of present local rules. Rather than bless local rules in the text of the Rule, it may be best simply to recognize the legitimacy of local rules in the Committee Note.

Judge Roettger suggested that the brief and noncommittal recognition of local rules in a sentence appearing on page 7 of the agenda materials was consistent with what the Bankruptcy Rules Committee had in mind.

Professor Coquillette confessed to being "the archetypical opponent of local rules," but urged that a modest exception would be wise in this instance. The Appellate Rules Committee recognized the legitimacy of local rules when it developed the original 1989 version of Rule 26.1. The Bankruptcy Rules Committee supports this approach. Many courts, moreover, are firmly attached to their

rules, and likely will fight for them in the Judicial Conference. This is an exceptional situation.

Discussion began with the note that the Judicial Conference form provision extends beyond nongovernmental parties. All parties and lawyers could be included. This would be a very broad expansion beyond the reach of Appellate Rule 26.1. It would be useful to add to the Note some version of the Note paragraph on page 16 of the agenda materials that suggests that any form that is adopted may not apply to all parties, and in any event may be limited to information that is not relevant to some parties. It will be up to the Judicial Conference to decide what to do in that situation. But there will be a great advantage in either allowing noncovered parties not to file the form or, if it is not likely to be evident whether a party is covered, to file a form that simply says that none of the requested items of information is relevant to a particular party. This approach would greatly ease the burden on court clerks, who otherwise could not readily determine whether the absence of a form represents the absence of relevant information or inadvertence to the filing obligation. There would be little burden on the parties if it becomes established routine to file a "null" report on a party's first appearance.

The local rules issue was addressed with the suggestion that it makes sense to permit local rules. The Judicial Conference form, if one is developed, and the Administrative Office case filing software, will exert a strong pull toward uniformity. But if recognition of local rules is expressed only in the Note, it will be difficult to retract the comment without revising the rule. The Judicial Conference may develop a form that, at some stage of evolution, warrants preemption of local rules. If we put permission for local rules into the text of Rule 7.1, as some of the drafts do, the Rule can be amended in the future to defeat local rules. It also is intrinsically desirable to address so important an issue in the text of the rule.

Another suggestion about local rules was that it will be difficult to stop a judge or court from asking for more information.

Marilyn Holmes said that the Codes of Conduct Committee defers to the rules committees on the local rules question. But she urged that if the Note does speak to the question, it should speak in a discouraging way. Even as sympathy was expressed for this view, it was noted that many courts believe that their present local rules are important and are working well. It would be difficult to persuade the Judicial Conference to disregard their views. One approach might be to say nothing in the Note, leaving the possible preemptive effect of Rule 7.1 for future decision. Since Rule 7.1 is closely modeled on Appellate Rule 26.1, however, the Committee Note to Rule 26.1 that expressly recognizes local rules likely would carry over at least until the Judicial Conference should act to adopt a disclosure form.

Looking to the various draft Note provisions on local rules, it was thought that the language of one, noting that districts are "free to adopt" local rules was too permissive. The Note should say that Rule 7.1 does not prohibit local rules. And it should say that if the Judicial Conference adopts a form, the Judicial Conference can decide whether the form preempts local rules.

It was asked whether there is any need to include the proposed subdivision (c), which directs the clerk to deliver a copy of the form to each judge assigned to the action or proceeding. Clerks are charged with many responsibilities that do not appear on the face of the rules: why note this one in an express rule provision? It was responded that in some districts the clerks do not do this. Delivery to the judge should be made routine. A mechanism should be provided to help the judge. A different response was that in a different district, the clerk does this now. It also was asked whether it is sufficient to require delivery to each judge assigned to the action or proceeding. A judge or magistrate judge may be asked to act in a case assigned to another judge, often in emergency circumstances. It was agreed that the rule should direct the clerk to deliver a copy of the disclosure to each judge "acting in the action or proceeding." It was recognized that there may be some circumstances of emergency action in which this direction cannot feasibly be honored, but the general direction seems useful. Professor Schiltz ventured the prediction that the Appellate Rules Committee likely will not add to their Rule 26.1 a provision that parallels this provision, for fear that it might create negative implications about the nature and extent of the clerk's duties in other situations.

The committee voted to recommend publication of the preferred form of Rule 7.1, as modified to reflect the discussion.

Rules 54, 58: Recommendation for Publication

The Appellate Rules Committee has devoted intense study to the problems that arise from the interplay of Civil Rules 54 and 58 with Appellate Rule 4(a)(7). Rule 4 governs appeal time. The Supreme Court has ruled that the appeal time periods set by Rule 4 are "mandatory and jurisdictional"; an out-of-time appeal must be dismissed for lack of jurisdiction. The event that signals the beginning of the appeal time period is important. In 1963, to assure a clear signal, Civil Rule 58 was amended to require that every "judgment" be set forth on a separate document. Entry of the separate document would avoid any ambiguity. Appellate Rule 4(a)(7) borrows Rule 58: "A judgment or appeal is entered for purposes of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure."

This well-intended and simple requirement has encountered several obstacles. One of them arises from Civil Rule 54(a), which defines a "judgment" to include "a decree and any order from which an appeal lies." This definition does not stand up well.

Opportunities for appeal have expanded since this part of Rule 54(a) was adopted in 1938. As one example, Rule 54(a) includes as a "judgment" any interlocutory order that would be found appealable under the collateral-order doctrine. One puzzling consequence seems to be that the time to appeal a collateral-order appeal does not begin to run unless the order is entered on a separate document, an awkward conclusion. A worse consequence is that Rule 58 also provides that a judgment "is effective only when" set forth on a separate document. Read literally, this combination of Rules 54(a) and 58 would mean that, for example, an order denying a claim of privilege made to resist discovery cannot be "effective" until it is entered on a separate document if a court of appeals would conclude (as the Third Circuit now routinely does) that the order is appealable.

This relationship between Rule 54(a) and Rule 58 has been the source of one of the specific concerns of the Appellate Rules Committee. Many judges do not follow the separate document drill when ruling on motions of the sort that — when timely made — suspend appeal time. These motions, enumerated in Appellate Rule 4(a)(4)(A), include post-trial motions under Rules 50, 52, 54(d)(2)(B), 59, and 60. Failure to enter the order on a separate document is no problem in the circuits that hold that an order denying one of these motions is not separately appealable, that the appeal must be timely taken from the underlying judgment. Some circuits, however, have concluded that a separate document is required because the order is appealable.

Another untoward consequence of the separate document requirement has caused greater concern to the Appellate Rules Committee. If a clearly and truly final judgment is not entered on a separate document, appeal time does not start to run. This consequence of the rules would not be troubling if district courts routinely adhered to the simple and easily implemented separate document requirement. Routine adherence, alas, has not been achieved despite more than a third of a century to become accustomed to Rule 58. There are large numbers of judgments entered years ago, in litigation long-since believed to have been concluded, that remain eligible for appeal. The Appellate Rules Committee views these judgments as "time bombs" waiting to explode.

The Appellate Rules Committee initially undertook to address this problem solely through Appellate Rule 4. The price for this approach, however, arises from the way in which Civil Rule 58 interacts with other Civil Rules as well as with the Appellate Rules. The times set for post-judgment motions by Civil Rules 50, 52, 54(d)(2), 59, and 60 begin to run from the entry of judgment. If the Appellate Rules and the Civil Rules set different events as the entry of judgment, the integration between post-judgment motions and appeal time is destroyed. The initial Appellate Rules proposal would have set the entry of judgment on one of two events: compliance with Civil Rules 58 and 79(a), or 150 days after entry of the judgment on the docket under Rule 79(a) notwithstanding

failure to set the judgment forth on a separate document. This approach would reduce the "time bomb" period for appeal purposes, but would not affect the time for post-trial motions. Termination of the opportunity to appeal would not terminate the time to make a post-judgment motion, which could be cut short only by entry on a separate document. The judgment might remain subject to revision in the district court, even though time to appeal had passed. And if the district court denied relief, that order itself would be appealable — and, under the most troubling view, might support some measure of review of the original judgment as well as the denial of post-judgment relief. (This troubling view could draw directly from Appellate Rule 4(a)(4), which provides that if a party timely files a motion under Rules 50, 52, 54(d)(2)(B), 59, or 60, the time to appeal runs from entry of the order disposing of the last timely motion. For want of entry of judgment, the motion perforce is timely.)

Convinced of the need to undertake a joint approach, the Civil and Appellate Rules Committees have proposed integrated amendments to Civil Rule 58 and Appellate Rule 4(a)(7). A conforming change would be made to Civil Rule 54(d)(2)(B), but the Civil Rule 54(a) definition of "judgment" would remain untouched.

The recommendation to bypass revision of Rule 54(a) rests on great uncertainty as to the consequences that might follow. Not surprisingly, the word "judgment" appears at many places throughout the Civil Rules. The Rule 54(a) definition does not integrate well with all of them. There are compelling arguments that the definition, by encompassing any order from which an appeal lies, includes too much. There are persuasive arguments that the definition, expressed as "includes," is not exclusive — that "judgment" at times should be read to include an event that is not a decree and is not an order from which an appeal lies. Very few reported decisions tangle with these problems, and the outcome is often uncertain. Despite a parade of theoretical problems, the rule does not seem to have caused any real problems in practice. The committee agreed that it is better to leave Rule 54(a) untouched.

Rule 58 is styled, and would be changed in two major ways. Rule 58(a) would continue to require that every judgment and amended judgment be set forth in a separate document, but also would make it clear that a separate document is not required for an order disposing of a motion for judgment under Rule 50(b), to amend or make additional findings of fact under Rule 52(b), for attorney fees under Rule 54, for a new trial or to alter or amend a judgment under Rule 59, or for relief under Rule 60. This change would address directly the lesser of the Appellate Rules Committee's concerns.

The major change in Rule 58 is reflected in draft Rule 58(b)(2). This rule provides that judgment is entered for purposes of Rules 50, 52, 54(d)(2)(B), 59, 60, and 62, when it is entered on

the civil docket under Rule 79(a) and, if a separate document is required, when one of two other events has occurred. It is enough that the judgment is set forth on a separate document. But if a separate document is required but has not been provided, judgment is entered after 60 days from entry on the civil docket. Although these terms do not speak directly to appeal time, draft Appellate Rule 4(a)(7) completes the circle by providing that judgment is entered for purposes of appellate Rule 4 when it is entered for purposes of Civil Rule 58(b).

Judge Niemeyer opened committee discussion by suggesting that there is no perfect solution to the problems created by the inability of the system to accomplish routine compliance with the separate document requirement. The reporters for the two committees have labored diligently to craft a reasonably effective solution. The rules intertwine in ways that should be approached with care. The proposed solution might well be accepted unless clear flaws can be found.

Professor Schiltz, summarizing the Appellate Rules Committee approach, observed that there are indeed many complicated problems. The combined present proposals, however, seek to approach only the least complicated of the problems. As matters now stand, failure to enter judgment on a separate document means that the time for post-judgment motions and the time for appeal never starts to run. There is widespread disregard of the separate document requirement. In reading some 500 separate document cases, many appeared in which appeals were taken 3, 4, 5, and even 6 years after final judgment was entered. We want to make sure that these time periods do not stretch on forever. The First Circuit has addressed the problem by ruling that after three months the separate document requirement is waived. Other courts of appeals have admired this approach, but have concluded that it is not an available interpretation of the rules. The Appellate Rules Committee cannot address the problems alone, unless it is prepared to decouple the time for appeal from the time for post-judgment motions.

The question whether a separate document is required for an order that denies a post-judgment motion has generated nightmarish complexities. Some circuits hold that such an order is appealable, but in terms that frequently involve contradictions within a single circuit. To make it worse, some circuits have read a separate document requirement into Appellate Rule 4, independent of the Civil Rule 58 requirement that is limited by the Civil Rule 54(a) definition of a judgment. But these circuits cannot agree on when the imputed Appellate Rule 4 separate document requirement applies.

If proposed Civil Rule 58 is adopted, the Appellate Rules Committee can put aside its plan to adopt its own bypass of the separate document requirement.

The first question in the ensuing discussion asked whether there is an inconsistency between draft Rule 58(a) and 58(b). Rule

58(a) says a judgment must be set forth on a separate document. Rule 58(b) seems to say that this requirement is excused for some purposes. The response was that the requirement is not actually excused. Draft Rule 58(d) provides that any party may ask that the judgment be set forth on a separate document, and Rule 58(a) establishes the court's duty to do so. All that happens is that an efficient central means is used to avoid writing repetitively into Rules 50, 52, 54(d)(2)(B), 59, and 60 the provision that motion time starts to run when the judgment is set forth on a separate document and entered on the civil docket, or 60 days after it is entered on the civil docket.

An example was offered of the benefits that may flow from this new approach. Many actions are dismissed under the Prison Litigation Reform Act, often without even serving the defendant. The separate document requirement is not always observed. Under the present rules, appeal time does not start to run — a defendant who does not even know the suit has been filed and dismissed remains subject to the prospect of an appeal several years in the future. Under the proposal, appeal time will start to run 60 days after the order of dismissal is entered on the civil docket.

It was asked how widespread is this reported disregard of the separate document requirement. Answers were offered that the requirement is observed in the vast majority of cases, and "all the time in certain circumstances." Professor Schiltz thought that the cases he has read suggest that most of the problems will be addressed by the draft Rule 58(a) exemption of orders that dispose of the enumerated post-judgment motions. One judge agreed that a separate document is never used for an order denying a new trial.

The question was raised whether it would be better to abandon the separate document requirement. Or, perhaps, the requirement could be limited to cases in which a party asks for one. The virtue of the separate document requirement is partly the clear signal for motion and appeal time limits, and partly as reassurance that the court indeed believes that it has entered a final and appealable order. This virtue could be achieved for the benefit of any party who cares for clarity and understands the rule by requiring a separate document only when requested. It was suggested that if the Rule 58 proposal is published for comment, the transmittal letter should solicit comment on the alternative of abandoning or limiting the separate document requirement.

Discussion turned to questions of style. The draft in the agenda materials converted the present Rule 58 requirement that a judgment be "set forth" on a separate document to a requirement that it be "entered" on a separate document. It was readily agreed that this effort at streamlining was ill-advised. Entry and setting forth are distinctive requirements and events. The "set forth" locution will be restored.

A motion was made to recommend to the Standing Committee

publication of the Reporter's version of the Style Subcommittee's version of Rule 58, on terms that ask for comment on whether the separate document requirement should be retained. It was noted that although publication itself would call attention to the buried time bombs and perhaps stir some belated appeals, the Appellate Rules Committee has concluded that the risk must and will be run. It also was noted that the Supreme Court order transmitting proposed rules amendments to Congress ordinarily addresses the question of application to pending cases, and that this process in turn is limited by the provision in 28 U.S.C. § 2074(a) that the pre-amendment rule applies when, "in the opinion of the court in which * * * proceedings are pending," application of the new rule "would not be feasible or would work injustice." After these observations, the motion was adopted.

Two minor changes were proposed in Rule 54(d)(2)(B). The first would parallel the Rule 58(a) proposal by eliminating the requirement that an order on attorney fees be entered on a separate document. The second would conform Rule 54(d)(2)(B) procedure to recent changes made in Rules 50, 52, and 59 that establish a uniform requirement that a post-judgment motion be "filed" no later than 10 days after entry of judgment. These two changes can be effected by simply striking a few words from the present rule. The Style Subcommittee has proposed a complete style revision of Rule 54(d)(2)(B) since the rule will be published for comment. It was observed that the modified Style Subcommittee version presented to the committee was a vast style improvement on the present rule. But concern was expressed that considerable time must be invested to ensure that unintended consequences do not flow from a style revision. In addition, there is a risk that problems might arise from the obvious differences in style and structure between this part of Rule 54 and other parts. A motion to recommend the restyled version for publication failed. The motion to recommend publication of the simpler revision of Rule 54(d)(2)(B) was adopted.

A brief discussion ensued about the general difficulty of integrating new style conventions with the ongoing process of rule amendment. Real advantages can be achieved by piecemeal style revision. Piecemeal revision, however, runs the risk of multiplying still further the many stylistic variations that have emerged in rules that have been revised on the advice of many different committees. With rules that touch fundamental aspects of the civil adversary system, moreover, attempts to restyle provisions that are not slated for changes of meaning may prove dangerous. The recent project to amend the discovery rules and the ongoing project to consider class-action rules, for examples, have deliberately put aside any effort to make stylistic changes. These topics have widespread impact and generate intense feelings. It was urged that the Standing Committee not adopt any requirement that a general style revision be made of any rule, or even rule subdivision, whenever any amendment is offered.

Rule 81(a)(2): Recommendation for Publication

Rule 81(a)(2) now includes provisions governing the time to make a return to a petition for habeas corpus. These provisions are inconsistent with statutory provisions, and also are inconsistent with provisions in the separate habeas corpus rules that are still more inconsistent with the statutory provisions. The Criminal Rules Committee will propose some changes in the rules that govern habeas corpus proceedings and those that govern § 2255 motions to vacate sentence. The Criminal Rules Committee has recommended that all reference to these matters should be stricken from Rule 81(a)(2). The committee agreed, voting to recommend publication of the draft Rule 81(a)(2) revision in the agenda materials at the same time as the parallel Criminal Rules Committee proposal is published.

Report: FRAC

The Standing Committee Subcommittee on Rules of Attorney Conduct continues to gather information and to deliberate, without any need to move immediately toward conclusion of the project. Judge Scirica and Judge Niemeyer opened the report, noting that the Standing Committee has pursued this topic over a period of several years. The initial draft set of ten Federal Rules of Attorney Conduct remains "in the wings." Variations of a simpler dynamic conformity model are being considered.

Professor Coquillette reminded the committee that the attorney rules topic began not in the Standing Committee but in Congress. In 1986 and 1987 Congress studied the questions raised by local rules, leading both to amendments of the Enabling Act and to creation of the Local Rules Project. So many local rules dealing with professional responsibility were found by the Local Rules Project that the topic was put aside while other local rules issues were pursued. But several years ago the question was taken up. The process has included several meetings to seek the advice of lawyers, judges, and academics who have special knowledge of professional responsibility issues. The attorney conduct issues are very sensitive. The local rules take many and inconsistent approaches. The inconsistencies have caused problems, particularly for the Department of Justice. The regimes adopted by local rules often are inconsistent with state rules — in Delaware, for example, the district court adopts the Model Rules, while the state adheres to the Model Code.

Professional responsibility issues cut across all committees. The joint subcommittee met in February to host a group of experts. The discussion focused on issues raised by a set of drafts of a Federal Rule of Attorney Conduct 1. Five versions were presented, moving in progression from a detailed model that expressly addresses several issues to a very simple model that simply incorporates local state rules. There will be another subcommittee meeting in August or early fall. The deliberate pace has been

adopted deliberately, to work toward a strong and generally acceptable solution.

As work continues, there may be a FRAC 2 to regulate areas in which the Department of Justice has encountered difficulties with state rules of professional responsibility. Particular problems have emerged with respect to contact with represented persons and calling lawyers as grand-jury witnesses. The American Bar Association, the Conference of Chief Justices, and the Department are discussing possible solutions, aiming toward revision of Model Rule 4.2. Congress is interested in these questions. 28 U.S.C. § 530B was an effort to address state regulation of federal government attorneys, but it is unfortunately drafted. By commanding compliance with both state rules and local federal court rules, the statute at times requires the impossible task of complying with inconsistent rules. Pending bills would either repeal § 530B or refer these problems to the Judicial Conference for recommendations.

There also may be a FRAC 3 to deal with bankruptcy issues. Bankruptcy is distinctive because the bankruptcy statutes address some matters of professional responsibility, there are unique conflicts-of-interest problems that arise from the multiparty nature of bankruptcy proceedings, and there is a national bar. The Bankruptcy Rules Committee is considering these matters, but is not aiming at immediate action.

The Standing Committee continues to study the alternatives, honoring its obligation to promote consistency of rules and otherwise serve the interests of justice. In the end, the decision may be that there is no need for new rules.

The ABA has set an October target to distribute a preliminary draft of "Ethics 2000" proposals. It may be that the target will not be hit. There is no point in attempting to move out ahead of these proposals in considering such specific issues as Model Rule 4.2. Discussion of these specific issues includes not only the ABA committees but also the Department of Justice and the Conference of Chief Justices. The ABA recognizes that simple adoption of a Model Rule does not accomplish adoption by any state. The Model Rules have not been unanimously adopted; the states that have not adopted them include such large states as New York and California.

And it has not been decided whether any federal rules addressing professional responsibility should be incorporated into the existing sets of rules of procedure or whether an independent set of Federal Rules of Attorney Conduct should be adopted.

Report: Discovery Subcommittee

Judge Niemeyer introduced the report of the Discovery Subcommittee by noting that although the Subcommittee has guided deliberations on the discovery amendments that now rest in the Supreme Court, it has important issues left to consider. The

question of privilege waiver in document production is an important one that attorneys still worry about, but it is also complex. Computer-based information presents another great set of problems. Enormous bodies of information are now kept in computer-based systems. Discovery problems are beginning to emerge. The subcommittee met on March 27 with groups of experts to learn more about the problems, and to begin to consider the question whether rules changes are appropriate.

Judge Levi began the report by stating that the subcommittee is in an information-gathering mode. He and Professor Marcus attended the January leadership meeting of the ABA Litigation Section and listened to a discussion about the opportunity to do something by rules changes to address discovery of computer-based information. Lawyers who typically seek information are worried about spoliation. Lawyers who typically provide information are worried about the costs and burdens of responding.

The March meeting presented three panels. The first panel, comprised primarily of lawyers, provided information about the problems that have been encountered in practice. The second panel, comprised primarily of judges but with a few lawyers, addressed possible solutions, including the possibility of rules changes. The third panel, comprised entirely of forensic computer experts, provided information about technological problems and prospects, costs, and the like.

One persisting problem arises from information that the creator has attempted to delete from the computer. Vast amounts of intentionally "deleted" material remain subject to retrieval. Heroic measures are required to completely and assuredly delete information beyond the prospect of retrieval. Like an ancient palimpsest, the investigator need only chisel away the overlying material to reach the original underlying information.

There is some interest in developing safe-harbor guides to information preservation. Uniformly accepted retention protocols would be welcomed by many.

Privilege problems remain very much under study. One particular source of privilege problems arises from the fact that the systems that "back up" computer information to protect against system failures typically back up all information in the order received, without any differentiation or ordering. Searches through back-up tapes for relevant information must indiscriminately review everything.

Battles continue to be waged over the form in which computer-based information is produced. The party that has the information may prefer to produce it in hard-copy form, while the requesting party may prefer to receive it in electronic form for easier searching. The party who has the information may, on the other hand, prefer to produce it in its current electronic form, shifting to the requesting party the burden of search; the requesting party

may have a contrary preference that the producing party do the search.

Cost-bearing has come back to the discussion. Texas Rule 196.4 includes cost-shifting as part of its regulation of computer-based information discovery. It has been suggested that the abandoned effort to make explicit provision for cost-bearing as part of the balance between discovery costs and discovery benefits might be revived for computer-based information.

It has been suggested that the Rule 34 definition of "document" may deserve further consideration. More explicit wording might make it easier for lawyers to convince clients of the extent of the obligation to provide computer-based information in discovery.

Additions to Rules 16(c), 26(a), and 26(f) have been suggested to focus the parties and courts on the need to prepare for, and to manage, computer-based discovery.

With all of this, many remain uncertain whether any rules amendments would be helpful. The subcommittee thinks that a second conference would be helpful, again on a reasonably modest scale. The Federal Judicial Center is willing to help. One possible study would be to undertake an in-depth analysis of ten cases that have involved high levels of computer-based discovery. It also may be possible to develop a survey of magistrate judges through the computer system that links them together.

A subcommittee member observed that the March 27 meeting was very informative. The judge participants made it clear that early intervention case management is very important.

Another observation was that often the discovery fight is over the nature of the search. It might help to provide in the rules that the notice of discovery can define the search method, subject to objection. Various methods of search are followed in practice. In some circumstances, the requesting party is allowed direct access to an adversary's computer system. In other circumstances, a party with computer-based information may regard the very set-up of its computer system as highly sensitive and confidential information. The magistrate judges at the conference were not inclined to adopt a special rule for computer-based discovery.

Professor Marcus began his summary of the conference by observing that we have come a long way without getting closer to the finish line. There was agreement on some points.

Issues surrounding discovery of computer-based information do matter, and will continue to matter. People make such pronouncements as that 35% of business information is never rendered in hard-copy form. No one has a "silver bullet." But there is a view that the internet will force greater uniformity in the means of generating and preserving computer-based information.

There is disagreement whether we need rules changes at all, and on what rules changes might be desirable if any are to be made. This is a moving target. Rules changes are costly. If the proposed amendments now in the Supreme Court take effect, many districts will have to adjust to deletion of the right to opt out of the national rules. Immediate adoption of still further discovery rules changes might prove burdensome for them.

Why is computer-based information different?

Discovery could be made easier by computers. Electronic searching can be both more thorough and much faster than a document-by-document paper review. A "word search" may be sufficient for many inquiries.

But one limit arises from information preserved in forms that can be searched only with obsolete software or hardware.

The problems presented by back-up tapes probably are unique. They are created in a form that makes search difficult. They may or may not be preserved over long periods of time.

Computers create "embedded" data that the user frequently does not know about. There is back-up information, cache files, and the like as well as encoded information about time of creation, changes over time, recipients of e-mail, and so on.

A lot of information can be found after a long time, including embedded information, supposedly deleted information, preserved back-up tapes, and so on.

Preservation is a problem. Simply turning on a computer can destroy information, and the destruction is in a random and unpredictable sequence. But not turning on the computer can be crippling. Even something as seemingly simple as turning off an automatic deletion program can immobilize a system after a relatively brief interval.

On-site inspection may be very important. Querying the system of another party, or of a nonparty, may be the most effective means of finding information.

The existence of experts in the field of computer-based discovery is itself a symptom of the differences between traditional forms of information and computer-based forms.

All of this leaves the questions of what to do. Work at educating judges and lawyers on the problems and prospects of computer-based discovery? Urge creation of a manual, similar to the Manual for Complex Litigation? Make changes in the discovery rules?

Current suggestions begin with those that are relatively modest. Rule 16(c) could be amended to make computer-based discovery a specific topic for the pretrial conference; Rule 26(f) could be amended to make it a subject of the parties' meeting to

plan discovery. Initial disclosure requirements could be expanded to include information about a party's computer-based information system. Rule 30(b)(6) could focus on discovery addressed to the people within an organization that know how computer-based information is maintained and retrieved. Rule 34 could require production of information in computer-readable form; requests could be put in computer-readable form to expedite the exchange. More modern terminology could be adopted into the rules. And Rule 26(a)(3) could be expanded to require advance disclosure of computer-generated trial evidence; Maryland is working on these issues now.

Broader issues may be considered as well. (1) Presumptive limits might be established for discovery of back-up tapes, perhaps providing that there is no need to search except on court order, or perhaps providing presumptive time limits for the backward search. (2) Something might be addressed to information preservation, although the rules do not now address preservation issues. One focus for a preservation rule might be coupled to the Rule 26(d) discovery moratorium, requiring that information be preserved through the moratorium period; immediate creation of mirror copies might be required, although it will be difficult to define the portions of widely dispersed computer systems that must be preserved in this fashion. (3) The problem of "deleted" information might be addressed, perhaps in Rule 26(b)(2). The purpose would be to limit the circumstances in which a responding party is required to incur great expense to recover deleted information. One challenge would be to define deletion of material that may have come into many computers and have been deleted from fewer than all. (4) Cost-bearing provisions may be more appropriate with respect to computer-based information than in more general terms. (5) Perhaps there is room to inject courts into the task of regulating "on-site" inspection and query processes. Some protocol or predicate might be created. (6) Privilege waiver by inadvertent production remains a challenging problem. The long-pending provision for a "quick look" that does not qualify as production and does not support waiver may not work for computer-based information: the quick look is the only look. There may be vast amounts of information that cannot be comfortably screened in any other way. An alternative has been suggested, allowing a defined period of time after production to assert privilege and retrieve the assertedly privileged information. But the amounts of material involved may mean that this approach simply shifts the time frame without reducing the burdens. (7) Some claims have been made that computer-based information cannot be produced because access is possible only through use of copyrighted software. These claims may well be bogus. But it may be difficult to attempt to define the substantive reach of fair use or similar copyright concepts, or to control the interpretation of copyright licenses, by court rule. (8) It might be possible to define the extent of a reasonable search by adopting a preference for key-word, boolian, or other search methods. (9) So-called "legacy" data may present

special problems of burden, involving the need for archival searches for obsolete equipment and software to retrieve information preserved independently of the means of access. But it is difficult to know what a rule provision might do.

All of this reduces to the general proposition that if possible, it would be desirable to reduce unnecessary burdens on parties who face requests to discover computer-based information, and also to reduce the unnecessary hurdles that may confront those who make the requests. But we are far from reaching that goal. Advice will be welcomed.

General discussion began with Rule 34(b), which provides that a party who produces documents shall produce them in orderly form. The "shuffled response" used to occur regularly, but is supposed to be prohibited now. Perhaps an equivalent provision can be adopted for discovery of computer-based information. But back-up tapes will present a problem; there is little apparent reason in the business purposes they serve to adopt a more orderly system of preservation.

It also was noted that a "freeze" order to preserve computer information against accidental or deliberate destruction can be disruptive. The disruption grows as information is dispersed more broadly throughout numerous desk- and lap-top computers. There seems to be a transition from centralized record-keeping of the sort that characterized the "main-frame" computer era. Migration to personal computers has led to dispersed and unorganized records.

Stories are growing that plaintiffs with modest assets are deterred from bringing litigation on strong claims by the costs of computer discovery. A plaintiff who has even a small number of personal computers in a business office may find that a thorough search in response to routine discovery requests can be prohibitively expensive. If we start fiddling with the rules we may expand the actual hours required for discovery — present levels are quite modest in most litigation, as revealed by the FJC study.

The March 27 meeting and other sources of information make it clear that there is intensive work with consultants to effect computer-based discovery, both in making discovery requests and in responding. Discovery may be made easier if the experts are brought together early in the process. But all of this is very expensive. And it may seem frightening that the parties and lawyers cannot manage discovery without the help of nonlawyer experts.

It has been suggested that the cost of retaining computer experts may decline as the market responds to expand the number of experts. But such reductions may not occur. There are a growing number of actions between parties who both have much computer-based information and who are seeking extensive discovery of each other. This seems a new phenomenon.

It will be important, if it is possible, to differentiate by rule between the basic information that is really needed for litigation and the costly and marginal information. Cost-bearing may be an appropriate approach: it puts the burden of deciding how much a computer search is worth on the party who wants the information.

Another observation was that the ranks of computer experts may expand to include experts based in the big accounting-consulting firms, and that this could in turn exert pressure toward the multidisciplinary practice firms that are the subject of current debate.

Both business practices and litigation practices seem to be evolving at a revolutionary rate. One development that could bring important relief is quite outside the civil rules. There is said to be real pressure toward greater uniformity of document creation, and toward commonly accepted standards for document preservation. If brought to fruition, these developments could be quite helpful.

With all of these possibilities, it remains important to ask whether we need new discovery rules. It was suggested that the present rules provide adequate tools. What judges need for effective management is not so much new rules as real knowledge of the technology. These problems should be addressed in the opening stages of case management. It may be enough to educate judges, and perhaps amend Rules 16(c) and 26(f) to encourage early attention to these issues.

It was urged that it takes so long to make a rule that the subcommittee should continue to work vigorously. Rule 34 might be revised; "data compilations from which information can be obtained" has a 1970-like ring and is no longer adequate. Perhaps Rule 34 should be amended to establish a presumption that computer-based records are to be produced in computer-based form.

Another suggestion was that the ease of instantaneous, dispersed access to computer-based information has implications for discovery in mass litigation. Document depositories may be outmoded; more efficient means may be available to ensure easy access to the information that makes multiple actions easy.

The need for continued work was expressed from a different perspective. "Games are being played." Discovery burdens are being imposed deliberately — first a demand is made for hard-copy information, then a demand is made for the same information in computer format. This is happening in litigation that pits business firm against business firm. In consumer litigation, wafted on the wings of notice pleading, discovery is changing rapidly. The costs can be staggering. In all sorts of litigation, nationwide and worldwide firms, in which everyone has a computer, present enormous difficulties in knowing where to go, who to talk to, how to retrieve and download the relevant information.

The theme of dispersed information continued in the observation that there is no way to view every computer in a party's organization. Going through a complete information system may be clearly out of any proportion to the reasonable pursuit of good-faith litigation. There is bad-faith litigation behavior that makes matters even worse.

A problem unique to computers is that a lot of private and often intensely personal information seems to reside in business computers. Few businesses, if any, have found any effective means to control the mingled business and personal use of office computers. The corresponding discovery problems are as difficult to manage as the habits of computer users.

It was noted that in criminal prosecutions, it is becoming common to seize computers to preserve evidence. Defendants then commonly assert that the computers must be returned because that is the only source of records needed to carry on daily life and business. Making mirror-image copies of all the information in the computer may provide an alternative to seizure, but the alternative itself is fraught with questions.

The discussion concluded with the agreement that the subcommittee should arrange a second conference, to be organized as a special meeting of the advisory committee, early next fall. Professor Marcus will prepare some draft rules for consideration. This work does not reflect a prejudgment that rules amendments are desirable, but only that the questions are important and should be pursued. "Little" changes will be in the mix. And the committee must be prepared to hear that it may prove difficult to draft even roughly satisfactory models. The fear of unintended consequences in an area of continual rapid evolution must haunt us continually.

Subcommittee Report: Rule 23

Judge Niemeyer introduced the Rule 23 subject by noting that there have been "several generations of Rule 23 proposals." The only amendment accomplished by the process so far has been adoption of Rule 23(f). This provision for permissive interlocutory appeals from orders granting or denying class certification bids fair to assist in the development of more orderly Rule 23 jurisprudence.

The work on Rule 23 has generated much information and has stirred, or revealed, much controversy. There was nothing simple about the reactions to early proposals. We still need to ask whether there are changes that would improve the practice and the rule. Are there problems that we can address effectively? The committee should provide such guidance as can be to the subcommittee.

Judge Rosenthal reported for the subcommittee. The subcommittee has focused its task less on gathering new information than on sorting through the incredible mass of information that has been gleaned through seven years of work, published proposals and

reactions to them, conferences, and related efforts. Rule 23(f) will generate new data on proper certification practices.

The proposal to soften the Rule 23(c)(1) requirement that class certification be decided as soon as practicable by requiring that certification be decided only "when practicable" was advanced because it seemed to make the rule fit actual practice. The proposal was resisted, however, because it was feared that it would open the way to some consideration of the merits of the underlying claims. Still, the one-time proposal to allow some examination of the merits before certification has not been fully resolved.

Consideration was given to adding new factors to the calculus of predominance and superiority in Rule 23(b)(3). Some of these factors would have tended to discourage certification. A maturity factor would have pointed toward caution in mass-tort class actions. A "just ain't worth it" factor, (F), was found not ready for advancement.

Another proposal would have confirmed the power to certify for settlement a class that could not be certified for trial. Work on this proposal was postponed to await the decision in the Amchem case, and then further postponed to consider the impact of the Amchem decision in the lower courts. The Amchem and Ortiz decisions have put important limits on certification for settlement.

Through all of this, nothing has become easier or simpler. The RAND class-action study has been completed, and will be helpful. But sorting through all of the RAND information will itself require substantial study. Much additional information is found in the committee's own four-volume set of working papers, the FJC study done for the committee, and the Report and papers of the Mass Torts Working Group.

There also appears to be an ongoing shift of class-action litigation from federal courts to state courts. There seems to be a concomitant proliferation of overlapping and competing class actions.

The volume of dollars flowing through class actions has continued to grow. Asbestos has ceded to breast implants as a focus of high-volume litigation, and tobacco litigation looms increasingly large. The amounts at stake can be huge.

There are fundamental choices to be made in considering every stage of class actions. Many of the abuses and problems do not yield readily to rulemaking. Amchem, for example, teaches that settlement classes cannot safely deal with many kinds of future claims, particularly the "future futures" who are not even aware of past exposure to the products or conditions that may cause future injury.

Congress is studying the problems of overlapping and competing classes. There may not be much that can be done about these

problems in the Enabling Act process.

Other of the real or perceived abuses may yield to more determined use of existing rules.

Earlier committee efforts were incredibly ambitious, addressing head-on some of the most important questions about class-action practice. But the rulemaking process itself will make it difficult to implement whatever answer may be found to some of these questions. The subcommittee has concluded that it is better to focus future efforts on the process of class actions. The final section of the RAND report says something familiar: Rules can help by identifying when judicial intervention is most needed, and by facilitating intervention when it is needed. Rule 23 does not say much about this. Case law helps to fill in the gaps, but not as effectively as a more explicit rule might do. We can set out criteria for addressing the process.

The first issue the subcommittee offers for discussion is the certification of settlement classes that would not be certified for trial. Rule 23 was read by the Court in the Amchem case to permit certification for settlement rather than trial only when "manageability" is the sole obstacle to certification for trial. Because the decision rests on interpretation of the present rule, amendment is possible to adopt a different approach. Models are provided with the subcommittee report that would allow certification beyond the limits of the Amchem decision. One model is a new Rule 23(b)(4); the other works through amendment of Rule 23(b)(3). There are strong arguments both for and against pursuing this possibility.

On the side of principle, the Amchem decision reminds us of the tension between individual and representative litigation. If the bonds that tie class members together are not strong enough for trial, can we say in a meaningful sense that there is a class at all?

If settlement classes are made more easily available, one consequence will be an increased number of opt-out classes. The financial risk to class lawyers is reduced when settlement is available. Do we want to encourage the continued growth of class actions in this way? And a permissive rule will in turn be expanded as courts, in the pursuit of convenience or other goals, find ways to approve settlements that lie outside the intended reach of any new rule. The limits carefully written into a new rule will, at times, be ignored.

Failure to expand the uses of Rule 23, on the other hand, may lead to still more class actions in state courts. The state courts may, with some delay, come to emulate the more stringent attitudes of the federal courts, but this cannot be predicted with confidence.

So we could decide to do nothing, to continue to rely on the

Amchem decision to supply the rule that guides us. Case law will clarify what weight can be given to settlement or the prospect of settlement. Rather than criteria, we could focus on the process, on such matters as attorney appointment and attorney fees. This, at any rate, is the first question: should we encourage certification for settlement of a class that could not be certified for trial?

Regulation of the settlement process itself presents another set of questions. The draft Rule 23(e) in the agenda materials addresses such issues as support for, and containment of, those who make objections to a proposed class settlement. It also enumerates an extensive list of factors drawn from case law to articulate the matters to be considered on reviewing a proposed class settlement. There are many different issues to consider.

A very rough draft addresses appointment of class-action counsel in a way that is designed to enlist the court in enhancing the prospect of effective class representation and to emphasize the fiduciary obligations of class counsel.

Another proposal that needs further development in the subcommittee would regulate the acts that counsel can undertake on behalf of a class before it is certified.

Attorney fee issues also are being considered. The executive summary of the RAND report suggests that fees are the most important source and symptom of abuse. And this may be the most easily addressed problem. Much good can be done if courts are able and willing to understand proposed settlements and fee awards. And a new rule can help equip courts to discharge this responsibility. One frequent suggestion, for example, is that fee awards should be based on the amount actually distributed to class members, not on the amount theoretically available if all class members choose to participate in the distribution.

There is a continuing need to examine the evolution of the cases. Mass torts are particularly likely to shift quickly. Three years ago, the Court said in the Amchem opinion that asbestos litigation is a terrible problem, but one that cannot be addressed through present Rule 23 without doing violence to the system. Can we amend Rule 23 to address it without doing violence to the system? Amchem may be read to give warnings on that score.

And so we can consider the "23(b)(4)" model that would go beyond Amchem. This is simply one picture of what a rule might look like if we were to decide to follow this path. Even with this model, it would not be possible to duplicate the Amchem settlement, at least to the extent of resolving the claims of victims who do not yet know even that they have been exposed to injury. Defendants seem to be saying now that they no longer think it necessary to be able to capture all of these future claims in a single settlement. Closure as to present claims is a sufficiently real benefit to promote settlement. But it remains to decide

whether it is useful to pursue broader settlement opportunities, in the face of the difficulty of predicting what the impact might be. It is hard to know whether Amchem has restricted pre-Amchem settlement practices. The subcommittee believes that more class actions are going to state courts, and that the migration is fueled in part by perceived restrictions in federal courts. Although prediction remains uncertain, it is a fair guess that adoption of a proposal like this would increase the number of class actions brought to federal court.

The settlement class proposals are not limited to "mass torts." They are drafted in general terms that apply to all varieties of class actions, reflecting the established uses of settlement classes before the Amchem decision. But it was urged that the committee should focus on the problems presented by mass torts that involve different state laws. It was suggested, by way of elaboration, that the "manageability" aspect of Rule 23(b)(3) certification rulings is all that Amchem focuses on, and that manageability does not speak to choice-of-law issues.

Several comments were addressed to the package as a whole. Of the two drafts that would go beyond Amchem, it was observed that the (b)(4) draft would include (b)(1) and (b)(2) classes as well as (b)(3) classes, and this scope was thought to be a mistake. If, for example, there is a "not really limited" fund, it would be wrong to certify a mandatory class on the theory that (b)(4) goes beyond (b)(1) limits. The same is true of a (b)(2) class — if declaratory or injunctive relief is not appropriate with respect to the class as a whole, why approve settlement with respect to a class? The provision proposed for discussion in Rule 23(e) that would permit a class member to opt out of a settlement was thought undesirable as to (b)(1) and (b)(2) classes because it would defeat the very purpose of certifying such a class. This set of comments then moved on to recognize that there are choice-of-law problems, but to suggest that an attempt to paper them over by certification of a settlement class may trespass so far on substantive rights as to violate the limits of the Enabling Act. Finally, it was asked whether the drafts on attorney appointment and attorney fees were intended to displace the inconsistent provisions of the Private Securities Litigation Reform Act. If this is not intended — as it is not — the draft should be modified to provide for inconsistent statutory procedures in the text of the rule, rather than leaving the issue to an observation in the Committee Note.

Further discussion of the "(b)(4) Beyond Amchem" draft recognized that the settlement-class questions are complex, and have been the occasion for frequent discussions over the years of committee deliberations. Views vary. Often plaintiffs' attorneys disagree on these questions among themselves, as do defendants' attorneys. The committee should attempt to focus on the public policy: what is appropriate for class actions generally? On the defense side, many defendants want a strong settlement rule that can be used to "get rid of problems." Many others fear the massive

pressures that can flow from certification of a class for any purpose, whether for settlement only or for trial. Plaintiffs' lawyers include those who prefer truly individual representation of small numbers of plaintiffs, those who prefer to aggregate representation of many plaintiffs by formal or informal means, and those who prefer large-scale class-action resolution. These differences should be evaluated as a matter of public interest, not self-interest.

The adoption of Rule 23(b)(3) in 1966 introduced a new element. Many critics worry about what happens to class members: how well are their interests represented? If the parties stipulate that the case will not be tried, and we allow anyone who wishes to be heard, what are we doing in replacing adjudication with settlement? Facilitating settlement generates many problems. Class members who are not represented, except by the self-appointed, are in a very dangerous position. There is force in the argument that a device as powerful as the settlement class should be approved by legislation, not rulemaking. "This is pretty heady stuff. We should confront it head-on."

Returning to the choice-of-law problem, the committee was reminded that concern was expressed in earlier discussions of these issues that settlement circumvents state law. The manageability advantages of settlement run roughshod over state law. And if a case cannot be tried, there are weird incentives for the lawyers who represent a plaintiff class. But the Amchem decision accepts these consequences of settlement. Now we seem to be worried about conflicts of interest within the class and the need to subclass. In mass torts, differences in the nature of injury among class members can be a problem on this score. It is a fair question whether the advantages of settlement are so great that we should put aside theoretical concerns in favor of designing procedural tools that will advance better justice.

The choice-of-law discussion continued with the argument that the Amchem decision does not speak to the effect of state-law differences on the predominance of "questions of law or fact common to the members of the class." The statement that only "manageability" concerns can justify certification for settlement of a class that would not be certified for trial is not clear, but it seems to refer to concerns more mundane than choice of law.

The question whether to attempt to amend Rule 23 to expand the role of settlement classes beyond limits of the present rule, as interpreted in the Amchem decision, came back. If expansion is pursued, it could be along lines similar to the "(b)(4)" draft, or instead could be done in terms similar to the (b)(3) draft. If expansion is not pursued, there is another choice — the Amchem interpretation could be made explicit in the rule, or the rule could be left unchanged. There might be some advantage in amending the rule to confirm the Amchem interpretation, but the advantages are not clear. Something might turn on whether other changes are

to be made; an express confirmation of the Amchem interpretation could help if other changes might seem to imply some doubt.

Mass-tort classes present special problems of binding class members who, without the class disposition, would be likely to undertake individual litigation. One of the problems involves notice. The Federal Judicial Center has agreed to help by gathering models of notice for certification, for settlement, and for both certification and settlement together. A number of illustrative forms will be prepared for different substantive areas, and will be made widely available.

The desirability of encouraging settlement was discussed directly. It was urged that it is anachronistic to express doubts about the values of settlement — settlement is the fact. But what is the impact of expanding the opportunity to settle class actions in federal court when state courts remain available?

Settlement was simultaneously praised and damned in a comment that sought to set practical advantages and broad-scale theoretical advantages against the more familiar conceptual objections. The practical advantages lie in the abilities to resolve claims at lower, and perhaps far lower, transaction costs, leaving more money for victims and less for lawyers; to assure an orderly distribution of perhaps limited assets so compensation is available to those who are worst injured and those who are slowest to sue (including "future" plaintiffs), without disproportionate early payments to those who are least injured or for punitive damages; to provide like treatment as to both liability and damages for victims who have suffered similar injuries inflicted by a common course of action, free from artificial distinctions based on the choices of different law and differently inclined tribunals; and to marshall judicial capacities in an orderly manner. The theoretical advantages are implicit in these practical advantages, emphasizing the like treatment of like cases. The familiar conceptual objections assert that these practical and theoretical advantages come at too high a sacrifice of traditional values. The like treatment of like cases involves a homogenization that defies the customary opportunity of plaintiffs to pick the time, the court, the coparties, and the adversaries. Settlements defy governing state law by disregarding the different social policies that are reflected in different legal rules. The settlement, moreover, is controlled by class counsel who — most pointedly in a class certified only for settlement — get nothing if there is no settlement. The ability of defendants to influence the choice of settlement terms in this setting cannot be controlled effectively by judicial review because the range of plausible alternative settlements is far too wide to support any but the most general appraisal of actual settlement terms. Choice between these warring views is exquisitely difficult.

Adoption of the proposed (b)(4) would support an argument to approve the actual Amchem settlement, at least without the "future

futures" (those who, at the time of settlement, do not know of their exposures to the injury-causing event or condition). The Amchem settlement is so attractive that it has furnished the model for pending asbestos legislation. The importance of these questions is reflected in the opening of Judge Becker's opinion in the Third Circuit reversal of the Amchem settlement. In paraphrase, he observed that every decade presents a few great cases that force courts to choose between resolving a pressing social problem and preserving their own institutional values. Certification for settlement on behalf of a class that could not be certified for trial solves a problem, but at a price.

Turning to the question of the interplay between state and federal courts, it was thought difficult to predict what would be the consequences of adopting an expanded federal settlement-class rule. State courts are beginning to enter the arena of nationwide class settlements. A great many choices might be made in the federal rule, facing such questions as control of competing and overlapping classes, control of multiple actions by injunction, and the like. A federal rule that treats a class certification as an event establishing exclusive federal jurisdiction over the certified class might support effective federal control, if such a rule can be written within Enabling Act limits. The res judicata effects of a refusal to certify, or a refusal to approve a particular settlement proposal, also could affect federal-state relationships in pervasive ways. Many dimensions of federalism are involved. That fact of itself demonstrates the need for care.

The role of the rulemaking process was questioned from another direction. The attempted settlements in the Amchem and Ortiz cases seemed to many observers to go beyond the limits of what should be done by settlement. A rule that explores ways of improving settlement class practice within the limits of the Amchem opinion could present reasonably comfortable alternatives. But it would be a bold step to go at all beyond the Amchem limits. Caution should be observed in pursuing the practical values of class actions and class settlements.

A veteran committee member who "was here for the Rule 23 wars" noted that proposals that emerged from years of hard work failed for want of any consensus for reform. The chances for de facto rule changes by court decision are better than the chance for achieving consensus within the Enabling Act process.

The subcommittee is determined to continue the committee's effort to be "sensitive to reality." The settlement-class question is the most prominent question that the committee decided to put aside to await first the decision in the Amchem case and then lower-court reactions to the decision. The Amchem opinion itself recognizes the question whether Rule 23 should be changed. Any attempt to go beyond Amchem will meet the practical difficulties that were recognized in the earlier deliberations. The question is not really whether to favor or disfavor settlement. It is a

question of class certification criteria at the point where the most money is involved.

It was urged again that it is difficult to say that a set of representative plaintiffs do not qualify to try a case but do qualify to settle the case. A lot of public policy is established by litigants in class actions; establishing public policy by settlement, not adjudication, is a precarious undertaking.

The Amchem decision was approached from a different angle with the observation that the opinion is not entirely clear and the dissent is persuasive. Has the decision caused problems in practice? A response was that the Amchem decision does not seem to be preventing settlements. A settlement has been reached in the fen-phen litigation, the biggest mass tort since breast implants. State court plaintiffs are objecting strenuously to the settlement, however, and it remains to be seen whether the settlement will be approved. And some cases are going to state courts. Another response was that there are decisions that retract initial certifications on the basis of the Amchem decision. A limited-fund settlement was initially approved in the pedicle screw litigation, but was decertified after the Ortiz decision on the view that the only true limited fund requires assigning complete ownership of the defendant to the plaintiff class. And there is anecdotal evidence that fear of the Amchem decision is driving cases to state courts. But there seems to be an increase in federal class actions of the sort emphasized in the Amchem opinion — not mass torts, but consumer actions on claims that would not be brought by class members as individual plaintiffs, employment cases, and the like.

Another dimension of the questions left open in the Amchem and Ortiz opinions was noted with the suggestion that the "case-or-controversy" perspective makes the approach to Rule 23 seem odd. What is odd is that usually the committee acts by reacting to problems that are brought to it. Is anyone coming to the committee now, saying that there is a problem with Rule 23 that needs to be addressed? Why not let the subcommittee continue its work, waiting to see whether real problems emerge?

The response was offered that we are in a period of transition. Interlocutory appeals under new Rule 23(f) offer a new safety valve that may release some of the pressures that to many defendants have made settlement the only available course after class certification. The Amchem and Ortiz decisions are the first Supreme Court interpretations of Rule 23 in several years. They have changed what some courts were doing. The Amchem opinion is opaque in parts, and Justice Breyer's dissent has a strong practical grounding in the real importance of settlement in the process itself. The subcommittee is asking now only for a threshold determination of the most useful present direction to follow, not for a committee determination that will permanently close off any alternative. The RAND report is an indication that there still are problems. So of the many problems that were

described by lawyers at committee conferences and hearings, and the problems that were discussed in the conferences held by the Mass Torts Working Group.

The subcommittee thus is looking for directions to focus its work for the immediate future. It seeks to find proposals that may survive and that will improve ongoing administration of Rule 23. There is no present belief that some specific part of Rule 23 needs to be fixed as an independent source of problems. The Rule is, for what it does, a very short and general rule. The proposals set out in the agenda materials would make specific in the rule practices that have emerged in the cases or developing practice. They would add flesh to the structure in places where the rule now says nothing. The draft Rule 23(e) provisions for reviewing class settlements are very much in this vein.

With all of this, it was argued that settlement classes should not be further explored. There is no clear reason to take on these questions, unless it be to make the practical impact of the Amchem decision more clear. Why go beyond, into uncharted territory? A parallel argument was made that no practical case has yet been articulated for going forward with the (b)(4) draft. We should see real benefits before making any investment or running any risk in this area.

The subcommittee agreed that for the time being, it should be assumed that Rule 23 will remain within the limits sketched in the Amchem decision. The subcommittee will work to improve the workings of Rule 23 within those limits.

That objective leads to the question whether an attempt should be made to restate the Amchem decision in the body of Rule 23. It was urged that it is difficult to be confident of the decision's meaning, and that in any event it is awkward for an advisory committee to purport to interpret Supreme Court pronouncements. The Amchem decision can be read to authorize settlement classes on a broad scale; perhaps it should be left alone. But a majority of the committee concluded that the subcommittee should continue to work toward a proposal that would constructively capture the meaning of the Amchem decision in Rule 23. A careful review of lower-court developments will be a central part of this task.

Apart from the settlement-class question, the subcommittee is pursuing several "process" questions. The approach to these questions has been to attempt to capture in Rule 23 the best practices that courts sometimes, but not always, honor now.

Draft Rule 23(e) sets out a long list of criteria for review of a proposed settlement. Objectors are noted in a way that reflects the difficulty of sorting out beneficial from harmful manifestations of the objection process. Many of the points covered in the draft respond to concerns that have been repeatedly expressed during the Rule 23 review process.

The draft provisions for court appointment of class attorneys and for determination of attorney fees are in "very preliminary" form. These issues are very sensitive. The attorney appointment draft reflects an attempt to increase court control. An application is required. There must be a hearing if more than one application is filed. The fiduciary role of class counsel is emphasized.

The draft fee rule also is intended to increase court control. It does not purport to resolve the choice between measuring fees by a percentage of the class recovery and by "lodestar" calculation. The factors identified in the draft, indeed, emphasize that there are many common elements that affect both approaches.

Both drafts reflect the fear that there are continuing abuses, and a continuing need to strengthen judicial regulation.

Discussion began with the assertion that the drafts respond directly to real problems. These are highly controversial topics, but the committee should not shy away from them on that account. There are existing paradigms in the case law. The subcommittee should focus its attention on these issues as its first priority.

Regulation of appointment and fees involves issues that overlap concerns of professional responsibility. The "Ethics 2000" committee is considering rules that overlap these issues with such matters as fees, competency, and conflicts of interest. Proposals in these areas will be as controversial as anything the committee has considered. It may be desirable to seek a preview of what the controversy will be like. On possibility might be to seek advice at one of the conferences held to discuss possible federal rules of attorney conduct, recognizing that more drafting work remains to be done before such discussion would be useful.

It was agreed that the subcommittee should continue to develop rules regulating appointment of class counsel and determination of fees for class counsel.

Report: Agenda Subcommittee

The Agenda Subcommittee advanced the proposal to amend Rule 82 described with the other proposals of rules to be recommended for adoption.

The Agenda Subcommittee further reported that, with the help of support staff, the subcommittee process is functioning smoothly.

Report: Rule 53 Subcommittee

The Federal Judicial Center study of special masters, undertaken at the request of the Rule 53 Subcommittee, has been completed. The report was distributed to committee members for this meeting.

Thomas Willging launched the report presentation. Phase 1 of

the study was a statistical study of the incidence of special master activity in all federal-court cases closed during a two-year period. There is consideration of appointment in about 3 cases out of every 1,000, and appointment in about 2 cases out of every 1,000. The statistics cover such matters as the stages of proceedings at which masters act (all stages), who initiates appointment, and the like. Phase 2 selected a sample of all the cases identified, and undertook interviews with judges, masters, and attorneys to examine the use of masters in greater detail. One focus of the inquiry is how actual practice is influenced, if at all, by the apparent focus of Rule 53 on trial activities. The sample of cases was not random. Instead, it was targeted, including a purpose to examine some cases in which appointment of a master was discussed but not made.

Marie Leary described the findings as to the reasons that led to appointment of special masters. Approximately half of the appointments were made at the judge's suggestion. One reason for appointing discovery masters was experience with insurmountable discovery disputes and hostility between counsel in discovery; masters appointed for this reason were given authority to manage every phase of discovery. A pretrial appointment may instead be designed to help the court's understanding of complex technical issues. In several civil rights cases, magistrate judges were appointed to act as special masters because of statutory encouragement and the opportunity to save scarce judicial resources.

For trial, Evidence Rule 706 experts were used to help the court. Another case involved appointment of a master for one of the most traditional reasons, performance of a partnership accounting. Another master was appointed to handle all activity in an insurance interpleader action. The motivations were similar to many pretrial appointments — to accommodate limitations of judicial resources and to keep the cases moving.

Post-trial masters were appointed to obtain competences the courts could not muster on their own. One example involved administration of a class-action settlement. Another was to implement settlement of a tax-assessment case involving a large defendant class. Implementing institutional changes is another reason, including a desire to get information about actual implementation and its effects that the court may not be able to obtain from the parties. Nearly unique reasons were given for the multiple uses of masters in the silicone gel breast implant litigation.

Generally the judges, attorneys, and masters themselves agreed that the masters had functioned effectively. The appointments would have been made again with all the benefits of hindsight.

The greatest concern about appointing masters was that the parties must bear the cost.

Laural Hooper presented two of the areas of problems found in the study.

One set of problems arises from the methods used to select masters. The methods are set out in Table 6 of the study at p. 34. Problems are most likely to be perceived when the judge appoints a former law clerk or someone recommended by another judge. Lawyers who did not object to such appointments nonetheless reported doubts whether the person appointed was the best person. About three-fourths of the masters are attorneys. Some are magistrate judges. In Phase 1 of the study, some screening for conflicts of interest was visible in the record of about 11% of the cases. In Phase 2, it was found that courts rarely inquire into possible conflicts unless the parties raise the issue. Nonetheless, the overall finding was that parties generally were satisfied with the selection process, apparently because they were actively involved.

A second set of problems arises from ex parte communications between the master and either the judge or the parties. The nature of the appointment controls the approach to ex parte communications. If the master is to perform administrative, procedural, or settlement functions, ex parte communication with the parties is permitted, especially in post-trial decrees. Party consent is often sought. Most of the parties said they would not engage in ex parte communications unless the order of appointment permitted it. Some orders specifically forbid ex parte communications with judge or the parties. Courts that entered these orders did so to protect the masters against being lobbied. One court permitted a Rule 706 expert to communicate with the court during breaks in trial, but then put the communications on the record. In another case the judge talked to the expert off the record; this was a rare event. Several masters thought a rule on ex parte communications would be desirable; they want guidance.

Thomas Willging concluded the report. He began by noting that party consent (or acquiescence) is important to appointment. Phase 1 found, Table 3, p. 24, that 70% of motions or sua sponte orders for appointment were unopposed. Appointment is twice as likely when there is no opposition.

Authority for the appointment was found in Rule 53 in 40% of the cases, Table 5, p. 29. In another 40% of the cases, no authority at all was cited. The explanation for the failure to cite any authority may well lie in the fact that most appointments were done with consent. Often there is express consent of all parties. In other cases, the judge expressed an interest in getting the help of a master and the parties consented; interviews with the attorneys suggested that in some of these cases consent was given despite unvoiced misgivings. The rules provide a backdrop for the negotiation.

The Phase 2 interviews disclosed only a bit of reaction to the apparent limits of Rule 53. One very experienced judge suggested

that pre- and post-trial uses can involve "fact finding," so there is some Rule 53 support for these appointments. The persons interviewed did not see problems for their cases, but some would like the rule to provide express authorization for what was done. Page 69 of the report quotes a very experienced judge, who observed that it would help to clarify authority, but the task should be approached carefully. If the rule is written in broad terms, it may seem to authorize too much; if it is written in narrow terms, it may seem to impose undesirable restrictions.

Some judges believe they have inherent authority to appoint masters outside Rule 53. Those who focus on development of Rule 53 want broad, flexible authority. Flexibility is thought particularly desirable as to the role of "monitor." The monitor practice has evolved in a lot of directions.

At times the respondents talked of specific rules changes. Ex parte communications were noted, with expressions of feeling inhibited or restrained by the lack of clear guidance in rule or the appointing order. In one case a motion to remove was brought because the master engaged in settlement discussions with two of the three parties. And it was noted that Evidence Rule 706 does lay out an appointment process.

Judge Scheindlin expressed the subcommittee's thanks to the Federal Judicial Center for this fine empirical research.

Judge Scheindlin did some more impressionistic research by sending the Rule 53 draft prepared some years ago to people who have worked in the field. Six written responses were received and provide additional useful insights. Generally the responses indicate that revision of Rule 53 is long overdue. Rule 53 as it stands covers the least frequent, and the least popular, use of masters to prepare findings of fact. Findings prepared for review by the court may prove wasteful. Findings prepared for reading to a jury are "scary." One respondent said that current practice is essentially lawless; there is much that remains outside Rule 53.

The respondents in this informal survey thought that consent is important in making appointments. They believed that an "exceptional circumstances" test should continue to restrain appointments when there is no consent.

All respondents favored use of masters for discovery or mediation. The parties will readily consent when a discovery master is actually needed. And post-trial uses also were approved.

As to selection of the master, it was thought that something has to be done about possible conflicts of interest. One suggestion was that Rule 53 should invoke the 28 U.S.C. § 455 standard. And it should be required that the master be competent.

Standards of review should be adjusted to the circumstances. The respondents did not want an abuse-of-discretion standard, preferring clear error. But for "trial facts," a preference was

expressed for de novo review by the court on the record compiled by the master.

The respondents thought that generally the parties should share equally in paying the master's compensation, but that the master should be given power to recommend a different allocation.

Ex parte communications should be addressed by Rule 53. It would be sufficient to provide that the order of appointment should address the question, prohibiting ex parte communications or authorizing them in defined circumstances.

With this background, the subcommittee asks whether it should proceed with the work of developing a new rule to replace the current outmoded rule. The subcommittee believes that it would be desirable to proceed with preparation of a rule.

Judge Niemeyer recalled that the Rule 53 project was put aside several years ago because it seemed a daunting subject, and because the committee was committed to working on other demanding projects. The subject is complicated by the need to relate the use of special masters to the opportunities to rely on magistrate judges. Masters in fact are doing many different things.

It was agreed that Rule 53 is out of date. It seems to conflict with the magistrate-judge statute and Rule 72.

At the same time, Judge Roettger observed that Rule 53 is flexible in some ways that may be surprising. Many years ago he wanted to take testimony outside of his district, but could not contrive a way to do it until the Administrative Office said that he could do it if the parties would consent to an order by which he appointed himself as special master. It worked, and was very useful.

A committee member described extensive experience with special masters in California state practice. Specialized lawyers are routinely appointed as masters, with consent to all the terms of appointment, in Leaking Underground Storage Tank litigation. There are hundreds of these actions. Ex parte communications are prohibited. Most of the actions wind up successfully by mediation. The practice works well. More recently, litigation about the MTV gasoline additive has involved enormous discovery. The state court discovery commissioners bogged down. Special masters — retired appellate judges — have worked out successfully.

The committee approved a motion directing the subcommittee to develop draft Rule 53 for consideration by the committee.

Report: Simplified Rules of Procedure Subcommittee

The subcommittee on simplified rules of procedure plans to work toward a draft of simplified rules for further consideration. An effort will be made to identify people who may have relevant experience to help guide the process. If a modest number of people

can be identified who are willing to confer together, a small meeting will be convened in late summer to gain new perspectives.

Discussion began with Judge Niemeyer's report that district judges at the Judicial Conference and elsewhere have reacted with enthusiasm to the concept of simplified rules for some cases. The ABA and the American College of Trial Lawyers also seem enthusiastic.

Some valuable information may be found in studies of experience with differential case management under the Civil Justice Reform Act. Experience in the Southern District of New York, however, is not promising. Parties or lawyers do not want to be assigned to a track that seems to diminish their procedural rights, even though the "rights" are not likely to be useful or used, and are costly. This project may be a solution in search of a problem.

It was responded that an incentive to use simplified rules might be provided by empowering plaintiffs to invoke the rules by making a binding election that caps total recovery. The cap would in turn provide an incentive for defendants.

Concluding Thanks

Judge Niemeyer closed the meeting by observing that the committee should not take for granted the great work of the Rules Committee Support Office. John Rabiej is unfailing in his great and imaginative support. And Mark Shapiro, who has been of great help as well, will be moving to London, England. The appreciation and good wishes of the committee were extended to him.

Next Meeting

The next meeting was set for October 16 and 17 in Phoenix, Arizona.

Respectfully submitted,

Edward H. Cooper
Reporter

Item 8

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES CONTAINED IN SEPARATE VOLUME

COMMITTEE ON RULES File Copy
of
PRACTICE AND PROCEDURE
Volume II
Report of the Advisory
Committee on Criminal Rules
Agenda Item 8
June 7-8, 2000

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JUNE 7-8, 2000

1. Opening Remarks of the Chair

   A. Report on the Judicial Conference session

   B. Supreme Court approval of proposed rule amendments

2. **ACTION** — Approval of Minutes

3. Report of the Administrative Office

   - **ACTION** — Proposal linking courts' Internet web sites containing local rules with "Federal Rulemaking" web site and encouraging courts that do not have an existing web site to post their local rules on one

4. Report of the Federal Judicial Center

5. Report of the Advisory Committee on Appellate Rules

   A. **ACTION** — Proposed amendments to Rules 4, 25, and 45 for approval to be published for comment (publication of proposed amendments to Rules 1, 5, 15, 24, 26, 27, 28, 31, 32, 41, and 44 and revision of Form 6 approved at January 2000 meeting)

   B. Minutes and other informational items

6. Report of the Advisory Committee on Bankruptcy Rules

   A. **ACTION** — Proposed amendments to Rules 1007, 2002, 3016, 3017, 3020, 9006, 9020, and 9022 and Official Form 7 for approval and transmission to the Judicial Conference

   B. **ACTION** — Proposed amendments to Rules 1004, 1004.1, 2014, 2015, 4004, 9014, and 9027 and Official Form 1 for approval to be published for comment

   C. Minutes and other informational items

7. Report of the Advisory Committee on Civil Rules

   A. **ACTION** — Proposed amendments to Rules 5, 6, 65, 77, 81, and 82, and abrogation of Copyright Rules for approval and transmission to the Judicial Conference

B. **ACTION** — Proposed amendments to Rules 54, 58, and 81(a)(2) for approval to be published for comment

C. Minutes and informational items

8. Report of the Advisory Committee on Criminal Rules

A. **ACTION** — Comprehensive "style" revision of Rules 32 through 60 for approval to be published for comment in August (publication of revised Rules 1 through 31 approved at January 2000 meeting)

B. **ACTION** — Proposed "substantive" amendments to Rules 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41, and 43, which deal with revisions that were considered before the "style" project started, for approval to be published for comment

C. **ACTION** — Proposed amendments to Rules 1, 2, 3, 6, 8, 9, and 10 Governing Section 2254 Proceedings and Rules 2, 3, 8, 9, and 10 Governing Section 2255 Proceedings

D. Minutes and other informational items

9. Report of the Advisory Committee on Evidence Rules

10. Status Report of Subcommittee on Attorney Conduct Rules

11. Disclosure of Financial Interests

A. **ACTION** — Proposed new Civil Rule 7.1 and Criminal Rule 12.4 and amendments to Appellate Rule 26.1 for approval to be published for comment

B. Alternative language recommended by Committee of Codes of Conduct and FJC report on local rules governing financial disclosure

12. Report of Technology Subcommittee

13. Status Report of Local Rules Project

14. Comments on Proposed New Statistical System

15. Long Range Planning

16. Next Meeting: January 4-5, 2001, in Tucson, Arizona; June 14-15, 2001 (tentative dates)

Item 8

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

ANTHONY J. SCIRICA
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

WILL L. GARWOOD
APPELLATE RULES

ADRIAN G. DUPLANTIER
BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

W. EUGENE DAVIS
CRIMINAL RULES

MILTON I. SHADUR
EVIDENCE RULES

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

FROM: **W. Eugene Davis, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: **Report of the Advisory Committee on Criminal Rules**

DATE: **May 8, 2000**

I. Introduction

The Advisory Committee on the Rules of Criminal Procedure met on January 10-11, 2000 in Orlando, Florida and on April 25-26 in New York City and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Minutes of those meetings are included at Appendix E.

II. Action Items—Summary and Recommendations.

This report includes three action items:

- Approval for publication of Criminal Rules 1 to 60 in two separate packages;
- Approval for publication of proposed changes to the Rules Governing § 2254 and § 2255 Proceedings (Habeas Rules); and

- Approval of new Rule 12.4 (financial disclosure statements) for publication and comment.

A. Publication of Restyled Criminal Rules 1-60--Summary

The Committee has been working on restyling the Rules of Criminal Procedure since 1999. Those discussions have taken place at five full Committee meetings and at a series of subcommittee meetings. In January 2000, the Standing Committee approved the publication of Criminal Rules 1 to 31, subject to some suggested editing and revisions.

This report addresses the proposed changes to Rules 32 through 60. The rules and the accompanying Committee Notes are at Appendix A. The Committee requests that the amendments to those rules be approved for public comment. The "style" package is appended as Appendix A.

B. Separate Publication of Amendments to Rules 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41, and 43--Summary.

A number of proposed amendments were under active consideration by the Criminal Rules Committee before the restyling project was begun. In addition, during the restyling effort, the Committee identified several amendments that might be considered controversial or significant changes in current practice. The Committee believes that it would be appropriate to publish these rules —which also contain the style changes —as a separate package in order to highlight those proposed changes for the bench and the bar. Those amendments are attached as Appendix B.

C. Publication of Proposed Amendments to Rules Governing §§ 2254 and 2255 Proceedings--Summary

The Committee conducted a review of the Rules Governing §§ 2254 and 2255 Proceedings to determine if any changes were required as a result of the passage of the Antiterrorism and Effective Death Penalty Act, which amended a number of applicable federal statutes. As a result, the Committee has proposed a number of amendments to those rules and recommends that they be published separately for public comment. Those proposed amendments are attached at Appendix C.

D. Publication of Proposed Amendment to New Rule 12.4, Disclosure Statement.

The Criminal Rules Committee has proposed a new Rule 12.4 to mirror similar amendments to Appellate Rule of Procedure 26.1 and Civil Rule of Procedure 7.1, with some modifications. A copy of the proposed rule and accompanying committee note are attached at Appendix D.

III. Restyling Project—

A. Rules 1 to 60—In General

In 1998, the Committee was informed that following successful completion of the restyling of the Appellate Rules, the Style Subcommittee of the Standing Committee would prepare an initial draft of proposed style changes to the Criminal Rules, with the first installment being presented in late 1998. The Advisory Committee was formed into two separate subcommittees to review the rules as they were completed by the Style Subcommittee. In April, June, and October 1999, the Committee considered style revisions to Rules 1 through 31 and presented those rules to the Standing Committee at its January 2000 meeting in Miami.

At meetings in January and April 2000, the Advisory Committee considered the Standing Committee's proposed revisions to Rules 1-31 and proposed style changes to Rules 32-60.

In conducting the restyling project, the Committee has focused on several key points. First, the Committee has attempted to standardize key terms and phrases that appear throughout the rules.

Second, the Committee has attempted to avoid any unforeseen substantive changes and has attempted in the Committee Notes to clearly state where the Committee is making what it considers to be a change in practice.

Third, in several rules, the Committee has deleted provisions that it believed were no longer necessary or required, usually because the caselaw has evolved since the rule was initially promulgated (or last amended). Whether those constitute changes in practice is not always clear. *See* Rule 4, where the Committee has deleted the reference to whether hearsay may be used to establish probable cause.

Fourth, during the restyling effort, several rules have been completely reorganized to make them easier to read and apply. *See, e.g.*, Rules 11, 16, 32, and 32.1. In several

others, sections from one rule have been transferred to another rule. *See, e.g.*, Rules 4, 9, and 40.

Fifth, in some rules, major substantive changes have been made. Some of those changes have been under discussion for some time but were deferred pending the restyling projects. Still others were identified and included during the project. As noted, below, the Committee proposes that those Rules be published separately; one version containing proposed style and controversial amendment and the other including only the proposed style changes.

B. Proposed Separate Publication of Rules—

The Committee recommends that Standing Committee approve publication of the changes to Rules 1 to 60 in two separate packages. The purpose of separating these two packages—although somewhat duplicative—is to make it clear to the public that there are some rules that deserve special attention.

The first package—referred to as the "restyle" package, includes Rules 1 to 60. For those rules where the Committee is proposing significant substantive changes (Rules 5, 5.1, 10, 12.2, 26, 30, 35, 41, and 43), the language containing those major changes has been deleted from the "style" package. A proposed "Reporter's Note" explains to the public that additional substantive changes for that particular rule are being published simultaneously in a separate package.

The second package—referred to as the "substantive" package, consists of Rules 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41, and 43, which all provide for significant changes in practice. This version of the package includes not only the restyled version of the rule but also the language that would effect the change in practice. The Committee Notes reflect those changes and again, a proposed Reporter's Note explains that another version of each of these rules (which includes only style changes) is being published simultaneously in a separate package. Rules, such as Rule 11, which have been completely reorganized, were not included because they did not appear to include what could be considered significant changes in substance or practice.

IV. ACTION ITEM—Restyling Project—Publication of Rules for Comment.

The following discussion focuses on the Rules that include one or more substantive changes, or changes, which the Committee believes are likely to generate some debate.

A. Proposed Amendments in Rules 1 to 31.

1. In General.

Following the Standing Committee Meeting in January, the Advisory Committee considered suggested revisions made by members of the Standing Committee, both at the meeting and in later communications. Most of those changes were accepted and incorporated into Rules 1 to 31.

The following discussion briefly addresses significant, nonstyle, changes that were made in Rules 1 to 31 following the Standing Committee meeting.

2. Rule 5. Initial Appearance.

During the process of reviewing Rules 32-60, the Committee concluded that portions of Rule 32.1 (Revoking or Modifying Probation or Supervised Release) and Rule 40 (Commitment to Another District) would be better suited for Rule 5. A subcommittee was formed and ultimately recommended that Rule 5 be expanded to cover all initial appearances, including those cases where the person has been arrested for failing to appear in another district, or for violating a term of probation or supervised release. The Rule now also deals with transfers to another district.

The version of Rule 5 presented to the Standing Committee in January 2000 included a provision for conduct video teleconferencing for initial appearances —if the defendant consents. At its meeting in April, the Advisory Committee reconsidered that proposal and concluded that it would be helpful to publish not only that provision but also an alternate provision that would permit the court to conduct such procedures, even without the defendant's consent. Thus, the substantive package version of Rule 5(f) includes alternative proposals. The Committee Note addresses the two alternatives.

Because Rule 5 contains an amendment that was being considered apart from the restyling project (video teleconferencing), the Committee has included this rule in the "substantive" package for publication.

3. Rule 10. Arraignments.

Rule 10 is being included in the "substantive" package of amendments due to the fact that it includes the proposed amendment to video teleconferencing—a proposal that had been under consideration before the restyling project began. As with Rule 5, *supra*, the version of Rule 10 presented to the Standing Committee in January 2000 included a provision for conduct video teleconferencing for arraignments—if the defendant consents. The Advisory Committee reconsidered that proposal and concluded that it would be helpful to publish not only that provision but also an alternate provision that

would permit the court to conduct such procedures, even without the defendant's consent. Thus, the substantive package version of Rule 10 includes alternative proposals.

4. Rule 24. Trial Jurors.

In the materials presented to the Standing Committee at its January 2000, meeting, the Advisory Committee proposed an amendment to Rule 24 that would have equalized the number of peremptory challenges available to the defense and the government. After further consideration, the Committee has deleted that amendment from the restyling project and has deferred consideration of that particular amendment.

5. Rule 26.

The Committee considered its proposed amendment to Rule 26 concerning remote transmission of testimony and its possible impact on Federal Rule of Evidence 804. Although the Committee has narrowed the grounds of unavailability for using such procedures—Rule 804(a)(1)-(3) seemed inapplicable—but has not taken any other action that might explicitly address the interplay in the Rule and the ability of a proponent to admit hearsay statements under Rule 804 if the declarant is in effect "available" to give remote testimony. The Committee views remote transmission of live testimony to be preferable to other hearsay evidence, even if it is in the form of a deposition or other recorded testimony.

B. Proposed Amendments to Rules 32 to 60.

The Advisory Committee discussed proposed style changes to Rules 32 to 60 at a special meeting in January 2000, at two subcommittee meetings, and finally, at its regularly schedule meeting in April 2000, in New York City.

The following discussion focuses on the Rules that include one or more substantive changes, or changes, which the Committee believes are likely to generate some debate.

1. Rule 32. Sentencing and Judgment.

Rule 32 has been completely reorganized to make it easier to follow and apply; the sequencing of the provisions has been changed. For example, the definitions in the rule had been moved to the first sections.

The proposed rule includes one change that may generate controversy. The Committee considered whether to retain revised Rule 32(h)(3)(A) (portions of current Rule 32(c)(1)). Some members believed that the provision, which requires the court to rule on all unresolved objections to the presentence report, placed an unnecessary burden on the court. Others noted that the Bureau of Prisons regularly relies upon the

presentence report to make important decisions about post-sentencing disposition of defendants, for example, designating them for a particular confinement facility. Ultimately, the Committee adopted language that would require the sentencing judge to rule on all unresolved objections to a "material" matter in the report. For all other unresolved objections the judge may either rule on them or conclude that the objections affect matters that will not be considered in imposing an appropriate sentence. The Committee envisions that a "material" matter would include those matters that would typically impact on treatment of the defendant in the prison system.

Because of this significant amendment, the Committee decided to include it in the "substantive" package.

2. Rule 32.1. Revoking or Modifying Probation or Supervised Release.

Although Rule 32.1 has been completely reorganized and expanded, the Committee intends to make no significant changes in practice. In particular, Rule 32.1(a)(5) now includes guidance on dealing with cases where the person is arrested in a district that does not have jurisdiction to conduct a revocation proceeding.

3. Rule 35. Correcting or Reducing a Sentence.

The Committee decided to delete current rule 35(a) in its entirety. Rule 35(a)(1) was considered unnecessary. Rule 35(a)(2) was also considered unnecessary; it should be very clear to a district court that further sentencing proceedings are necessary, following a decision by a Court of Appeals on the issue of whether the sentence was correct.

Rule 35 includes a substantive change that had been under consideration apart from the restyling project. That amendment, in Rule 35(b) includes new language to the effect that the government may file a late motion to reduce a sentence if it demonstrates that the defendant had presented information, the usefulness of which could not reasonably be known until more than one year following sentencing. The current rule, however, did not address the issue. The courts were split on the issue. *Compare United States v. Morales*, 52 F.3d 7 (1st Cir. 1995) (permitting filing and granting of motion) *with United States v. Orozco*, 160 F.3d 1309 (11th Cir. 1998) (denying relief and citing cases). Although the court in *Orozco* felt constrained to deny relief under Rule 35(b), the court urged an amendment of the rule to:

> address the apparent unforeseen situation presented in this case where a convicted defendant provides information to the government prior to the expiration of the jurisdictional, one-year period from sentence imposition, but that information does not become useful to the government until more than one year after sentence imposition. *Id.* at 1316, n. 13.

The amendment to Rule 35(b) makes clear that a sentence reduction motion is permitted in those instances identified by the court in *Orozco*. The proposed amendment would not eliminate the one-year requirement as a generally operative element.

Rule 35 is one of those rules that are also included in the substantive package for publication.

4. Rule 40. Transfer to Another District.

As noted supra, as the Committee reviewed Rules 32 to 60, it came to the conclusion that some of the material in Rule 40 should be included in Rule 5. A subcommittee considered the issue and recommended major amendments in Rules 5, 32.1, and 40. Much of Rule 40 is now located in Rule 5. Although those three rules have been completely reorganized, the Committee anticipates no great controversy over the amendments.

5. Rule 41. Search and Seizure.

Rule 41 has been completely reorganized and includes a substantive amendment that may generate some controversy. The substantive amendment would permit officers to seek a warrant to conduct "covert entry" searches, e.g., where officers seek a warrant to examine or monitor activities in a covert manner. The Committee discussed this proposed change at length. Although two circuits have approved such searches, several members of the Committee believed that the amendment was premature and that any change in the rule should await further caselaw developments. Ultimately, a motion to remove this provision from Rule 41 failed by a close vote.

Rule 41(b) also includes a possible change in practice by stating a clear preference for seeking a warrant from a magistrate judge; the current rule states no preference. The Committee Note indicates that the Committee does not intend to create any new ground for contesting the validity of a search warrant.

Rule 41 has been included in the "substantive" package for publication.

6. Rule 42. Criminal Contempt.

Rule 42 includes an amendment regarding the appointment of a prosecutor for contempt proceedings. The proposed language mirrors language in *Klayminic v. United States ex rel Vuitton*, 481 U.S. 787 (1987). In that case, the Supreme Court observed that ordinarily the court should request that an attorney for the government prosecute the contempt; only if that request is denied, should the court appoint a private prosecutor. The revised rule also includes a reference to the fact that notwithstanding Rule 32, the

court may summarily punish a person found in contempt in the presence of the judge. The Committee expects no controversy regarding these amendments.

7. Rule 43. Presence of the Defendant.

Portions of Rule 43 have been reorganized and depending upon the disposition of proposed amendments to Rules 5 and 10, regarding presence of the defendant where video teleconferencing is used for initial appearances and arraignments, Rule 43 will also have to be amended. Thus, Rule 43 has been included in the substantive package for publication, along with Rules 5 and 10.

8. Rule 46. Release from Custody.

Revised Rule 46(i), currently Rule 46(h), includes language originally included by Congress. Following several discussions about that provision, the Committee decided to restyle the language and retain the essence of the original language. Revised Rule 46(i) addresses the ability of a court to order forfeiture of property where a defendant has failed to appear as required by the court. Under this provision, the court may only forfeit property as permitted under 18 U.S.C. §§ 3146(b) and 3142(c)(1)(B)(xi). The term "appropriate sentence" means a sentence that is consistent with the Sentencing Guidelines.

9. Rule 48. Dismissal.

In reviewing Rule 48(b), which deals with the authority of the court to dismiss an indictment for delays, the Committee questioned whether there was still need for any provision in the rule that seemed to be already covered by the Speedy Trial Act. The original provision predated that Act, and some members of the Committee were concerned that re-promulgating Rule 48(b) might be viewed as superseding the Speedy Trial Act. The Committee ultimately decided to retain Rule 48(b) and make it clear in the Committee Note that it views the rule and the Act to operate independently and that there is no intent supersede any provision in the Act.

10. Rule 49. Serving and Filing of Papers.

The Committee has proposed an amendment to Rule 49 to reflect changes in the Civil Rules of Procedure 5(b) and 77(d) that permit, but do not require, a court to provide notice of its orders and judgments through electronic means. Rule 49(c) now parallels a similar extant provision in Rule 49(b), regarding service of papers.

11. Rule 51. Preserving Claimed Error.

The Committee has added a sentence at the end of the Rule to clarify that any rulings regarding evidence would be governed by Federal Rule of Evidence 103. The

sentence was added because of concerns about the Supersession Clause and the belief that an argument might have been made that Congressional approval of this rule would supercede that Rule of Evidence.

12. Rule 53. Courtroom Photographing and Broadcasting Prohibited.

Rule 53 has been amended by deleting the word "radio." Further, the rule has been amended to reference the fact that other rules, such as the proposed amendments to Rules 5 and 10 regarding video teleconferencing of certain proceedings, might provide for exceptions to the general prohibition against broadcasting.

Recommendation—The Committee recommends that restyled Criminal Rules 1 to 60 be approved and separately published for public comment.

Recommendation—The Committee recommends that Criminal Rules 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41, and 43.1 be approved and separately published for public comment.

V. ACTION ITEM—Publication of Amendments to Rules Governing § 2254 and § 2255 Proceedings for Comment.

Over the past year, the Criminal Rules Committee has conducted a review of the Rules Governing §§ 2254 and 2255 Proceedings to determine if any changes were required as a result of the passage of the Antiterrorism and Effective Death Penalty Act, which amended a number of applicable federal statutes. As a result, the Committee has proposed a number of amendments to those rules and recommends that they be published separately for public comment. Those proposed amendments are attached at Appendix C.

The amendments to Rule 1 of both sets of rules recognizes that there are no separate rules governing actions brought under 28 U.S.C. § 2241 (power to grant a writ of habeas corpus) and which might not otherwise be covered under § 2254 (state custody) or § 2255 (federal custody). The Committee believes that applying the rules to § 2241 proceedings will promote uniformity and consistency.

The amendments to Rule 2 in both sets of rules is intended to conform the rules to language in Federal Rule of Civil Procedure 5(e). In addition, Rule 2 of the Rules Governing § 2255 Proceedings has been amended to make use of the term "movant" consistent throughout those rules.

Amendments to Rule 3 in both sets of rules is intended to reflect the practice set out in Federal Rule of Civil Procedure 5(e) —that the clerk files the papers and refers the matter to the court for consideration of any defects in the petition or the motion.

Rules 8 and 10 of both sets have been amended to reflect the change in title of magistrate judges to United States magistrate judges. In addition, Rule 8 of the Rules Governing § 2254 Proceedings has been amended to reflect the change in designation of 18 U.S.C. § 3006A.

Finally, Rule 9 in both sets of rules has been amended to reflect amendments to 28 U.S.C. § 2244, where Congress limited the ability of petitioners and movants to obtain relief on successive actions; under the amendments, the person seeking relief must first obtain approval from a court of appeals before filing a second or successive petition.

The proposed amendments and Committee Notes are at Appendix C to this report.

Recommendation—The Committee recommends that Rules 1, 2, 3, 6, 8, 9 and 10 of the Rules Governing § 2254 Proceedings and Rules 1, 2, 3, 8, 9, and 10 of the Rules Governing § 2255 Proceedings be approved and separately published for public comment.

VI. ACTION ITEM—Publication of Rule 12.4 for Comment.

The Criminal Rules Committee has recommended that new Rule 12.4 be promulgated to address the issue of filing disclosure statements with the court. Similar amendments are being proposed in Appellate Rule 26.1 and Civil Rule 7.1. Although Rule 12.4 closely tracks those two rules in most respects, Rule 12.4(b) includes a requirement that the government disclose to the court the identities of any organizational victims in the case. While the scope of the Civil and Appellate Rules are limited to corporate parties, Rule 12.4 would extend the disclosure requirement to organizational victims which would include business associations and partnerships. The Committee believed that the ethical rules require judges to recuse themselves if they have a financial interest in an organizational victim. Absent such disclosure, a judge may not know the identity of the organizational victim.

The proposed Rule and Committee Note are at Appendix D to this report.

Recommendation—The Committee recommends that new Criminal Rule 12.4 be approved and published for public comment.

Attachments:

Appendix A. Rules 1 to 60 — Style Package.
Appendix B. Substantive Package (Rules 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41, and 43).

Appendix C. Rules Governing §§ 2254 and 2255 Proceedings.
Appendix D. Rule 12.4. Disclosure Statement.
Appendix E. Minutes of Meetings (January 2000, April 2000).

Item 8A

APPENDIX A

STYLE PACKAGE
RULES 1 TO 60

I. SCOPE, PURPOSE, AND CONSTRUCTION	TITLE I. APPLICABILITY OF RULES
	Rule 1. Scope; Definitions
Rule 1. Scope These rules govern the procedure in all criminal proceedings in the courts of the United States, as provided in Rule 54(a); and, whenever specifically provided in one of the rules, to preliminary, supplementary, and special proceedings before United States magistrate judges and at proceedings before state and local judicial officers. **Rule 54. Application and Exception** (a) **Courts**. These rules apply to all criminal proceedings in the United States District Courts; in the District of Guam; in the District Court for the Northern Mariana Islands, except as otherwise provided in articles IV and V of the covenant provided by the Act of March 24, 1976 (90 Stat. 263); and in the District Court of the Virgin Islands; in the United States Courts of Appeals; and in the Supreme Court of the United States; except that the prosecution of offenses in the District Court of the Virgin Islands shall be by indictment or information as otherwise provided by law.	**(a) Scope.** **(1)** ***In General.*** These rules govern the procedure in all criminal proceedings in the United States district courts, United States courts of appeals, and the Supreme Court of the United States. **(2)** ***State or Local Judicial Officer.*** When a rule so states, it applies to a proceeding before a state or local judicial officer. **(3)** ***Territorial Courts.*** These rules also govern the procedure in criminal proceedings in the following courts: (A) the district court of Guam; (B) the district court for the Northern Mariana Islands, except as otherwise provided by law; and (C) the district court of the Virgin Islands, except that the prosecution of offenses in that court must be by indictment or information as otherwise provided by law.

(b) PROCEEDINGS (Rule 54 continued) **(1) Removed Proceedings.** These rules apply to criminal prosecutions removed to the United States district courts from state courts and govern all procedure after removal, except that dismissal by the attorney for the prosecution shall be governed by state law. **(2) Offenses Outside a District or State.** These rules apply to proceedings for offenses committed upon the high seas or elsewhere out of the jurisdiction of any particular state or district, except that such proceedings may be had in any district authorized by 18 U.S.C. § 3238. **(3) Peace Bonds.** These rules do not alter the power of judges of the United States or of United States magistrate judges to hold security of the peace and for good behavior under Revised Statutes, § 4069, 50 U.S.C. § 23, but in such cases the procedure shall conform to these rules so far as they are applicable. **(4) Proceedings Before United States Magistrate Judges.** Proceedings involving misdemeanors and other petty offenses are governed by Rule 58.	(4) ***Removed Proceedings.*** Although these rules govern all proceedings after removal from a state court, state law governs a dismissal by the prosecution.
(5) Other Proceedings. These rules are not applicable to extradition and rendition of fugitives; civil forfeiture of property for violation of a statute of the United States; or the collection of fines and penalties. Except as provided in Rule 20(d) they do not apply to proceedings under 18 U.S.C. Chapter 403 — Juvenile Delinquency — so far as they are inconsistent with that chapter. They do not apply to summary trials for offenses against the navigation laws under Revised Statutes §§ 4300-4305, 33 U.S.C. §§ 391-396, or to proceedings involving disputes between seamen under Revised Statutes §§ 4079-4081, as amended, 22 U.S.C. §§ 256-258, or to proceedings for fishery offenses under the Act of June 28, 1937, c. 392, 50 Stat. 325-327, 16 U.S.C. §§ 772-772i, or to proceedings against a witness in a foreign country under 28 U.S.C. § 1784.	(5) ***Excluded Proceedings.*** Proceedings not governed by these rules include: (A) the extradition and rendition of a fugitive; (B) a civil property forfeiture for the violation of a federal statute; (C) the collection of a fine or penalty; (D) a proceeding under a statute governing juvenile delinquency to the extent the procedure is inconsistent with the statute, unless Rule 20(d) provides otherwise; and (E) a dispute between seamen under 22 U.S.C. §§ 256–258.

(c) Application of Terms. (Rule 54 continued) As used in these rules the following terms have the designated meanings. "Act of Congress" includes any act of Congress locally applicable to and in force in the District of Columbia, in Puerto Rico, in a territory or in any insular possession. "Attorney for the government" means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney, when applicable to cases arising under the laws of Guam the Attorney General of Guam or such other person or persons as may be authorized by the laws of Guam to act therein, and when applicable to cases arising under the laws of the Northern Mariana Islands the Attorney General of the Northern Mariana Islands or any other person or persons as may be authorized by the laws of the Northern Marianas to act therein. "Civil action" refers to a civil action in a district court. The words "demurrer," "motion to quash," "plea in abatement," "plea in bar" and "special plea in bar," or words to the same effect, in any act of Congress shall be construed to mean the motion raising a defense or objection provided in Rule 12. "District court" includes all district courts named in subdivision (a) of this rule.	**(b) Definitions.** The following definitions apply to these rules: **(1)** "Attorney for the government" means: (A) the Attorney General, or an authorized assistant; (B) a United States attorney, or an authorized assistant; (C) when applicable to cases arising under Guam law, the Guam Attorney General or other person whom Guam law authorizes to act in the matter; and (D) any other attorney authorized by law to conduct proceedings under these rules as a prosecutor.
"Federal magistrate judge" means a United States magistrate judge as defined in 28 U.S.C. §§ 631-639, a judge of the United States or another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates. "Judge of the United States" includes a judge of the district court, court of appeals, or the Supreme Court. "Law" includes statutes and judicial decisions. "Magistrate judge" includes a United States magistrate judge as defined in 28 U.S.C. §§ 631-639, a judge of the United States, another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates, and a state or local judicial officer, authorized by 18 U.S.C. § 3041 to perform the functions prescribed in Rules 3, 4, and 5.	**(2)** "Court" means a federal judge performing functions authorized by law. **(3)** "Federal judge" means: (A) a justice or judge of the United States as these terms are defined in 28 U.S.C. § 451; (B) a magistrate judge; or (C) a judge confirmed by the United States Senate and empowered by statute in any commonwealth, territory, or possession to perform a function to which a particular rule relates. **(4)** "Judge" means a federal judge or a state or local judicial officer. **(5)** "Magistrate judge" means a United States magistrate judge as defined in 28 U.S.C. §§ 631-639.

"Oath" includes affirmations. "Petty offense" is defined in 18 U.S.C. § 19. "State" includes District of Columbia, Puerto Rico, territory and insular possession. "United States magistrate judge" means the officer authorized by 28 U.S.C. §§ 631-639.	**(6)** "Oath" includes an affirmation. **(7)** "Organization" is defined in 18 U.S.C. § 18. **(8)** "Petty offense" is defined in 18 U.S.C. § 19. **(9)** "State" includes the District of Columbia, and any commonwealth, territory, or possession of the United States. **(10)** "State or local judicial officer" means: (A) a state or local officer authorized to act under 18 U.S.C. § 3041; and (B) a judicial officer specifically empowered by statute in force in the District of Columbia or in any commonwealth, territory, or possession, to perform a function to which a particular rule relates. **(c) Authority of Justices and Judges of the United States.** When these rules authorize a magistrate judge to act, any other federal judge may also act.

Committee Notes
Rule 1
May 10, 2000

COMMITTEE NOTE

Rule 1 is entirely revised and expanded to incorporate Rule 54, which deals with the application of the rules. Consistent with the title of the existing rule, the Committee believed that a statement of the scope of the rules should be placed at the beginning to show readers which proceedings are governed by these rules. The Committee also revised the rule to incorporate the definitions found in Rule 54(c) as a new Rule 1(b).

Rule 1(a) contains language from Rule 54(b). But language in current Rule 54(b)(2)-(4) has been deleted for several reasons: First, Rule 54(b)(2) refers to a venue statute that governs an offense committed on the high seas or somewhere outside the jurisdiction of a particular district; it is unnecessary and has been deleted because once venue has been established, the Rules of Criminal Procedure automatically apply. Second, Rule 54(b)(3) currently deals with peace bonds; that provision is inconsistent with the governing statute and has therefore been deleted. Finally, Rule 54(b)(4) references proceedings conducted before United States Magistrate Judges, a topic now covered in Rule 58.

Rule 1(a)(5) consists of material currently located in Rule 54(b)(5), with the exception of the references to the navigation laws, fishery offenses, and to proceedings against a witness in a foreign country. Those provisions were considered obsolete. But if those proceedings were to arise, they would be governed by the Rules of Criminal Procedure.

Rule 1(b) is composed of material currently located in Rule 54(c), with several exceptions. First, the reference to an "Act of Congress" has been replaced with the term "federal statute." Second, the language concerning demurrers, pleas in abatement, etc. has been deleted as being anachronistic. Third, the definitions of "civil action" and "district court" have been deleted. Fourth, the term "attorney for the government" has been expanded to include reference to those attorneys who may serve as special or independent counsel under applicable federal statutes.

Fifth, the Committee added a definition for the term "court" in Rule 1(b)(1). Although that term originally was almost always synonymous with the term "district judge," the term might be misleading or unduly narrow because it may not cover the many functions performed by magistrate judges. *See generally* 28 U.S.C. §§ 132, 636. Additionally, the term does not cover circuit judges who may be authorized to hold a district court. *See* 28 U.S.C. § 291. The proposed definition continues the traditional view that "court" means district judge, but also reflects the current

understanding that magistrate judges act as the "court" in many proceedings. Finally, the Committee intends that the term "court" be used principally to describe a judicial officer, except where a rule uses the term in a spatial sense, such as describing proceedings in "open court."

Sixth, the term "Judge of the United States"` has been replaced with the term "Federal judge." That term includes Article III judges and magistrate judges and, as noted in Rule 1(b)(3)(C), federal judges other than Article III judges who may be authorized by statute to perform a particular act specified in the Rules of Criminal Procedure. Seventh, the definition of "Law" has been deleted as being superfluous and possibly misleading because it suggests that administrative regulations are excluded.

Eighth, the current rules include three definitions of "magistrate judge." The term used in amended Rule 1(b)(5) is limited to United States magistrate judges. In the current rules the term magistrate judge includes not only United States magistrate judges, but also district court judges, court of appeals judges, Supreme Court justices, and where authorized, state and local officers. The Committee believed that the rules should reflect current practice, i.e. the wider and almost exclusive use of United States magistrate judges, especially in preliminary matters. The definition, however, is not intended to restrict the use of other federal judicial officers to perform those functions. Thus, Rule 1(c) has been added to make it clear that where the rules authorize a magistrate judge to act, any other federal judge or justice may act.

Finally, the term "organization" has been added to the list of definitions.

The remainder of the rule has been amended as part of the general restyling of the rules to make them more easily understood. In addition to changes made to improve the clarity, the Committee has changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only.

Rule 2. Purpose and Construction	Rule 2. Interpretation
These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.	These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.

Committee Notes
Rule 2
May 10, 2000

COMMITTEE NOTE

The language of Rule 2 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic. No substantive change is intended.

In particular, Rule 2 has been amended to clarify the purpose of the Rules of Criminal Procedure. The words "are intended" have been changed to read "are to be interpreted." The Committee believed that that was the original intent of the drafters and more accurately reflects the purpose of the rules.

II. PRELIMINARY PROCEEDINGS	TITLE II. PRELIMINARY PROCEEDINGS
Rule 3. The Complaint	**Rule 3. The Complaint**
The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a magistrate judge.	The complaint is a written statement of the essential facts constituting the offense charged. It must be made under oath before a magistrate judge, or, if none is reasonably available, before a state or local judicial officer.

Committee Notes
Rule 3
May 10, 2000

COMMITTEE NOTE

The language of Rule 3 is amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended, except as described below.

The amendment makes one change in practice. Currently, Rule 3 requires the complaint to be sworn before a "magistrate judge," which under current Rule 54 could include a state or local judicial officer. Revised Rule 1 no longer includes state and local officers in the definition of magistrate judges for the purposes of these rules. Instead, the definition includes only United States magistrate judges. Rule 3 requires that the complaint be made before a United States magistrate judge or before a state or local officer. The revised rule does, however, make a change to reflect prevailing practice and the outcome desired by the Committee—that the procedure take place before a *federal* judicial officer if one is reasonably available. As noted in Rule 1(c), where the rules, such as Rule 3, authorize a magistrate judge to act, any other federal judge may act.

Rule 4. Arrest Warrant or Summons Upon Complaint	Rule 4. Arrest Warrant or Summons on a Complaint
(a) Issuance. If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.	**(a) Issuance.** If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant to an officer authorized to execute it. At the request of the attorney for the government, the judge must issue a summons, instead of a warrant, to a person authorized to serve it. A judge may issue more than one warrant or summons on the same complaint. If a defendant fails to appear in response to a summons, a judge may, and upon request of the attorney for the government must, issue a warrant.
(b) Probable Cause. The finding of probable cause may be based upon hearsay evidence in whole or in part.	
(c) Form. **(1) Warrant.** The warrant shall be signed by the magistrate judge and shall contain the name of the defendant or, if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available magistrate judge. **(2) Summons.** The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate at a stated time and place.	**(b) Form.** **(1)** ***Warrant.*** A warrant must: (A) contain the defendant's name or, if it is unknown, a name or description by which the defendant can be identified with reasonable certainty; (B) describe the offense charged in the complaint; (C) command that the defendant be arrested and brought before a magistrate judge without unnecessary delay or, if none is reasonably available, before a state or local judicial officer; and (D) be signed by a judge. **(2)** ***Summons.*** A summons is to be in the same form as a warrant except that it must require the defendant to appear before a magistrate judge at a stated time and place.

(d) Execution or Service; and Return. **(1) By Whom.** The warrant shall be executed by a marshal or by some other officer authorized by law. The summons may be served by any person authorized to serve a summons in a civil action. **(2) Territorial Limits.** The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States.	**(c) Execution or Service, and Return.** (1) ***By Whom.*** Only a marshal or other authorized officer may execute a warrant. Any person authorized to serve a summons in a federal civil action may serve the summons. (2) ***Territorial Limits.*** A warrant may be executed, or a summons served, only within the jurisdiction of the United States.
(3) Manner. The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant at the time of the arrest but upon request shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant at the time of the arrest, the officer shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The summons shall be served upon a defendant by delivering a copy to the defendant personally, or by leaving it at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein and by mailing a copy of the summons to the defendant's last known address.	(3) ***Manner.*** (A) A warrant is executed by arresting the defendant. Upon arrest, an officer possessing the warrant must show it to the defendant. If the officer does not possess the warrant, the officer must inform the defendant of the warrant's existence and of the offense charged and, at the defendant's request, must show the warrant to the defendant as soon as possible. (B) A summons is served on a defendant: (i) by personal delivery; or (ii) by leaving it at the defendant's residence or usual place of abode with a person of suitable age and discretion residing at that location and by mailing a copy to the defendant's last known address. (C) A summons to an organization is served by delivering a copy to an officer or to a managing or general agent or to another agent appointed or legally authorized to receive service of process. A copy must also be mailed to the organization's last known address within the district or to its principal place of business elsewhere in the United States.

(4) Return. The officer executing a warrant shall make return thereof to the magistrate judge or other officer before whom the defendant is brought pursuant to Rule 5. At the request of the attorney for the government any unexecuted warrant shall be returned to and canceled by the magistrate judge by whom it was issued. On or before the return day the person to whom a summons was delivered for service shall make return thereof to the magistrate judge before whom the summons is returnable. At the request of the attorney for the government made at any time while the complaint is pending, a warrant returned unexecuted and not canceled or summons returned unserved or a duplicate thereof may be delivered by the magistrate judge to the marshal or other authorized person for execution or service.	**(4)** ***Return.*** (A) After executing a warrant, the officer must return it to the judge before whom the defendant is brought in accordance with Rule 5. At the request of the attorney for the government, an unexecuted warrant must be brought back to and canceled by a magistrate judge or, if none is reasonably available, by a state or local officer. (B) The person to whom a summons was delivered for service must return it on or before the return day. (C) At the request of the attorney for the government, a judge may deliver an unexecuted warrant or an unserved summons or a copy of the warrant or summons to the marshal or other authorized person for execution or service.

Committee Notes
Rule 4
May 10, 2000

COMMITTEE NOTE

The language of Rule 4 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic, except as noted below.

The first non-stylistic change is in Rule 4(a), which has been amended to provide an element of discretion in those situations when the defendant fails to respond to a summons. Under the current rule, the judge must in all cases issue an arrest warrant. The revised rule provides discretion to the judge to issue an arrest warrant if the attorney for the government does not request that an arrest warrant be issued for a failure to appear.

Current Rule 4(b), which refers to the fact that hearsay evidence may be used to support probable cause, has been deleted. That language was added to the rule in 1974, apparently to reflect emerging federal case law. *See* Advisory Committee Note to 1974 Amendments to Rule 4 (citing cases). In the intervening years, the case law has become perfectly clear on that proposition. Thus, the Committee believed that the reference to hearsay was no longer necessary. Furthermore, the limited reference to hearsay evidence was misleading to the extent that it might have suggested that other forms of inadmissible evidence could not be considered. For example, the rule made no reference to considering a defendant's prior criminal record, which clearly may be considered in deciding whether probable cause exists. *See, e.g., Brinegar v. United States*, 338 U.S. 160 (1949) (officer's knowledge of defendant's prior criminal activity). Rather than address that issue, or any other similar issues, the Committee believed that the matter was best addressed in Rule 1101(d)(3), Federal Rules of Evidence. That rule explicitly provides that the Federal Rules of Evidence do not apply to "preliminary examinations in criminal cases, . . . issuance of warrants for arrest, criminal summonses, and search warrants." The Advisory Committee Note accompanying that rule recognizes that: "The nature of the proceedings makes application of the formal rules of evidence inappropriate and impracticable." The Committee did not intend to make any substantive changes in practice by deleting the reference to hearsay evidence.

New Rule 4(b), which is currently Rule 4(c), addresses the form of an arrest warrant and a summons and includes two non-stylistic changes. First, Rule 4(b)(1)(C) requires that the warrant require that the defendant be brought "without unnecessary delay" before a judge. The Committee believed that this was a more appropriate standard than the current requirement that the defendant be brought

before the "nearest available" magistrate judge. This new language accurately reflects the thrust of the original rule, that time is of the essence and that the defendant should be brought with dispatch before a judicial officer in the district. Second, the revised rule states a preference that the defendant be brought before a federal judicial officer.

Rule 4(b)(2) has been amended to require that if a summons is issued, the defendant must appear before a magistrate judge. The current rule requires the appearance before a "magistrate," which could include a state or local judicial officer. This change is consistent with the preference for requiring defendants to appear before federal judicial officers stated in revised Rule 4(b)(1).

Rule 4(c) (currently Rule 4(d)) includes three changes. First, current Rule 4(d)(3) provides that the arresting officer is only required to inform the defendant of the offense charged and that a warrant exists, if the officer does not have a copy of the warrant. As revised, Rule 4(c)(3)(A) explicitly requires the arresting officer in all instances to inform the defendant of the offense charged and of the fact that an arrest warrant exists. The new rule continues the current provision that the arresting officer need not have a copy of the warrant but if the defendant requests to see it, the officer must show the warrant to the defendant as soon as possible. The rule does not attempt to define any particular time limits for showing the warrant to the defendant.

Second, Rule 4(c)(3)(C) is taken from former Rule 9(c)(1). That provision specifies the manner of serving a summons on an organization. The Committee believed that Rule 4 was the more appropriate location for general provisions addressing the mechanics of arrest warrants and summons. Revised Rule 9 liberally cross-references the basic provisions appearing in Rule 4. Under the amended rule, in all cases in which a summons is being served on an organization, a copy of the summons must be mailed to the organization.

Third, a change is made in Rule 4(c)(4). Currently, Rule 4(d)(4) requires that an unexecuted warrant must be returned to the judicial officer or judge who issued it. As amended, Rule 4(c)(4)(A) provides that after a warrant is executed, the officer must return it to the judge before whom the defendant will appear under Rule 5. At the government's request, however, an unexecuted warrant may be returned and canceled by any magistrate judge. The change recognizes the possibility that at the time the warrant is returned, the issuing judicial officer may not be available.

Rule 5. Initial Appearance Before the Magistrate Judge	Rule 5. Initial Appearance
(a) In General. Except as otherwise provided in this rule, an officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate judge or, if a federal magistrate judge is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. If a person arrested without a warrant is brought before a magistrate judge, a complaint, satisfying the probable cause requirements of Rule 4(a), shall be promptly filed. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate judge, the magistrate judge shall proceed in accordance with the applicable subdivisions of this rule.	**(a) In General.** **(1)** ***Appearance Upon Arrest.*** (A) A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge, or before a state or local judicial officer as Rule 5(c) provides. (B) A person making an arrest outside the United States must take the defendant without unnecessary delay before a magistrate judge.
An officer making an arrest under a warrant issued upon a complaint charging solely a violation of 18 U.S.C. § 1073 need not comply with this rule if the person arrested is transferred without unnecessary delay to the custody of appropriate state or local authorities in the district of arrest and an attorney for the government moves promptly, in the district in which the warrant was issued, to dismiss the complaint.	**(2)** ***Exceptions.*** (A) An officer making an arrest under a warrant issued upon a complaint charging solely a violation of 18 U.S.C. § 1073 need not comply with this rule if: (i) the person arrested is transferred without unnecessary delay to the custody of appropriate state or local authorities in the district of arrest; and (ii) an attorney for the government moves promptly, in the district where the warrant was issued, to dismiss the complaint. (B) If a defendant is arrested for a violation of probation or supervised release, Rule 32.1 applies. (C) If a defendant is arrested for failing to appear in another district, Rule 40 applies. **(3)** ***Appearance Upon a Summons.*** When a defendant appears in response to a summons under Rule 4, a magistrate judge must proceed under Rule 5(d) or (e), as applicable.
	(b) Complaint Required. If a defendant is arrested without a warrant, a complaint meeting Rule 4(a)'s requirement of probable cause must be promptly filed in the district where the offense was allegedly committed.

	(c) Initial Appearance; Transfer to Another District. **(1)** ***Arrest in the District Where the Offense Was Allegedly Committed.*** If the defendant is arrested in the district where the offense was allegedly committed: (A) the initial appearance must be in that district; and (B) if a magistrate judge is not reasonably available, the initial appearance may be before a state or local judicial officer.

	(2) ***Arrest in District Other Than the District Where the Offense Was Allegedly Committed.*** If the defendant is arrested in a district other than where the offense was allegedly committed, the following procedures apply: (A) the initial appearance must be in that district, or in an adjacent district if the appearance can occur more promptly there; (B) the judge must inform the defendant of the provisions of Rule 20; (C) if the defendant was arrested without a warrant, the district court where the prosecution is pending must first issue a warrant before the magistrate judge transfers the defendant to that district; (D) the judge must conduct a preliminary hearing as required under Rule 5.1 or Rule 58(b)(2)(G); (E) the judge must transfer the defendant to the district where the prosecution is pending if: (i) the government produces the warrant, a certified copy of the warrant, a facsimile of either, or other appropriate form of either; and (ii) the judge finds that the defendant is the same person named in the indictment, information, or warrant; and (F) when a defendant is transferred or discharged, the court must promptly transmit the papers and any bail to the clerk in the district where the prosecution is pending.

(c) Offenses Not Triable by the United States Magistrate Judge. If the charge against the defendant is not triable by the United States magistrate judge, the defendant shall not be called upon to plead. The magistrate judge shall inform the defendant of the complaint against the defendant and of any affidavit filed therewith, of the defendant's right to retain counsel or to request the assignment of counsel if the defendant is unable to obtain counsel, and of the general circumstances under which the defendant may secure pretrial release. The magistrate judge shall inform the defendant that the defendant is not required to make a statement and that any statement made by the defendant may be used against the defendant. The magistrate judge shall also inform the defendant of the right to a preliminary examination. The magistrate judge shall allow the defendant reasonable time and opportunity to consult counsel and shall detain or conditionally release the defendant as provided by statute or in these rules. * * * * *	**(d) Procedure in a Felony Case.** **(1)** ***Advice.*** If the offense charged is a felony, the judge must inform the defendant of the following: (A) the complaint against the defendant, and any affidavit filed with it; (B) the defendant's right to retain counsel or to request that counsel be appointed if the defendant cannot obtain counsel; (C) the circumstances, if any, under which the defendant may secure pretrial release; (D) any right to a preliminary hearing; and (E) the defendant's right not to make a statement, and that any statement made may be used against the defendant. **(2)** ***Consultation with Counsel.*** The judge must allow the defendant reasonable opportunity to consult with counsel. **(3)** ***Detention or Release.*** The judge must detain or release the defendant as provided by statute or these rules. **(4)** ***Plea.*** A defendant may be asked to plead only under Rule 10.
(b) Misdemeanors and Other Petty Offenses. If the charge against the defendant is a misdemeanor or other petty offense triable by a United States magistrate judge under 18 U.S.C. § 3401, the magistrate judge shall proceed in accordance with Rule 58.	**(e) Procedure in a Misdemeanor Case.** If the defendant is charged with a misdemeanor only, the judge must inform the defendant in accordance with Rule 58(b)(2).

Committee Notes
Rule 5
May 10, 2000

COMMITTEE NOTE

The language of Rule 5 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic, except as noted below.

Rule 5 has been completely revised to more clearly set out the procedures for initial appearances and to recognize that such appearances may be required at various stages of a criminal proceeding, for example, where a defendant has been arrested for violating the terms of probation.

Rule 5(a), which governs initial appearances by an arrested defendant before a magistrate judge, includes several changes. The first is a clarifying change; revised Rule 5(a)(1) provides that a person making the arrest must bring the defendant "without unnecessary delay" before a magistrate judge, instead of the current reference to "nearest available" magistrate. This language parallels changes in Rule 4 and reflects the view that time is of the essence. The Committee intends no change in practice. In using the term, the Committee recognizes that on occasion there may be necessary delay in presenting the defendant, for example, due to weather conditions or other natural causes. A second change is non-stylistic, and reflects the stated preference (as in other provisions throughout the rules) that the defendant be brought before a federal judicial officer. Only if a magistrate judge is not available should the defendant be taken before a state or local officer.

The third sentence in current Rule 5(a), which states that a magistrate judge must proceed in accordance with the rule when a defendant is arrested without a warrant or given a summons, has been deleted because it is unnecessary.

Rule 5(a)(1)(B) codifies the caselaw reflecting that the right to an initial appearance applies not only when a person is arrested within the United States but also when the an arrest occurs outside the United States. *See, e.g.*, *United States v. Purvis*, 768 F.2d 1237 (11th Cir. 1985); *United States v. Yunis*, 859 F.2d 953 (D.C. Cir. 1988). In these circumstances, the Committee believes—and the rule so provides—that the initial appearance should be before a federal magistrate judge rather than a state or local judicial officer.

Rule 5(a)(2)(A) consists of language currently located in Rule 5, that addresses the procedure to be followed when a defendant has been arrested under a warrant issued on a complaint charging solely a violation of 18 U.S.C. § 1073

(unlawful flight to avoid prosecution). Rule 5(a)(2)(B) and 5(a)(2)(C) are new provisions. They are intended to make it clear that when a defendant is arrested for violating probation or supervised release or for failing to appear in another district, Rules 32.1 and 40 apply. No change in practice is intended.

Rule 5(a)(3) is new and fills a perceived gap in the rules. It recognizes that a defendant may be subjected to an initial appearance under this rule if a summons was issued under Rule 4, instead of an arrest warrant. If the defendant is appearing pursuant to a summons in a felony case, Rule 5(d) applies and if the defendant is appearing in a misdemeanor case, Rule 5(e) applies.

Rule 5(b) carries forward the requirement in former Rule 5(a) that if the defendant is arrested without a warrant, a complaint must be promptly filed.

Rule 5(c) is a new provision setting out where an initial appearance is to take place. If the defendant is arrested in the district where the offense was allegedly committed, under Rule 5(c)(1), the defendant must be taken to a magistrate judge in that district. If no magistrate judge is reasonably available, the initial appearance may be conducted by a state or local judicial officer. On the other hand, if the defendant is arrested in a district other than the district where the offense was allegedly committed, Rule 5(c)(2) governs. In those instances, the defendant must be taken to a magistrate judge within the district of arrest, unless the appearance can take place more promptly in an adjacent district. The Committee recognized that in some cases, the nearest magistrate judge may actually be across a district's lines. The remainder of Rule 5(c)(2) includes material formerly located in Rule 40.

Rule 5(d) is derived from current Rule 5(c) and has been retitled to more clearly reflect the subject of that subdivision—the procedure to be used if the defendant is charged with a felony. Rule 5(d)(4) has been added to make clear that a defendant may only be called upon to enter a plea under the provisions of Rule 10. That language is intended to reflect and reaffirm current practice.

The remaining portions of current Rule 5(c) have been moved to Rule 5.1, which deals with preliminary hearings in felony cases.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 5 is one of those rules. In restyling and reformatting Rule 5, the Committee decided to also propose a substantive change that would permit video teleconferencing of initial appearances.

Another version of Rule 5, which includes a new subdivision (f) governing such procedures, is being published simultaneously in a separate pamphlet.

	Rule 5.1. Preliminary Hearing in a Felony Case
Rule 5(c) Offenses Not Triable by the United States Magistrate Judge. * * * * * A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court. If the defendant waives preliminary examination, the magistrate judge shall forthwith hold the defendant to answer in the district court. If the defendant does not waive the preliminary examination, the magistrate judge shall schedule a preliminary examination.	**(a) In General.** If a defendant is charged with a felony, a magistrate judge must conduct a preliminary hearing unless: **(1)** the defendant waives the hearing; **(2)** the defendant is indicted; or **(3)** the government files an information under Rule 7(b).
	(b) Election of District. A defendant arrested in a district other than where the offense was allegedly committed may elect to have the preliminary hearing conducted in the district where the prosecution is pending.
Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if the defendant is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination.	**(c) Scheduling.** The magistrate judge must hold the preliminary hearing within a reasonable time, but no later than 10 days after the initial appearance if the defendant is in custody and no later than 20 days if not in custody.
With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times by a federal magistrate judge. In the absence of such consent by the defendant, time limits may be extended by a judge of the United States only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.	**(d) Extending the Time.** With the defendant's consent and upon a showing of good cause — taking into account the public interest in the prompt disposition of criminal cases — a magistrate judge may extend the time limits in Rule 5.1(c) one or more times. If the defendant does not consent, a justice or judge of the United States as these terms are defined in 28 U.S.C. § 451 may extend the time limits only on a showing that extraordinary circumstances exist and justice requires the delay.
Rule 5.1. Preliminary Examination. **(a) Probable Cause Finding.** If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the federal magistrate judge shall forthwith hold the defendant to answer in district court. The finding of probable cause may be based upon hearsay evidence in whole or in part. The defendant may cross-examine adverse witnesses and may introduce evidence. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12.	**(e) Hearing and Finding.** At the preliminary hearing, the defendant may cross-examine adverse witnesses and may introduce evidence but cannot object to evidence on the ground that it was unlawfully acquired. If the magistrate judge finds probable cause to believe an offense has been committed and the defendant committed it, the magistrate judge must promptly require the defendant to appear for further proceedings.

(b) Discharge of Defendant. If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the defendant committed it, the federal magistrate judge shall dismiss the complaint and discharge the defendant. The discharge of the defendant shall not preclude the government from instituting a subsequent prosecution for the same offense.	**(f) Discharging the Defendant.** If the magistrate judge finds no probable cause to believe an offense has been committed or the defendant committed it, the magistrate judge must dismiss the complaint and discharge the defendant. A discharge does not preclude the government from later prosecuting the defendant for the same offense.
(c) Records. After concluding the proceeding the federal magistrate judge shall transmit forthwith to the clerk of the district court all papers in the proceeding. The magistrate judge shall promptly make or cause to be made a record or summary of such proceeding. (1) On timely application to a federal magistrate judge, the attorney for a defendant in a criminal case may be given the opportunity to have the recording of the hearing on preliminary examination made available to that attorney in connection with any further hearing or preparation for trial. The court may, by local rule, appoint the place for and define the conditions under which such opportunity may be afforded counsel.	**(g) Records.** The preliminary hearing must be recorded by a court reporter or by a suitable recording device. A recording of the proceeding may be made available to any party upon request. A copy of the recording and a transcript may be provided to any party upon request and upon payment as required by applicable Judicial Conference regulations.
(2) On application of a defendant addressed to the court or any judge thereof, an order may issue that the federal magistrate judge make available a copy of the transcript, or of a portion thereof, to defense counsel. Such order shall provide for prepayment of costs of such transcript by the defendant unless the defendant makes a sufficient affidavit that the defendant is unable to pay or to give security therefor, in which case the expense shall be paid by the Director of the Administrative Office of the United States Courts from available appropriated funds. Counsel for the government may move also that a copy of the transcript, in whole or in part, be made available to it, for good cause shown, and an order may be entered granting such motion in whole or in part, on appropriate terms, except that the government need not prepay costs nor furnish security therefor.	
(d) Production of Statements. (1) In General. Rule 26.2(a)-(d) and (f) applies at any hearing under this rule, unless the court, for good cause shown, rules otherwise in a particular case. (2) Sanctions for Failure to Produce Statement. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, the court may not consider the testimony of a witness whose statement is withheld.	**(h) Production of Statements.** **(1)** ***In General.*** Rule 26.2(a)-(d) and (f) applies at any hearing under this rule, unless the magistrate judge for good cause rules otherwise in a particular case. **(2)** ***Sanctions for Failure to Produce Statement.*** If a party disobeys a Rule 26.2(a) order to deliver a statement to the moving party, the magistrate judge must not consider the testimony of a witness whose statement is withheld.

Committee Notes
Rule 5.1
May 10, 2000

COMMITTEE NOTE

The language of Rule 5.1 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic, except as noted below.

First, the title of the rule has been changed. Although the underlying statute, 18 U.S.C. § 3060, uses the phrase *preliminary examination*, the Committee believes that the phrase *preliminary hearing* is more accurate. What happens at this proceeding is more than just an examination; it includes an evidentiary hearing, argument, and a judicial ruling. Further, the phrase *preliminary hearing* predominates in actual usage.

Rule 5.1(a) is composed of the first sentence of the second paragraph of current Rule 5(c). Rule 5.1(b) addresses the ability of a defendant to elect where a preliminary hearing will be held. That provision is taken from current Rule 40(a).

Rule 5.1(c) and (d) include material currently located in Rule 5(c): scheduling and extending the time limits for the hearing. Although the rule continues to refer to proceedings before a "court," the Committee is aware that in most districts, magistrate judges perform these functions. That point is also reflected in the definition of "court" in Rule 1(b), which in turn recognizes that magistrate judges may be authorized to act.

Rule 5.1(e), addressing the issue of probable cause, contains the language currently located in Rule 5.1(a), with the exception of the sentence, "The finding of probable cause may be based upon hearsay evidence in whole or in part." That language was included in the original promulgation of the rule in 1972. Similar language was added to Rule 4 in 1974. In the Committee Note on the 1974 amendment, the Advisory Committee explained that the language was included to make it clear that a finding of probable cause may be based upon hearsay, noting that there had been some uncertainty in the federal system about the propriety of relying upon hearsay at the preliminary examination. *See* Advisory Committee Note to Rule 5.1 (citing cases and commentary). Federal law is now clear on that proposition. Thus, the Committee believed that the reference to hearsay was no longer necessary. Further, the Committee believed that the matter was best addressed in Rule 1101(d)(3), Federal Rules of Evidence. That rule explicitly states that the Federal Rules of Evidence do not apply to "preliminary examinations in criminal

cases,...issuance of warrants for arrest, criminal summonses, and search warrants." The Advisory Committee Note accompanying that rule recognizes that: "The nature of the proceedings makes application of the formal rules of evidence inappropriate and impracticable." The Committee did not intend to make any substantive changes in practice by deleting the reference to hearsay evidence.

Rule 5.1(f), which deals with the discharge of a defendant, consists of former Rule 5.1(b).

Rule 5.1(g) is a revised version of the material in current Rule 5.1(c). Instead of including detailed information in the rule itself concerning records of preliminary hearings, the Committee opted simply to direct the reader to the applicable Judicial Conference regulations governing records. The Committee did not intend to make any substantive changes in the way in which those records are currently made available.

Finally, although the rule speaks in terms of initial appearances being conducted before a magistrate judge, Rule 1(c) makes clear that a district judge may perform any function in these rules that a magistrate judge may perform.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 5.1 is one of those rules. In revising Rule 5.1, the Committee decided to also propose a significant substantive change that would permit a United States Magistrate Judge to grant a continuance for a preliminary hearing conducted under the rule where the defendant has not consented to such a continuance. That version is being published simultaneously in a separate pamphlet.

III. INDICTMENT AND INFORMATION	**TITLE III. THE GRAND JURY, THE INDICTMENT, AND THE INFORMATION**
Rule 6. The Grand Jury	**Rule 6. The Grand Jury**
(a) Summoning Grand Juries. **(1) Generally.** The court shall order one or more grand juries to be summoned at such time as the public interest requires. The grand jury shall consist of not less than 16 nor more than 23 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement. **(2) Alternate Jurors.** The court may direct that alternate jurors may be designated at the time a grand jury is selected. Alternate jurors in the order in which they were designated may thereafter be impanelled as provided in subdivision (g) of this rule. Alternate jurors shall be drawn in the same manner and shall have the same qualifications as the regular jurors, and if impanelled shall be subject to the same challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors.	**(a) Summoning a Grand Jury.** (1) ***In General.*** When the public interest so requires, the court must order that one or more grand juries be summoned. A grand jury must have 16 to 23 members, and the court must order that enough legally qualified persons be summoned to meet this requirement. (2) ***Alternate Jurors.*** When a grand jury is selected, the court may designate alternate jurors. They must be drawn and summoned in the same manner and must have the same qualifications as regular jurors. Alternate jurors will be impaneled in the sequence in which they are designated. If impaneled, an alternate juror is subject to the same challenges, takes the same oath, and has the same functions, duties, powers, and privileges as a regular juror.
(b) Objections to Grand Jury and to Grand Jurors. **(1) Challenges.** The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court. **(2) Motion to Dismiss.** A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. It shall be made in the manner prescribed in 28 U.S.C. § 1867(e) and shall be granted under the conditions prescribed in that statute. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.	**(b) Objections to the Grand Jury or to a Grand Juror.** (1) ***Challenges.*** Either the government or a defendant may challenge the grand jury on the ground that it was not lawfully drawn, summoned, or selected, and may challenge an individual juror on the ground that the juror is not legally qualified. (2) ***Motion to Dismiss an Indictment.*** A party may move to dismiss the indictment based on an objection to the grand jury or on an individual juror's lack of legal qualification, unless the court has previously ruled on the same objection under Rule 6(b)(1). The motion to dismiss is governed by 28 U.S.C. § 1867(e). The court cannot dismiss the indictment on the ground that a grand juror was not legally qualified if the record shows that at least 12 qualified jurors concurred in the indictment.

(c) Foreperson and Deputy Foreperson. The court shall appoint one of the jurors to be foreperson and another to be deputy foreperson. The foreperson shall have power to administer oaths and affirmations and shall sign all indictments. The foreperson or another juror designated by the foreperson shall keep record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. During the absence of the foreperson, the deputy foreperson shall act as foreperson.	**(c) Foreperson and Deputy Foreperson.** The court will appoint one juror as the foreperson and another as the deputy foreperson. In the foreperson's absence, the deputy foreperson will act as the foreperson. The foreperson may administer oaths and affirmations and will sign all indictments. The foreperson — or another juror designated by the foreperson — will record the number of jurors concurring in every indictment and will file the record with the district clerk, but the record may not be made public unless the court so orders.
(d) Who May Be Present. **(1) While Grand Jury is in Session.** Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session. **(2) During Deliberations and Voting.** No person other than the jurors, and any interpreter necessary to assist a juror who is hearing or speech impaired, may be present while the grand jury is deliberating or voting.	**(d) Who May Be Present.** (1) ***While the Grand Jury Is in Session.*** The following persons may be present while the grand jury is in session: attorneys for the government, the witness being questioned, interpreters when needed, and a stenographer or operator of a recording device. (2) ***During Deliberations and Voting.*** No person other than the jurors, and any interpreter needed to assist a hearing-impaired or speech-impaired juror, may be present while the grand jury is deliberating or voting.

(e) Recording and Disclosure of Proceedings. **(1) Recording of Proceedings.** All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case. **(2) General Rule of Secrecy.** A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.	**(e) Recording and Disclosing Proceedings.** **(1)** ***Recording the Proceedings.*** Except while the grand jury is deliberating or voting, all proceedings must be recorded by a court reporter or by a suitable recording device. The validity of a prosecution is not affected by the unintentional failure to make a recording. Unless the court orders otherwise, an attorney for the government will retain control of the recording, the reporter's notes, and any transcript prepared from those notes. **(2)** ***General Rule of Secrecy.*** Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury: (A) a grand juror; (B) an interpreter; (C) a court reporter; (D) an operator of a recording device; (E) a person who transcribes recorded testimony; (F) an attorney for the government; or (G) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii).

(3) Exceptions. (A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to— (i) an attorney for the government for use in the performance of such attorney's duty; and (ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law. (B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of their obligation of secrecy under this rule.	**(3) *Exceptions.*** (A) Disclosure of a grand-jury matter — other than the grand jury's deliberations or any grand juror's vote — may be made to: (i) an attorney for the government for use in performing that attorney's duty; or (ii) any government personnel — including those of a state or state subdivision or of an Indian tribe — that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law. (B) A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law. An attorney for the government must promptly provide the court that impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made— (i) when so directed by a court preliminarily to or in connection with a judicial proceeding; (ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury; (iii) when the disclosure is made by an attorney for the government to another federal grand jury; or (iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law. If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.	(C) An attorney for the government may disclose any grand-jury matter to another federal grand jury. (D) The court may authorize disclosure — at a time, in a manner, and subject to any other conditions that it directs — of a grand-jury matter: (i) preliminarily to or in connection with a judicial proceeding; (ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury; (iii) at the request of the government if it shows that the matter may disclose a violation of state or Indian tribal criminal law, as long as the disclosure is to an appropriate state, state-subdivision, or Indian tribal official for the purpose of enforcing that law; or (iv) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.
(D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened. Unless the hearing is ex parte, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard.	(E) A petition to disclose a grand jury matter under Rule 6(e)(3)(D)(i) must be filed in the district where the grand jury convened. Unless the hearing is ex parte — as it may be when the government is the petitioner — the petitioner must serve the petition on, and the court must afford a reasonable opportunity to appear and be heard to: (i) the attorney for the government; (ii) the parties to the judicial proceeding; and (iii) any other person whom the court may designate.

(E) If the judicial proceeding giving rise to the petition is in a federal district court in another district, the court shall transfer the matter to that court unless it can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper. The court shall order transmitted to the court to which the matter is transferred the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy. The court to which the matter is transferred shall afford the aforementioned persons a reasonable opportunity to appear and be heard.	(F) If the petition to disclose arises out of a proceeding in another district, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper. If the petitioned court decides to transfer, it must send to the transferee court the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand-jury secrecy. The transferee court must afford those persons identified in Rule 6(e)(3)(E) a reasonable opportunity to appear and be heard.
(4) Sealed Indictments. The federal magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons. **(5) Closed Hearing.** Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury. **(6) Sealed Records.** Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.	(4) ***Sealed Indictment.*** The magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. The clerk must then seal the indictment, and no person may disclose the indictment's existence except as necessary to issue or execute a warrant or summons. (5) ***Closed Hearing.*** Subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury. (6) ***Sealed Records.*** Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury. (7) ***Contempt.*** A knowing violation of Rule 6 may be punished as a contempt of court.

(f) Finding and Return of Indictment. A grand jury may indict only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury, or through the foreperson or deputy foreperson on its behalf, to a federal magistrate judge in open court. If a complaint or information is pending against the defendant and 12 persons do not vote to indict, the foreperson shall so report to a federal magistrate judge in writing as soon as possible.	**(f) Indictment and Return.** A grand jury may indict only if at least 12 jurors concur. The grand jury — or its foreperson or deputy foreperson — must return the indictment to a magistrate judge in open court. If a complaint or information is pending against the defendant and 12 jurors do not concur in the indictment, the foreperson must promptly and in writing report the lack of concurrence to the magistrate judge.
(g) Discharge and Excuse. A grand jury shall serve until discharged by the court, but no grand jury may serve more than 18 months unless the court extends the service of the grand jury for a period of six months or less upon a determination that such extension is in the public interest. At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another person in place of the juror excused.	**(g) Discharge.** A grand jury must serve until the court discharges it, but it may serve more than 18 months only if the court, having determined that an extension is in the public interest, extends the grand jury's service. An extension may be granted for no more than 6 months, except as otherwise provided by statute. **(h) Excuse.** At any time, for good cause, the court may excuse a juror either temporarily or permanently, and if permanently, the court may impanel an alternate juror in place of the excused juror. **(i) Indian Tribe.** " Indian tribe" means an Indian tribe recognized by the Secretary of the Interior on a list published in the Federal Register under 25 U.S.C. § 479a-1.

Committee Notes
Rule 6
May 10, 2000

COMMITTEE NOTE

The language of Rule 6 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic, except as noted below.

The first change is in Rule 6(b)(1). The last sentence of current Rule 6(b)(1) provides that "Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court." That language has been deleted from the amended rule. The remainder of this subdivision rests on the assumption that formal proceedings have begun against a person, i.e., an indictment has been returned. The Committee believed that although the first sentence reflects current practice of a defendant being able to challenge the composition or qualifications of the grand jurors after the indictment is returned, the second sentence does not comport with modern practice. That is, a defendant will normally not know the composition or identity of the grand jurors before they are administered their oath. Thus, there is no opportunity to challenge them and have the court decide the issue before the oath is given.

In Rule 6(d)(1), the term "court stenographer" has been changed to "court reporter." Similar changes have been made in Rule 6(e)(1) and (2).

Rule 6(e) continues to spell out the general rule of secrecy of grand jury proceedings and the exceptions to that general rule. The last sentence in current Rule 6(e)(2), concerning contempt for violating Rule 6, now appears in Rule 6(e)(7). No change in substance is intended.

Rule 6(e)(3)(A)(ii) includes a new provision recognizing the sovereignty of Indian Tribes and the possibility that it would be necessary to disclose grand jury information to appropriate tribal officials in order to enforce federal law. Similar language has been added to Rule 6(e)(3)(D)(iii).

Rule 6(e)(3)(C) consists of language located in current Rule 6(e)(3)(C)(iii). The Committee believed that this provision, which recognizes that prior court approval is not required for disclosure of a grand jury matter to another grand jury, should be treated as a separate subdivision in revised Rule 6(e)(3). No change in practice is intended.

Rule 6(e)(3)(D)(iv) is a new provision that addresses disclosure of grand jury information to armed forces personnel where the disclosure is for the purpose of enforcing military criminal law under the Uniform Code of Military Justice, 10 U.S.C. §§ 801-946. *See, e.g.,* Department of Defense Directive 5525.7 (January 22, 1985); 1984 Memorandum of Understanding Between Department of Justice and Department of Justice; Memorandum of Understanding Between the Departments of Justice and Transportation (Coast Guard) Relating to the Investigations and Prosecution of Crimes Over Which the Two Departments Have Concurrent Jurisdiction (October 9, 1967).

In Rule 6(e)(3)(E)(ii), the Committee considered whether to amend the language relating to "parties to the judicial proceeding" and determined that in the context of the rule, it is understood that the parties referred to are the parties in the same judicial proceeding identified in Rule 6(e)(3)(D)(i).

The Committee decided to leave in subdivision (e) the provision stating that a "knowing violation of Rule 6" may be punished by contempt notwithstanding that, due to its apparent application to the entirety of the Rule, the provision seemingly is misplaced in subdivision (e). Research shows that the provision was added by Congress in 1977 and that it was crafted solely to deal with violations of the secrecy prohibitions in subdivision (e). *See* S. Rep. No. 95-354, p. 8 (1977). Supporting this narrow construction, the Committee found no reported decision involving an application or attempted use of the contempt sanction to a violation other than of the disclosure restrictions in subdivision (e). On the other hand, the Supreme Court in dicta did indicate on one occasion its arguable understanding that the contempt sanction would be available also for a violation of Rule 6(d) relating to who may be present during the grand jury's deliberations. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1987).

In sum, it appears that the scope of the contempt sanction in Rule 6 is unsettled. Because the provision creates an offense, altering its scope may be beyond the authority bestowed by the Rules Enabling Act, 28 U.S.C. 2071 et seq. *See* 28 U.S.C. 2072(b) (Rules must not "abridge, enlarge, or modify any substantive right"). The Committee decided to leave the contempt provision in its present location in subdivision (e), because breaking it out into a separate subdivision could be construed to support the interpretation that the sanction may be applied to a knowing violation of any of the Rule's provisions rather than just those in subdivision (e). Whether or not that is a correct interpretation of the provision—a matter on which the Committee takes no position—must be determined by caselaw, or resolved by Congress.

Current Rule 6(g) has been divided into two new subdivisions, Rule 6(g), Discharge, and Rule 6(h), Excuse. The Committee added the phrase in Rule 6(g) "except as otherwise provided by statute," to recognize the provisions of 18 U.S.C. § 3331 relating to special grand juries.

Rule 6(i) is a new provision defining the term "Indian Tribe," a term used only in this rule.

Rule 7. The Indictment and the Information	Rule 7. The Indictment and the Information
(a) Use of Indictment or Information. An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.	**(a) When Used.** **(1)** ***Felony.*** An offense must be prosecuted by an indictment if it is punishable: (A) by death; or (B) by imprisonment for more than one year. **(2)** ***Misdemeanor.*** An offense punishable by imprisonment for one year or less may be prosecuted in accordance with Rule 58(b)(1).
(b) Waiver of Indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor may be prosecuted by information if the defendant, after having been advised of the nature of the charge and of the rights of the defendant, waives in open court prosecution by indictment.	**(b) Waiving Indictment.** An offense punishable by imprisonment for more than one year may be prosecuted by information if the defendant — in open court and after being advised of the nature of the charge and of the defendant's rights — waives prosecution by indictment.

(c) Nature and Contents. **(1) In General.** The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. **(2) Criminal Forfeiture.** No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information provides notice that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute.[1] **(3) Harmless Error.** Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice.	**(c) Nature and Contents.** **(1)** ***In General.*** The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government. It need not contain a formal introduction or conclusion. A count may incorporate by reference an allegation made in another count. A count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. For each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated. **(2)** ***Criminal Forfeiture.*** No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information provides notice that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute. **(3)** ***Citation Error.*** Unless the defendant was misled and thereby prejudiced, neither an error in a citation nor a citation's omission is a ground to dismiss the indictment or information or to reverse a conviction.
(d) Surplusage. The court on motion of the defendant may strike surplusage from the indictment or information.	**(d) Surplusage.** Upon the defendant's motion, the court may strike surplusage from the indictment or information.
(e) Amendment of Information. The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.	**(e) Amending an Information.** Unless an additional or different offense is charged or a substantial right of the defendant is prejudiced, the court may permit an information to be amended at any time before verdict or finding.
(f) Bill of Particulars. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.	**(f) Bill of Particulars.** The court may direct the government to file a bill of particulars. The defendant may move for a bill of particulars before or within 10 days after arraignment or at a later time if the court permits. The government may amend a bill of particulars subject to such conditions as justice requires.

[1]The Supreme Court approved amendment in April 2000. The amendments take effect on December 1, 2000, unless Congress takes action otherwise.

Committee Notes
Rule 7
May 10, 2000

COMMITTEE NOTE

The language of Rule 7 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic.

The Committee has deleted the references to "hard labor" in the rule. This punishment is not found in current federal statutes.

[Rule 7(c)(2), Criminal Forfeiture, is language approved by the Supreme Court]

The title of Rule 7(c)(3) has been amended. The Committee believed that potential confusion could arise with the use of the term "harmless error." Rule 52, which deals with the issues of harmless error and plain error, is sufficient to address the topic. Potentially, the topic of harmless error could arise with regard to any of the other rules and there is insufficient need to highlight the term in Rule 7. Rule 7(c)(3), on the other hand, focuses specifically on the effect of an error in the citation of authority in the indictment. That material remains but without any reference to harmless error.

Rule 8. Joinder of Offenses and of Defendants	Rule 8. Joinder of Offenses or Defendants
(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.	**(a) Joinder of Offenses.** The indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged — whether felonies or misdemeanors or both — are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.
(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.	**(b) Joinder of Defendants.** The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

Committee Notes
Rule 8
May 10, 2000

COMMITTEE NOTE

The language of Rule 8 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 9. Warrant or Summons Upon Indictment or Information	Rule 9. Arrest Warrant or Summons on an Indictment or Information
(a) Issuance. Upon the request of the attorney for government the court shall issue a warrant for each defendant named in an information supported by a showing of probable cause under oath as is required by Rule 4(a), or in an indictment. Upon the request of the attorney for the government a summons instead of a warrant shall issue. If no request is made, the court may issue either a warrant or a summons in its discretion. More than one warrant or summons may issue for the same defendant. The clerk shall deliver the warrant or summons to the marshal or other person authorized by law to execute or serve it. If a defendant fails to appear in response to the summons, a warrant shall issue. When a defendant arrested with a warrant or given a summons appears initially before a magistrate judge, the magistrate judge shall proceed in accordance with the applicable subdivisions of Rule 5.	**(a) Issuance.** The court must issue a warrant — or at the government's request, a summons — for each defendant named in an indictment or named in an information if one or more affidavits accompanying the information establish probable cause to believe that an offense has been committed and that the defendant committed it. More than one warrant or summons may issue for the same defendant. If a defendant fails to appear in response to a summons, the court may, and upon request of the attorney for the government must, issue a warrant. The court must issue the arrest warrant to an officer authorized to execute it or the summons to a person authorized to serve it.
(b) Form. **(1) Warrant.** The form of the warrant shall be as provided in Rule 4(c)(1) except that it shall be signed by the clerk, it shall describe the offense charged in the indictment or information and it shall command that the defendant be arrested and brought before the nearest available magistrate judge. The amount of bail may be fixed by the court and endorsed on the warrant. **(2) Summons.** The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate judge at a stated time and place.	**(b) Form.** **(1)** ***Warrant.*** The warrant must conform to Rule 4(b)(1) except that it must be signed by the clerk and must describe the offense charged in the indictment or information. **(2)** ***Summons.*** The summons is to be in the same form as a warrant except that it must require the defendant to appear before the court at a stated time and place.
(c) Execution or Service; and Return. **(1) Execution or Service.** The warrant shall be executed or the summons served as provided in Rule 4(d)(1), (2) and (3). A summons to a corporation shall be served by delivering a copy to an officer or to a managing or general agent or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the corporation's last known address within the district or at its principal place of business elsewhere in the United States. The officer executing the warrant shall bring the arrested person without unnecessary delay before the nearest available federal magistrate judge or, in the event that a federal magistrate judge is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041.	**(c) Execution or Service; Return; Initial Appearance.** **(1)** ***Execution or Service.*** (A) The warrant must be executed or the summons served as provided in Rule 4(c)(1), (2), and (3). (B) The officer executing the warrant must proceed in accordance with Rule 5(a)(1).

(2) Return. The officer executing a warrant shall make return thereof to the magistrate judge or other officer before whom the defendant is brought. At the request of the attorney for the government any unexecuted warrant shall be returned and cancelled. On or before the return day the person to whom a summons was delivered for service shall make return thereof. At the request of the attorney for the government made at any time while the indictment or information is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the clerk to the marshal or other authorized person for execution or service.	**(2)** ***Return.*** A warrant or summons must be returned in accordance with Rule 4(c)(4). **(3)** ***Initial Appearance.*** When an arrested or summoned defendant first appears before the court, the judge must proceed under Rule 5.
[(d) Remand to United States Magistrate for Trial of Minor Offenses] (Abrogated Apr. 28, 1982, eff. Aug. 1, 1982).	

Committee Notes
Rule 9
May 10, 2000

COMMITTEE NOTE

The language of Rule 9 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Rule 9 has been changed to reflect its relationship to Rule 4 procedures for obtaining an arrest warrant or summons. Thus, rather than simply repeating material that is already located in Rule 4, the Committee determined that where appropriate, Rule 9 should simply direct the reader to the procedures specified in Rule 4.

Rule 9(a) has been amended to permit a judge discretion whether to issue an arrest warrant when a defendant fails to respond to a summons on a complaint. Under the current language of the rule, if the defendant fails to appear, the judge must issue a warrant. Under the amended version, if the defendant fails to appear and the government requests that a warrant be issued, the judge must issue one. In the absence of such a request, the judge has the discretion whether to do so. This change mirrors language in amended Rule 4(a).

A second amendment has been made in Rule 9(b)(1). The rule has been amended to delete language permitting the court to set the amount of bail on the warrant. The Committee believes that this language is inconsistent with the 1984 Bail Reform Act. *See United States v. Thomas*, 992 F. Supp. 782 (D.V.I. 1998) (bail amount endorsed on warrant that has not been determined in proceedings conducted under Bail Reform Act has no bearing on decision by judge conducting Rule 40 hearing).

The language in current Rule 9(c)(1), concerning service of a summons on an organization, has been moved to Rule 4.

IV. ARRAIGNMENT, AND PREPARATION FOR TRIAL	**TITLE IV. ARRAIGNMENT AND PREPARATION FOR TRIAL**
Rule 10. Arraignment	**Rule 10. Arraignment**
Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead thereto. The defendant shall be given a copy of the indictment or information before being called upon to plead.	Arraignment must be conducted in open court and must consist of: **(a)** ensuring that the defendant has a copy of the indictment or information; **(b)** reading the indictment or information to the defendant or stating to the defendant the substance of the charge; and then **(c)** asking the defendant to plead to the indictment or information.

Committee Notes
Rule 10
May 10, 2000

COMMITTEE NOTE

The language of Rule 10 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 10 is one of those rules. Another version of Rule 10, which includes several significant changes, is being published simultaneously in a separate pamphlet. That version includes a proposed amendment that would permit a defendant to waive altogether an appearance at the arraignment and another amendment that would permit use of video teleconferencing for arraignments.

Rule 11. Pleas	Rule 11. Pleas
(a) Alternatives. **(1) In General.** A defendant may plead guilty, not guilty, or nolo contendere. If a defendant refuses to plead, or if a defendant organization, as defined in 18 U.S.C. § 18, fails to appear, the court shall enter a plea of not guilty. **(2) Conditional Pleas.** With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.	**(a) Entering a Plea.** **(1)** ***In General.*** A defendant may plead guilty, not guilty, or (with the court's consent) nolo contendere. **(2)** ***Conditional Plea.*** With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.
(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.	**(3)** ***Nolo Contendere Plea.*** Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice. **(4)** ***Failure to Enter a Plea.*** If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and

(2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding, and, if necessary, one will be appointed to represent the defendant; and

(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and

(4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement; and

(b) Consideration and Acceptance of a Guilty or Nolo Contendere Plea.

(1) ***Advising and Questioning the Defendant.*** Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(A) any statement that the defendant gives under oath may be used against the defendant in a later prosecution for perjury or false statement;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel — and if necessary have the court appoint counsel — at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(6) the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence.	(H) any maximum possible penalty, including imprisonment, fine, special assessment, forfeiture, restitution, and term of supervised release; (I) any mandatory minimum penalty; (J) the court's obligation to apply the Sentencing Guidelines, and the court's authority to depart from those guidelines under some circumstances; and (K) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.
(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.	**(2)** ***Ensuring That a Plea Is Voluntary.*** Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement). **(3)** ***Determining the Factual Basis for a Plea.*** Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(e) Plea Agreement Procedure. (1) **In General.** The attorney for the government and the attorney for the defendant — or the defendant when acting pro se — may agree that, upon the defendant's entering a plea of guilty or nolo contendere to a charged offense, or to a lesser or related offense, the attorney for the government will: (A) move to dismiss other charges; or (B) recommend, or agree not to oppose the defendant's request for a particular sentence or sentencing range, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Any such recommendation or request is not binding on the court; or (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Such a plea agreement is binding on the court once it is accepted by the court. The court shall not participate in any discussions between the parties concerning any such plea agreement.	**(c) Plea Agreement Procedure.** **(1)** ***In General.*** An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and agree to a plea. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either the charged offense or a lesser or related offense, the plea agreement may specify that the attorney for the government will: (A) not bring, or will move to dismiss, other charges; (B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable (such a recommendation or request does not bind the court); or (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable (such a recommendation or request binds the court once the court accepts it).
(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, upon a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.	**(2)** ***Disclosing a Plea Agreement.*** The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.	**(3)** ***Judicial Consideration of a Plea Agreement.*** (A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report. (B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request. **(4)** ***Accepting a Plea Agreement.*** If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11 (c)(1)(A) or (C), the agreed disposition will be included in the judgment.
(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.	**(5)** ***Rejecting a Plea Agreement.*** If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must on the record: (A) inform the parties that the court rejects the plea agreement; (B) advise the defendant personally in open court — or, for good cause, in camera — that the court may not follow the plea agreement and give the defendant an opportunity to withdraw the plea; and (C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.	**(d)** ***Withdrawing a Guilty or Nolo Contendere Plea.*** A defendant may withdraw a plea of guilty or nolo contendere : **(1)** before the court accepts a plea of guilty or a plea of nolo contendere, for any, or no, reason; or **(2)** after the court accepts a plea of guilty or nolo contendere, but before it imposes sentence if: (A) the court rejects a plea agreement under Rule 11(c)(5); or (B) the defendant can show fair and just reasons for requesting the withdrawal. **(e)** ***Finality of Guilty or Nolo Contendere Plea.*** After the court imposes sentence the defendant may not withdraw a plea of guilty or nolo contendere and the plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.
(6) Inadmissibility of Pleas, Plea Discussions, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions: **(A)** a plea of guilty which was later withdrawn; **(B)** a plea of nolo contendere; **(C)** any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or **(D)** any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.	**(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements.** Except as otherwise provided in this subdivision, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions: **(1)** a plea of guilty that was later withdrawn; **(2)** a plea of nolo contendere; **(3)** any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or **(4)** any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.	
(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.	**(g) Recording the Proceedings.** The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).
(h) Harmless Error. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.	**(h) Harmless Error.** A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

Committee Notes
Rule 11
May 10, 2000

COMMITTEE NOTE

The language of Rule 11 has been amended and reorganized as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Amended Rule 11(b)(1) requires the court to apprise the defendant of his or her rights before accepting a plea of guilty or nolo contendere. The list is generally the same as that in the current rule except that the reference to parole has been removed and the judge is now required under Rule 11(b)(1)(H) to advise the defendant of the possibility of a fine and special assessment as a part of a maximum possible sentence. Also, the list has been re-ordered.

Rule 11(c)(1)(A) includes a change which recognizes a common type of plea agreement—that the government will "not bring" other charges.

The Committee considered whether to address the practice in some courts of using judges to facilitate plea agreements. The current rule states that "the court shall not participate in any discussions between the parties concerning such plea agreement." Some courts apparently believe that that language acts as a limitation only upon the judge taking the defendant's plea and thus permits other judges to serve as facilitators for reaching a plea agreement between the government and the defendant. *See, e.g., United States v. Torres*, 999 F.2d 376, 378 (9th Cir. 1993) (noting practice and concluding that presiding judge had not participated in a plea agreement that had resulted from discussions involving another judge). The Committee decided to leave the Rule as it is with the understanding that doing so was in no way intended either to approve or disapprove the existing law interpreting that provision.

Amended Rules 11(c)(3) to (5) address the topics of consideration, acceptance, and rejection of a plea agreement. The amendments are not intended to make any change in practice. The topics are discussed separately because in the past there has been some question about the possible interplay between the court's consideration of the guilty plea in conjunction with a plea agreement and sentencing and the ability of the defendant to withdraw a plea. *See United States v. Hyde*, 520 U.S. 670 (1997) (holding that plea and plea agreement need not be accepted or rejected as a single unit; "guilty pleas can be accepted while plea agreements are deferred, and the acceptance of the two can be separated in time."). Similarly, the

Committee decided to more clearly spell out in Rule 11(d) and 11(e) the ability of defendant to withdraw a plea. *See United States v. Hyde, supra.*

Amended Rule 11(e) is a new provision, taken from current Rule 32(e), that addresses the finality of a guilty or nolo contendere plea after the court imposes sentence. The provision makes it clear that it is not possible for a defendant to withdraw a plea after sentence is imposed.

Currently, Rule 11(e)(5) requires that unless good cause is shown, the parties are to give pretrial notice to the court that a plea agreement exists. That provision has been deleted. First, the Committee believed that although the provision was originally drafted to assist judges, under current practice few counsel would risk the consequences in the ordinary case of not informing the court that an agreement exists. Secondly, the Committee was concerned that there might be rare cases where the parties might agree that informing the court of the existence of an agreement might endanger a defendant or compromise an on-going investigation in a related case. In the end, the Committee believed that on balance, it would be preferable to remove the provision and reduce the risk of pretrial disclosure.

Rule 12. Pleadings and Motions Before Trial; Defenses and Objections.	Rule 12. Pleadings And Pretrial Motions
(a) Pleadings and Motions. Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and nolo contendere. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.	**(a) Pleadings.** Pleadings in criminal proceedings are the indictment, the information, and the pleas of not guilty, guilty, and nolo contendere.
(b) Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial: **(1)** Defenses and objections based on defects in the institution of the prosecution; or **(2)** Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or **(3)** Motions to suppress evidence; or **(4)** Requests for discovery under Rule 16; or **(5)** Requests for a severance of charges or defendants under Rule 14.	**(b) Pretrial Motions.** **(1)** ***In General.*** The provisions of Rule 47 apply to pretrial motions. **(2)** ***Motions That May Be Made Before Trial.*** The parties may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue. **(3)** ***Motions That Must Be Made Before Trial.*** The following must be raised before trial: (A) a motion alleging a defect in the institution of the prosecution; (B) a motion alleging a defect in the indictment or information — but at any time during the proceeding, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense; (C) a motion to suppress evidence; (D) a Rule 14 motion to sever charges or defendants; and (E) a Rule 16 motion for discovery.

	(4) ***Notice of the Government's Intent to Use Evidence.*** (A) *At the Government's Discretion.* At the arraignment or as soon afterward as practicable, the government may give notice to the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to raise objections to that evidence before trial under Rule 12(b)(3)(C). (B) *At the Defendant's Request.* At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.
(c) Motion Date. Unless otherwise provided by local rule, the court may, at the time of the arraignment or as soon thereafter as practicable, set a time for the making of pretrial motions or requests and, if required, a later date of hearing.	**(c) Motion Deadline.** The court may at the arraignment, or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing.
(d) Notice by the Government of the Intention to Use Evidence. **(1) At the Discretion of the Government.** At the arraignment or as soon thereafter as is practicable, the government may give notice to the defendant of its intention to use specified evidence at trial in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under subdivision (b)(3) of this rule. **(2) At the Request of the Defendant.** At the arraignment or as soon thereafter as is practicable the defendant may, in order to afford an opportunity to move to suppress evidence under subdivision (b)(3) of this rule, request notice of the government's intention to use (in its evidence in chief at trial) any evidence which the defendant may be entitled to discover under Rule 16 subject to any relevant limitations prescribed in Rule 16.	
(e) Ruling on Motion. A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.	**(d) Ruling on a Motion.** The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.

(f) Effect of Failure To Raise Defenses or Objections. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.	**(e) Waiver of a Defense, Objection, or Request.** A party waives any Rule 12(b)(1) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver.
(g) Records. A verbatim record shall be made of all proceedings at the hearing, including such findings of fact and conclusions of law as are made orally.	**(f) Records.** All proceedings at a motion hearing, including any findings of fact and conclusions of law made by the court, must be recorded by a court reporter or a suitable recording device.
(h) Effect of Determination. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be continued in custody or that bail be continued for a specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect the provisions of any Act of Congress relating to periods of limitations.	**(g) Defendant's Continued Custody or Release Status.** If the court grants a motion to dismiss based on a defect in the institution of the prosecution, in the indictment, or in the information, it may order the defendant to be released or detained under 18 U.S.C. § 3142 for a specified time until a new indictment or information is filed. This rule does not affect any federal statutory period of limitations.
(i) Production of Statements at Suppression Hearing. Rule 26.2 applies at a hearing on a motion to suppress evidence under subdivision (b)(3) of this rule. For purposes of this subdivision, a law enforcement officer is deemed a government witness.	**(h) Producing Statements at a Suppression Hearing.** Rule 26.2 applies at a suppression hearing under Rule 12(b)(3)(C). In a suppression hearing, a law enforcement officer is considered a government witness.

Committee Notes
Rule 12
May 10, 2000

COMMITTEE NOTE

The language of Rule 12 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The last sentence of current Rule 12(a), referring to the abolishment of "all other pleas, and demurrers and motions to quash" has been deleted as being unnecessary.

Rule 12(b) is modified to more clearly indicate that Rule 47 governs any pretrial motions filed under Rule 12, including form and content. The new provision also more clearly delineates those motions that *must* be filed pretrial and those that *may* be filed pretrial. No change in practice is intended.

Rule 12(b)(4) is composed of what is currently Rule 12(d). The Committee believed that that provision, which addresses the government's requirement to disclose discoverable information for the purpose of facilitating timely defense objections and motions, was more appropriately associated with the pretrial motions specified in Rule 12(b)(3).

Rule 12(c) includes a non-stylistic change. The reference to the "local rule" exception has been deleted to make it clear that judges should be encouraged to set deadlines for motions. The Committee believed that doing so promotes more efficient case management, especially when there is a heavy docket of pending cases. Although the rule permits some discretion in setting a date for motion hearings, the Committee believed that doing so at an early point in the proceedings would also promote judicial economy.

Moving the language in current Rule 12(d) caused the relettering of the subdivisions following Rule 12(c).

Although amended Rule 12(e) is a revised version of current Rule 12(f), the Committee intends to make no change in the current law regarding waivers of motions or defenses.

Rule 12.1. Notice of Alibi	Rule 12.1. Notice of Alibi Defense
(a) Notice by Defendant. Upon written demand of the attorney for the government stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten days, or at such different time as the court may direct, upon the attorney for the government a written notice of the defendant's intention to offer a defense of alibi. Such notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defendant intends to rely to establish such alibi.	**(a) Government's Request for Notice and Defendant's Response.** **(1)** ***Government's Request.*** The attorney for the government may request in writing that the defendant notify the attorney for the government of any intended alibi defense. The request must state the time, date, and place of the alleged offense. **(2)** ***Defendant's Response.*** Within 10 days after the request, or some other time the court directs, the defendant must serve written notice on the attorney for the government of any intended alibi defense. The defendant's notice must state the specific places where the defendant claims to have been at the time of the alleged offense and the names, addresses, and telephone numbers of the alibi witnesses on whom the defendant intends to rely.
(b) Disclosure of Information and Witness. Within ten days thereafter, but in no event less than ten days before trial, unless the court otherwise directs, the attorney for the government shall serve upon the defendant or the defendant's attorney a written notice stating the names and addresses of the witnesses upon whom the government intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied upon to rebut testimony of any of the defendant's alibi witnesses.	**(b) Disclosing Government Witnesses.** **(1)** ***Disclosure.*** If the defendant serves a Rule 12.1(a)(2) notice, the attorney for the government must disclose in writing to the defendant, or the defendant's attorney, the names, addresses, and telephone numbers of the witnesses the government intends to rely on to establish the defendant's presence at the scene of the alleged offense, and any government rebuttal witnesses to the defendant's alibi witnesses. **(2)** ***Time to Disclose.*** Unless the court directs otherwise, the attorney for the government must give notice under Rule 12.1(b)(1) within 10 days after the defendant serves notice of an intended alibi defense under Rule 12.1(a)(2), but no later than 10 days before trial.
(c) Continuing Duty to Disclose. If prior to or during trial, a party learns of an additional witness whose identity, if known, should have been included in the information furnished under subdivision (a) or (b), the party shall promptly notify the other party or the other party's attorney of the existence and identity of such additional witness.	**(c) Continuing Duty to Disclose.** Both the attorney for the government and the defendant must promptly disclose in writing to the other party the name, address, and telephone numbers of any additional witness if: **(1)** the disclosing party learns of the witness before or during trial; and **(2)** the witness should have been disclosed under Rule 12.1(a) or (b) if the disclosing party had earlier known of the witness.

(d) Failure to Comply. Upon failure of either party to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at, the scene of the alleged offense. This rule shall not limit the right of the defendant to testify.	**(d) Exceptions.** For good cause the court may grant an exception to any requirement of Rule 12.1 (a) -(c).
(e) Exceptions. For good cause shown, the court may grant an exception to any of the requirements of subdivisions (a) through (d) of this rule.	**(e) Failure to Comply.** If a party fails to comply with this rule, the court may exclude the testimony of any undisclosed witness regarding the defendant's alibi. This rule does not limit the defendant's right to testify.
(f) Inadmissibility of Withdrawn Alibi. Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connections with such intention, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.	**(f) Inadmissibility of Withdrawn Intent.** Evidence of an intent to rely on an alibi defense, later withdrawn, or of statements made in connection with that intent, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intent.

Committee Notes
Rule 12.1
May 10, 2000

COMMITTEE NOTE

The language of Rule 12.1 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Current Rules12.1(d) and 12.1(e) have been switched in the amended rule to improve the organization of the rule.

Finally, the amended rule includes a new requirement that in providing the names and addresses of alibi and any rebuttal witnesses, the parties must also provide the phone numbers of those witnesses. *See* Rule 12.1(a)(2), Rule 12.1(b)(1), and Rule 12.1(c). The Committee believed that requiring such information would facilitate locating and interviewing those witnesses.

Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition	Rule 12.2. Notice of Insanity Defense; Mental Examination
(a) Defense of Insanity. If a defendant intends to rely upon the defense of insanity at the time of the alleged offense, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.	**(a) Notice of an Insanity Defense.** A defendant who intends to assert a defense of insanity at the time of the alleged offense must notify the attorney for the government in writing within the time provided for filing a pretrial motion, or at any later time the court directs. A defendant who fails to do so cannot rely on an insanity defense. The court may — for good cause — allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.
(b) Expert Testimony of Defendant's Mental Condition. If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of guilt, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.	**(b) Notice of Expert Evidence of a Mental Condition.** If a defendant intends to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on the issue of guilt, the defendant must — within the time provided for the filing of pretrial motions or at a later time as the court directs — notify the attorney for the government in writing of this intention and file a copy of the notice with the clerk. The court may, for good cause, allow late filing of the notice or grant additional time to the parties to prepare for trial or make any other appropriate order.
(c) Mental Examination of Defendant. In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to an examination pursuant to 18 U.S.C. 4241 or 4242. No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony.	**(c) Mental Examination.** **(1)** ***Authority to Order Examination; Procedures.*** In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to an examination pursuant to 18 U.S.C. § 4241 or § 4242. **(2)** ***Inadmissibility of a Defendant's Statements.*** No statement made by a defendant in the course of any examination conducted under this rule (whether conducted with or without the defendant's consent), no testimony by the expert based on the statement, and no other fruits of the statement may be admitted into evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced evidence.

(d) Failure to Comply. If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's guilt.	**(d) Failure to Comply.** If the defendant fails to give notice under Rule 12.2(b) or does not submit to an examination when ordered under Rule 12.2(c), the court may exclude any expert evidence from the defendant on the issue of the defendant's mental disease, mental defect, or any other mental condition bearing on the defendant's guilt.
(e) Inadmissibility of Withdrawn Intention. Evidence of an intention as to which notice was given under subdivision (a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.	**(e) Inadmissibility of Withdrawn Intention.** Evidence of an intention as to which notice was given under Rule 12.2(a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

Committee Notes
Rule 12.2
May 10, 2000

COMMITTEE NOTE

The language of Rule 12.2 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 12.2 is one of those rules. Although this version of Rule 12.2 contains only "style" changes, another version of the rule is being published simultaneously in a separate pamphlet. That version of Rule 12.2 includes five significant amendments.

Rule 12.3. Notice of Defense Based upon Public Authority	Rule 12.3. Notice of Public-Authority Defense
(a) Notice by Defendant; Government Response; Disclosure of Witnesses. **(1) Defendant's Notice and Government's Response.** A defendant intending to claim a defense of actual or believed exercise of public authority on behalf of a law enforcement or Federal intelligence agency at the time of the alleged offense shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, serve upon the attorney for the Government a written notice of such intention and file a copy of such notice with the clerk. Such notice shall identify the law enforcement or Federal intelligence agency and any member of such agency on behalf of which and the period of time in which the defendant claims the actual or believed exercise of public authority occurred. If the notice identifies a Federal intelligence agency, the copy filed with the clerk shall be under seal. Within ten days after receiving the defendant's notice, but in no event less than twenty days before the trial, the attorney for the Government shall serve upon the defendant or the defendant's attorney a written response which shall admit or deny that the defendant exercised the public authority identified in the defendant's notice.	**(a) Notice of Defense and Disclosure of Witnesses.** **(1)** ***Notice in General.*** A defendant who intends to assert a defense of actual or believed exercise of public authority on behalf of a law-enforcement agency or federal intelligence agency at the time of the alleged offense must so notify the attorney for the government in writing and must file a copy of the notice with the clerk within the time provided for filing a pretrial motion, or at any later time the court directs. The notice filed with the clerk must be under seal if the notice identifies a federal intelligence agency under whose authority the defendant claims to have acted. **(2)** ***Contents of Notice.*** The notice must contain the following information: (A) the law-enforcement agency or federal intelligence agency involved; (B) the agency member on whose behalf the defendant claims to have acted; and (C) the time during which the defendant claims to have acted with public authority. **(3)** ***Response to Notice.*** An attorney for the government must serve a written response on the defendant or the defendant's attorney within 10 days after receiving the defendant's notice, but no later than 20 days before trial. The response must admit or deny that the defendant exercised the public authority identified in the defendant's notice.

(2) Disclosure of Witnesses. At the time that the Government serves its response to the notice or thereafter, but in no event less than twenty days before trial, the attorney for the Government may serve upon the defendant or the defendant's attorney a written demand for the names and addresses of the witnesses, if any, upon whom the defendant intends to rely in establishing the defense identified in the notice. Within seven days after receiving the Government's demand, the defendant shall serve upon the attorney for the Government a written statement of the names and addresses of any such witnesses. Within seven days after receiving the defendant's written statement, the attorney for the Government shall serve upon the defendant or the defendant's attorney a written statement of the names and addresses of the witnesses, if any, upon whom the Government intends to rely in opposing the defense identified in the notice.	**(4)** ***Disclosing Witnesses.*** (A) *Government's Request.* An attorney for the government may request in writing that the defendant disclose the name, address, and telephone number of each witness the defendant intends to rely on to establish a public-authority defense. The attorney for the government may serve the request when the government serves its response to the defendant's notice under Rule 12.3(a)(1), or later, but must serve the request no later than 20 days before trial. (B) *Defendant's Response.* Within 7 days after receiving the government's request, the defendant must serve on an attorney for the government a written statement of the name, address, and telephone number of each witness. (C) *Government's Reply.* Within 7 days after receiving the defendant's statement, the attorney for the government must serve on the defendant or the defendant's attorney a written statement of the name, address, and telephone number of each witness the government intends to rely on to oppose the defendant's public-authority defense.
(3) Additional Time. If good cause is shown, the court may allow a party additional time to comply with any obligation imposed by this rule.	**(5)** ***Additional Time.*** The court may for good cause allow a party additional time to comply with this rule.
(b) Continuing Duty to Disclose. If, prior to or during trial, a party learns of any additional witness whose identity, if known, should have been included in the written statement furnished under subdivision (a)(2) of this rule, that party shall promptly notify in writing the other party or the other party's attorney of the name and address of any such witness.	**(b) Continuing Duty to Disclose.** Both an attorney for the government and the defendant or the defendant's attorney must promptly disclose in writing to the other party the name, address, and telephone number of any additional witness if: **(1)** the disclosing party learns of the witness before or during trial; and **(2)** the witness should have been disclosed under Rule 12.3(a)(4) if the disclosing party had earlier known of the witness.
(c) Failure to Comply. If a party fails to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered in support of or in opposition to the defense, or enter such other order as it deems just under the circumstances. This rule shall not limit the right of the defendant to testify.	**(c) Failure to Comply.** If a party fails to comply with this rule, the court may exclude the testimony of any undisclosed witness regarding the public-authority defense. This rule does not limit the defendant's right to testify.

(d) Protective Procedures Unaffected. This rule shall be in addition to and shall not supersede the authority of the court to issue appropriate protective orders, or the authority of the court to order that any pleading be filed under seal.	**(d) Protective Procedures Unaffected.** This rule does not limit the court's authority to issue appropriate protective orders or to order that any filings be under seal.
(e) Inadmissibility of Withdrawn Defense Based upon Public Authority. Evidence of an intention as to which notice was given under subdivision (a), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.	**(e) Inadmissibility of Withdrawn Defense Based upon Public Authority.** Evidence of an intention as to which notice was given under Rule 12.3(a), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

Committee Notes
Rule 12.3
May 10, 2000

COMMITTEE NOTE

The language of Rule 12.3 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The Committee considered the issue of whether (as currently provided in Rule 12.3) a defendant could invoke the defense of public authority on either an actual or believed exercise of public authority. The Committee ultimately decided that any attempt to provide the defendant with a "right" to assert the defense was not a matter within the purview of the Committee under the Rules Enabling Act. The Committee decided to retain the current language, which recognizes, as a nonsubstantive matter, that if the defendant intends to raise the defense, notice must be given. Thus, the Committee decided not to make any changes in the current rule regarding the availability of the defense.

Substantive changes have been made in Rule 12.3(a)(4) and 12.3(b). As in Rule 12.1, the Committee decided to include in the restyled rule the requirement that the parties provide the telephone numbers of any witnesses disclosed under the rule.

Rule 13. Trial Together of Indictments or Informations	Rule 13. Joint Trial of Separate Cases
The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.	The court may order that separate cases be tried together as though brought in a single indictment or information if all offenses and all defendants could have been joined in a single indictment or information.

Committee Notes
Rule 13
May 10, 2000

COMMITTEE NOTE

The language of Rule 13 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 14. Relief from Prejudicial Joinder	Rule 14. Relief from Prejudicial Joinder
If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.	**(a) Relief.** If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires. **(b) Defendants' Statements.** Before ruling on a defendant's motion to sever, the court may order the attorney for the government to deliver to the court for in camera inspection any defendants' statements that the government intends to use as evidence.

Committee Notes
Rule 14
May 10, 2000

COMMITTEE NOTE

The language of Rule 14 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The reference to a defendant's "confession" in the last sentence of the current rule has been deleted. The Committee believed that the reference to the "defendant's statements" in the amended rule would fairly embrace any confessions or admissions by a defendant.

Rule 15. Depositions	Rule 15. Depositions
(a) When Taken. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place. If a witness is detained pursuant to section 3144 of title 18, United States Code, the court on written motion of the witness and upon notice to the parties may direct that the witness' deposition be taken. After the deposition has been subscribed the court may discharge the witness.	**(a) When Taken.** **(1)** ***In General.*** A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant such motion due to exceptional circumstances in the case and in the interest of justice. If the court orders the deposition to be taken, it may also require the deponent to produce at the deposition any designated book, paper, document, record, recording, data, or other material not privileged. **(2)** ***Detained Material Witness.*** A witness who is detained under 18 U.S.C. § 3144 may request to be deposed by filing a written motion and giving notice to the parties. The court may then order that the deposition be taken and may discharge the witness after the witness has signed under oath the deposition transcript.
(b) Notice of Taking. The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time or change the place for taking the deposition.	**(b) Notice.** **(1)** ***In General.*** A party seeking to take a deposition must give every other party reasonable written notice of the deposition's date and location. The notice must state the name and address of each deponent. If requested by a party receiving the notice, the court for good cause may change the deposition's date or location. **(2)** ***To the Custodial Officer.*** A party seeking to take the deposition must also notify the officer who has custody of the defendant of the scheduled date and location.

The officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce the defendant at the examination and keep the defendant in the presence of the witness during the examination, unless, after being warned by the court that disruptive conduct will cause the defendant's removal from the place of the taking of the deposition, the defendant persists in conduct which is such as to justify exclusion from that place. A defendant not in custody shall have the right to be present at the examination upon request subject to such terms as may be fixed by the court, but a failure, absent good cause shown, to appear after notice and tender of expenses in accordance with subdivision (c) of this rule shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.	**(c) Defendant's Presence.** **(1)** ***Defendant in Custody.*** The officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant: (A) waives in writing the right to be present; or (B) persists in disruptive conduct justifying exclusion after the court has warned the defendant that disruptive conduct will result in the defendant's exclusion. **(2)** ***Defendant Not in Custody.*** A defendant who is not in custody has the right upon request to be present at the deposition, subject to any conditions imposed by the court. If the government tenders the defendant's expenses as provided in Rule 15(d) but the defendant still fails to appear, the defendant — absent good cause — waives both the right to appear and any objection to the taking and use of the deposition based on that right.
(c) Payment of Expenses. Whenever a deposition is taken at the instance of the government, or whenever a deposition is taken at the instance of a defendant who is unable to bear the expenses of the taking of the deposition, the court may direct that the expense of travel and subsistence of the defendant and the defendant's attorney for attendance at the examination and the cost of the transcript of the deposition shall be paid by the government.	**(d) Expenses.** If the deposition was requested by the government the court may — or if the defendant is unable to bear the deposition expenses the court must — order the government to pay: **(1)** any reasonable travel and subsistence expenses of the defendant and the defendant's attorney to attend the deposition, and **(2)** the deposition transcript costs.

(d) How Taken. Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules, provided that (1) in no event shall a deposition be taken of a party defendant without that defendant's consent, and (2) the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself. The government shall make available to the defendant or the defendant's counsel for examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the government and to which the defendant would be entitled at the trial.	**(e) Taken.** Unless these rules or a court order provides otherwise, a deposition must be filed, and it must be taken in the same manner as a deposition in a civil action, except that: **(1)** A defendant may not be deposed without that defendant's consent. **(2)** The scope and manner of the deposition examination and cross-examination must be the same as would be allowed during trial. **(3)** The government must provide to the defendant or the defendant's attorney, for use at the deposition, any statement of the deponent in the government's possession to which the defendant would be entitled at trial.
(e) Use. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with that witness' deposition. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require the offering of all of it which is relevant to the part offered and any party may offer other parts.	**(f) Use as Evidence.** A party may use all or part of a deposition as provided by the Federal Rules of Evidence.
(f) Objections to Deposition Testimony. Objections to deposition testimony or evidence or parts thereof and the grounds for the objection shall be stated at the time of the taking of the deposition.	**(g) Objections.** A party objecting to deposition testimony or evidence must state the grounds for the objection during the deposition.
(g) Deposition by Agreement Not Precluded. Nothing in this rule shall preclude the taking of a deposition, orally or upon written questions, or the use of a deposition, by agreement of the parties with the consent of the court.	**(h) Agreed Depositions Permitted.** The parties may by agreement take and use a deposition with the court's consent.

Committee Notes
Rule 15
May 10, 2000

COMMITTEE NOTE

The language of Rule 15 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

In Rule 15(a), the list of materials to be produced has been amended to include the expansive term "data" to reflect the fact that in an increasingly technological culture, the information may exist in a format not already covered by the more conventional list, such as a book or document.

The last portion of current Rule 15(b), dealing with the defendant's presence at a deposition, has been moved to amended Rule 15(c).

Rule 15(d), which addresses the payment of expenses incurred by the defendant and the defendant's attorney, has been changed. Under the current rule, if the government requests the deposition, or if the defendant requests the deposition and is unable to pay for it, the court *may* direct the government to pay for travel and subsistence expenses for both the defendant and the defendant's attorney. In either case, the current rule requires the government to pay for the transcript. Under the amended rule, if the deposition was requested by the government, the court *must* require the government to pay reasonable subsistence and travel expenses and the cost of the deposition transcript. If the defendant is unable to pay the deposition expenses, the court *must* order the government to pay reasonable subsistence and travel expenses and the deposition transcript costs—regardless of who requested the deposition. Although the current rule places no apparent limits on the amount of funds that should be reimbursed, the Committee believed that insertion of the word "reasonable" was consistent with current practice.

Rule 15(f) has been revised to more clearly reflect that the admissibility of any deposition taken under the rule is governed not by the rule itself, but instead by the Federal Rules of Evidence.

Rule 16. Discovery and Inspection	Rule 16. Discovery and Inspection
(a) Governmental Disclosure of Evidence. **(1) Information Subject to Disclosure.** **(A) Statement of Defendant.** Upon request of a defendant the government must disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. The government must also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial. Upon request of a defendant which is an organization such as a corporation, partnership, association, or labor union, the government must disclose to the defendant any of the foregoing statements made by a person who the government contends (1) was, at the time of making the statement, so situated as a director, officer, employee or agent as to have been able legally to bind the defendant in respect to the subject of the statement, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to that alleged conduct in which the person was involved.	**(a) Government's Disclosure.** **(1) *Information Subject to Disclosure.*** (A) *Defendant's Oral Statement.* Upon request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial. (B) *Defendant's Written or Recorded Statement.* Upon request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following: (i) any relevant written or recorded statement by the defendant if: (a) the statement is within the government's possession, custody, or control; and (b) the attorney for the government knows — or through due diligence could know — that the statement exists; (ii) the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and (iii) the defendant's recorded testimony before a grand jury relating to the charged offense.
	(C) *Organizational Defendant.* Upon request, if the defendant is an organization, the government must disclose to the defendant any statement described in Rule 16(a)(1)(A) and (B) if the government contends that the person making the statement:

	(i) was legally able to bind the defendant regarding the subject of the statement because of that person's position as the defendant's director, officer, employee, or agent; or (ii) was personally involved in the alleged conduct constituting the offense and was legally able to bind the defendant regarding that conduct because of that person's position as the defendant's director, officer, employee, or agent.
(B) Defendant's Prior Record. Upon request of the defendant, the government shall furnish to the defendant such copy of the defendant's prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.	(D) *Defendant's Prior Record.* Upon request, the government must furnish the defendant with a copy of the defendant's prior criminal record that is within the government's possession, custody, or control if the attorney for the government knows — or through due diligence could know — that the record exists.
(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.	(E) *Documents and Objects.* Upon the defendant's request, the government must permit the defendant to inspect and copy, or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control, and: (i) the item is material to the preparation of the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant.

(D) Reports of Examinations and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.	(F) *Reports of Examinations and Tests.* Upon request, the government must permit a defendant to inspect and copy, or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if: (i) the item is within the government's possession, custody, or control; (ii) the attorney for the government knows — or through due diligence could know — that the item exists; and (iii) the item is material to the preparation of the defense or the government intends to use the item in its case-in-chief at trial.
(E) Expert Witnesses. At the defendant's request, the government shall disclose to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case in chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) of this rule and the defendant complies, the government shall, at the defendant's request, disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subdivision shall describe the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications.	(G) *Expert Testimony.* Upon request, the government must give to the defendant a written summary of any testimony the government intends to use in its case-in-chief at trial under Federal Rules of Evidence 702, 703, or 705. The summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.
(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), (D), and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case. Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.	(2) ***Information Not Subject to Disclosure.*** Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agent in connection with the investigation or prosecution of the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.
(3) Grand Jury Transcripts. Except as provided in Rules 6, 12(i) and 26.2, and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.	(3) ***Grand Jury Transcripts.*** This rule does not apply to the discovery or inspection of a grand jury's recorded proceedings, except as provided in Rules 6, 12(h), 16(a)(1), and 26.2.
[(4) Failure to Call Witness.] (Deleted Dec. 12, 1975)	

(b) The Defendant's Disclosure of Evidence. **(1) Information Subject to Disclosure.** **(A) Documents and Tangible Objects.** If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.	**(b) Defendant's Disclosure.** **(1) *Information Subject to Disclosure.*** (A) *Documents and Objects*. If the defendant requests disclosure under Rule 16(a)(1)(E), and the government complies, then the defendant must permit the government, upon request, to inspect and copy, or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if: (i) the item is within the defendant's possession, custody, or control; and (ii) the defendant intends to use the item in the defendant's case-in-chief at trial.
(B) Reports of Examinations and Tests. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to that witness' testimony.	(B) *Reports of Examinations and Tests*. If the defendant requests disclosure under Rule 16(a)(1)(F), then upon compliance and the government's request, the defendant must permit the government to inspect and copy, or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if: (i) the item is within the defendant's possession, custody, or control; and (ii) the defendant intends to use the item in the defendant's case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony.
(C) Expert Witnesses. Under the following circumstances, the defendant shall, at the government's request, disclose to the government a written summary of testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial: (i) if the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, or (ii) if the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition. This summary shall describe the witnesses' opinions, the bases and reasons for those opinions, and the witnesses' qualifications.	(C) *Expert Testimony*. If the defendant requests disclosure under Rule 16(a)(1)(G), then upon compliance and the government's request, the defendant must give the government a written summary of any testimony the defendant intends to use as evidence at trial under Federal Rules of Evidence 702, 703, or 705. The summary must describe the witness's opinions, the bases and reasons for these opinions, and the witness's qualifications.

(2) Information Not Subject To Disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or the defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, the defendant's agents or attorneys.	**(2)** ***Information Not Subject to Disclosure.*** Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of: (A) reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; or (B) a statement made to the defendant, or the defendant's attorney or agent, by: (i) the defendant; (ii) a government or defense witness; or (iii) a prospective government or defense witness.
[(3) Failure to Call Witness.] (Deleted Dec. 12, 1975)	
(c) Continuing Duty to Disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, such party shall promptly notify the other party or that other party's attorney or the court of the existence of the additional evidence or material.	**(c) Continuing Duty to Disclose.** A party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other party or the court, if: **(1)** the evidence or material is subject to discovery or inspection under this rule; and **(2)** the other party previously requested, or the court ordered, its production.
(d) Regulation of Discovery. **(1) Protective and Modifying Orders.** Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.	**(d) Regulating Discovery.** **(1)** ***Protective and Modifying Orders.*** At any time the court may for good cause deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal.

(2) Failure To Comply With a Request. If at any time during the course of proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.	**(2)** ***Failure to Comply.*** If a party fails to comply with Rule 16, the court may: (A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions; (B) grant a continuance; (C) prohibit that party from introducing the undisclosed evidence; or (D) enter any other order that is just under the circumstances.
(e) Alibi Witnesses. Discovery of alibi witnesses is governed by Rule 12.1.	

Committee Notes
Rule 16
May 10, 2000

COMMITTEE NOTE

The language of Rule 16 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Current Rule 16(a)(1)(A) is now located in Rule 16(a)(1)(A), (B), and (C). Current Rule 16(a)(1)(B), (C), (D), and (E) have been relettered.

Amended Rule 16(b)(1)(B) includes a change that may be substantive in nature. Rule 16(a)(1)(E) and 16(a)(1)(F) require production of specified information if the government intends to "use" the information "in its case-in-chief at trial." The Committee believed that the language in revised Rule 16(b)(1)(B), which deals with a defendant's disclosure of information to the government, should track the similar language in revised Rule 16(a)(1). In Rule 16(b)(1)(B)(ii), the Committee changed the current provision which reads: "the defendant intends to *introduce* as evidence" to the "defendant intends to *use* the item . . ." The Committee recognized that this might constitute a substantive change in the rule but believed that it was a necessary conforming change with the provisions in 16(a)(1)(E) and (F), noted *supra*, regarding use of evidence by the government.

In amended Rule 16(d)(1), the last phrase in the current subdivision —which refers to a possible appeal of the court's discovery order—has been deleted. In the Committee's view, no substantive change results from that deletion. The language is unnecessary because the court, regardless of whether there is an appeal, will have maintained the record.

Finally, current Rule 16(e), which addresses the topic of notice of alibi witnesses, has been deleted as being unnecessarily duplicative of Rule 12.1.

Rule 17. Subpoena	Rule 17. Subpoena
(a) For Attendance of Witnesses; Form; Issuance. A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. A subpoena shall be issued by a United States magistrate judge in a proceeding before that magistrate judge, but it need not be under the seal of the court.	**(a) Content.** A subpoena must state the court's name and the title of the proceeding, include the seal of the court, and command the witness to attend and testify at the time and place the subpoena specifies. The clerk must issue a blank subpoena — signed and sealed — to the party requesting it and that party must fill in the blanks before the subpoena is served.
(b) Defendants Unable to Pay. The court shall order at any time that a subpoena be issued for service on a named witness upon an ex parte application of a defendant upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense. If the court orders the subpoena to be issued, the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government.	**(b) Defendant Unable to Pay.** Upon a defendant's ex parte application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness's fees and the necessity of the witness's presence for an adequate defense. If the court orders a subpoena to be issued, the process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas.
(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.	**(c) Producing Documents and Objects.** **(1)** A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them. **(2)** On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.
(d) Service. A subpoena may be served by the marshal, by a deputy marshal or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named and by tendering to that person the fee for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof.	**(d) Service.** A marshal, deputy marshal, or any nonparty who is at least 18 years old, may serve a subpoena. The server must deliver a copy of the subpoena to the witness and must tender to the witness one day's witness-attendance fee and the legal mileage allowance. The server need not tender the attendance fee or mileage allowance when the United States, a federal officer, or a federal agency has requested the subpoena.

(e) Place of Service. **(1) In United States.** A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States. **(2) Abroad.** A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C., § 1783.	**(e) Place of Service.** **(1)** ***In the United States.*** A subpoena requiring a witness to attend a hearing or trial may be served at any place within the United States. **(2)** ***In a Foreign Country.*** If the witness is in a foreign country, 28 U.S.C. § 1783 governs the subpoena's service.
(f) For Taking Depositions; Place of Examination. **(1) Issuance.** An order to take a deposition authorizes the issuance by the clerk of the court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. **(2) Place.** The witness whose deposition is to be taken may be required by subpoena to attend at any place designated by the trial court, taking into account the convenience of the witness and the parties.	**(f) Deposition Subpoena.** **(1)** ***Issuance.*** A court order to take a deposition authorizes the clerk in the district where the deposition is to be taken to issue a subpoena for any witness named or described in the order. **(2)** ***Place.*** After considering the convenience of the witness and the parties, the court may order — and the subpoena may require — the witness to appear anywhere the court designates.
(g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a United States magistrate judge.	**(g) Contempt.** The court may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by a federal court in that district.
(h) Information Not Subject to Subpoena. Statements made by witnesses or prospective witnesses may not be subpoenaed from the government or the defendant under this rule, but shall be subject to production only in accordance with the provisions of Rule 26.2.	**(h) Information Not Subject to a Subpoena.** No party may subpoena a statement of a witness or of a prospective witness under this rule. Rule 26.2 governs the production of the statements.

Committee Notes
Rule 17
May 10, 2000

COMMITTEE NOTE

The language of Rule 17 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

A potential substantive change has been made in Rule 17(c)(1); the word "data" has been added to the list of matters that may be subpoenaed. The Committee believed that inserting that term will reflect the fact that in an increasingly technological culture, the information may exist in a format not already covered by the more conventional list, such as a book or document.

Rule 17.1. Pretrial Conference	Rule 17.1. Pretrial Conference
At any time after the filing of the indictment or information the court upon motion of any party or upon its own motion may order one or more conferences to consider such matters as will promote a fair and expeditious trial. At the conclusion of a conference the court shall prepare and file a memorandum of the matters agreed upon. No admissions made by the defendant or the defendant's attorney at the conference shall be used against the defendant unless the admissions are reduced to writing and signed by the defendant and the defendant's attorney. This rule shall not be invoked in the case of a defendant who is not represented by counsel.	On its own, or on a party's motion, the court may hold one or more pretrial conferences to promote a fair and expeditious trial. When a conference ends, the court must prepare and file a memorandum of any matters agreed to during the conference. The government may not use any statement made during the conference by the defendant or the defendant's attorney unless it is in writing and signed by the defendant and the defendant's attorney.

Committee Notes
Rule 17.1
May 10, 2000

COMMITTEE NOTE

The language of Rule 17.1 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Current Rule 17.1 prohibits the court from holding a pretrial conference where the defendant is not represented by counsel. It is unclear whether this would bar such a conference when the defendant invokes the constitutional right to self-representation. *See Faretta v. California*, 422 U.S. 806 (1975). The amended version makes clear that a pretrial conference may be held in these circumstances. Moreover, the Committee believed that pretrial conferences might be particularly useful in those cases where the defendant is proceeding pro se.

V. VENUE	**Title V. Venue**
Rule 18. Place of Prosecution and Trial	**Rule 18. Place of Prosecution and Trial**
Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice.	Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district in which the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant and the witnesses, and the prompt administration of justice.

Committee Notes
Rule 18
May 10, 2000

COMMITTEE NOTE

The language of Rule 18 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 19. Rescinded.	Rule 19. [Rescinded.]

Rule 20. Transfer From the District for Plea and Sentence	Rule 20. Transfer for Plea and Sentence
(a) Indictment or Information Pending. A defendant arrested, held, or present in a district other than that in which an indictment or information is pending against that defendant may state in writing a wish to plead guilty or nolo contendere, to waive trial in the district in which the indictment or information is pending, and to consent to disposition of the case in the district in which that defendant was arrested, held, or present, subject to the approval of the United States attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States attorneys, the clerk of the court in which the indictment or information is pending shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant is arrested, held, or present, and the prosecution shall continue in that district.	**(a) Consent to Transfer.** A prosecution may be transferred from the district where the indictment or information is pending, or from which a warrant on a complaint has been issued, to the district where the defendant is arrested, held, or present, if: **(1)** the defendant states in writing a wish to plead guilty or nolo contendere and to waive trial in the district where the indictment, information, or complaint is pending, consents in writing to the court's disposing of the case in the transferee district, and files the statement in the transferee district; and **(2)** the United States attorneys in both districts approve the transfer in writing. **(b) Clerk's Duties.** After receiving the defendant's statement and the required approvals, the clerk where the indictment, information, or complaint is pending must send the file, or a certified copy, to the clerk in the transferee district.
(b) Indictment or Information Not Pending. A defendant arrested, held, or present, in a district other than the district in which a complaint is pending against that defendant may state in writing a wish to plead guilty or nolo contendere, to waive venue and trial in the district in which the warrant was issued, and to consent to disposition of the case in the district in which that defendant was arrested, held, or present, subject to the approval of the United States attorney for each district. Upon filing the written waiver of venue in the district in which the defendant is present, the prosecution may proceed as if venue were in such district.	
(c) Effect of Not Guilty Plea. If after the proceeding has been transferred pursuant to subdivision (a) or (b) of this rule the defendant pleads not guilty, the clerk shall return the papers to the court in which the prosecution was commenced, and the proceeding shall be restored to the docket of that court. The defendant's statement that the defendant wishes to plead guilty or nolo contendere shall not be used against that defendant.	**(c) Effect of a Not Guilty Plea.** If the defendant pleads not guilty after the case has been transferred under Rule 20(a), the clerk must return the papers to the court where the prosecution began, and that court must restore the proceeding to its docket. The defendant's statement that the defendant wished to plead guilty or nolo contendere is not, in any civil or criminal proceeding, admissible against the defendant.

(d) Juveniles. A juvenile (as defined in 18 U.S.C. § 5031) who is arrested, held, or present in a district other than that in which the juvenile is alleged to have committed an act in violation of a law of the United States not punishable by death or life imprisonment may, after having been advised by counsel and with the approval of the court and the United States attorney for each district, consent to be proceeded against as a juvenile delinquent in the district in which the juvenile is arrested, held, or present. The consent shall be given in writing before the court but only after the court has apprised the juvenile of the juvenile's rights, including the right to be returned to the district in which the juvenile is alleged to have committed the act, and of the consequences of such consent.	**(d) Juveniles.** **(1)** ***Consent to Transfer.*** A juvenile, as defined in 18 U.S.C. § 5031, may be proceeded against as a juvenile delinquent in the district where the juvenile is arrested, held, or present, if: (A) the alleged offense that occurred in the other district is not punishable by death or life imprisonment; (B) an attorney has advised the juvenile; (C) the court has informed the juvenile of the juvenile's rights — including the right to be returned to the district where the offense allegedly occurred — and the consequences of waiving those rights; (D) the juvenile, after receiving the court's information about rights, consents in writing to be proceeded against in the transferee district, and files the consent in the transferee district; (E) the United States attorneys for both districts approve the transfer in writing; and (F) the transferee court approves the transfer. **(2)** ***Clerk's Duties.*** After receiving the juvenile's written consent and the required approvals, the clerk where the indictment or information or complaint is pending or where the alleged offense occurred must send the file, or a certified copy, to the clerk in the transferee district.

Committee Notes
Rule 20
May 10, 2000

COMMITTEE NOTE

The language of Rule 20 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

New Rule 20(d)(2) applies to juvenile cases and has been added to parallel a similar provision in Rule 20(b). The new provision provides that after the court has determined that the provisions in Rule 20(d)(1) have been completed and the transfer is approved, the file (or certified copy) must be transmitted from the original court to the transferee court.

Rule 21. Transfer From the District for Trial.	Rule 21. Transfer for Trial
(a) For Prejudice in the District. The court upon motion of the defendant shall transfer the proceeding as to that defendant to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.	**(a) For Prejudice.** Upon the defendant's motion, the court must transfer the proceeding as to that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.
(b) Transfer in Other Cases. For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to that defendant or any one or more of the counts thereof to another district.	**(b) For Convenience.** Upon the defendant's motion, the court may transfer the proceeding, or one or more counts, as to that defendant to another district for the convenience of the parties and witnesses and in the interest of justice.
(c) Proceedings on Transfer. When a transfer is ordered the clerk shall transmit to the clerk of the court to which the proceeding is transferred all papers in the proceeding or duplicates thereof and any bail taken, and the prosecution shall continue in that district.	**(c) Proceedings on Transfer.** When the court orders a transfer, the clerk must send to the transferee district the file or a certified copy of it, and any bail taken. The prosecution will then continue in the transferee district.
	(d) Time to File a Motion to Transfer. A motion to transfer may be made at or before arraignment or at any other time the court or these rules prescribe.

Committee Notes
Rule 21
May 10, 2000

COMMITTEE NOTE

The language of Rule 21 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Amended Rule 21(d) consists of what was formerly Rule 22. The Committee believed that the substance of Rule 22, which addressed the issue of the timing of motions to transfer, was more appropriate for inclusion in Rule 21.

Rule 22. Time of Motion to Transfer	Rule 22. Time to File a Motion to Transfer
A motion to transfer under these rules may be made at or before arraignment or at such other time as the court or these rules may prescribe.	[Rescinded.]

Committee Notes
Rule 22
May 10, 2000

COMMITTEE NOTE

Rule 22 has been abrogated. The substance of the rule is now located in Rule 21(d).

VI. TRIAL	TITLE VI. TRIAL
Rule 23. Trial by Jury or by the Court	**Rule 23. Jury or Nonjury Trial**
(a) Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.	**(a) Jury Trial.** If the defendant is entitled to a jury trial, the trial must be by jury unless: **(1)** the defendant waives a jury trial in writing; **(2)** the government consents; and **(3)** the court approves.
(b) Jury of Less Than Twelve. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.	**(b) Jury Size.** **(1)** ***In General.*** A jury consists of 12 persons unless this rule provides otherwise. **(2)** ***Stipulation for a Smaller Jury.*** At any time before the verdict, the parties may, with the court's approval, stipulate in writing that: (A) the jury may consist of fewer than 12 persons; or (B) a jury of fewer than 12 persons may return a verdict if the court finds it necessary to excuse a juror for good cause after the trial begins. **(3)** ***Court Order for a Jury of 11.*** After the jury has retired to deliberate, the court may permit a jury of 11 persons to return a verdict, even without a stipulation by the parties, if the court finds good cause to excuse a juror.
(c) Trial Without a Jury. In a case tried without a jury the court shall make a general finding and shall in addition, on request made before the general finding, find the facts specially. Such findings may be oral. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.	**(c) Nonjury Trial.** In a case tried without a jury, the court must find the defendant guilty or not guilty. If a party requests before the finding of guilty or not guilty, the court must state its specific findings of fact in open court or in a written decision or opinion.

Committee Notes
Rule 23
May 10, 2000

COMMITTEE NOTE

The language of Rule 23 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

In current Rule 23(b), the term "just cause" has been replaced with the more familiar term "good cause," that appears in other rules. No change in substance is intended.

Rule 24. Trial Jurors	Rule 24. Trial Jurors
(a) Examination. The court may permit the defendant or the defendant's attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or the defendant's attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.	**(a) Examination.** **(1)** ***In General.*** The court may examine prospective jurors or may permit the attorneys for the parties to do so. **(2)** ***Court Examination.*** If the court examines the jurors, it must permit the attorneys for the parties to: (A) ask further questions that the court considers proper; or (B) submit further questions that the court may ask if it considers them proper.
(b) Peremptory Challenges. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.	**(b) Peremptory Challenges.** Each side is entitled to the number of peremptory challenges to prospective jurors specified below. The court may allow additional peremptory challenges to multiple defendants, and may allow the defendants to exercise those challenges separately or jointly. **(1)** ***Capital Case.*** Each side has 20 peremptory challenges when the government seeks the death penalty. **(2)** ***Other Felony Case.*** The government has 6 peremptory challenges and the defendant or defendants jointly have 10 peremptory challenges when the defendant is charged with a crime punishable by imprisonment of more than one year. **(3)** ***Misdemeanor Case.*** Each side has 3 peremptory challenges when the defendant is charged with a crime punishable by fine, imprisonment of one year or less, or both.

(c) Alternate Jurors.

(1) *In General.* The court may empanel no more than 6 jurors, in addition to the regular jury, to sit as alternate jurors. An alternate juror, in the order called, shall replace a juror who becomes or is found to be unable or disqualified to perform juror duties. Alternate jurors shall (i) be drawn in the same manner, (ii) have the same qualifications, (iii) be subject to the same examination and challenges, and (iv) take the same oath as regular jurors. An alternate juror has the same functions, powers, facilities and privileges as a regular juror.

(2) *Peremptory Challenges.* In addition to challenges otherwise provided by law, each side is entitled to 1 additional peremptory challenge if 1 or 2 alternate jurors are empaneled, 2 additional peremptory challenges if 3 or 4 alternate jurors are empaneled, and 3 additional peremptory challenges if 5 or 6 alternate jurors are empaneled. The additional peremptory challenges may be used to remove an alternate juror only, and the other peremptory challenges allowed by these rules may not be used to remove an alternate juror.

(3) *Retention of Alternate Jurors.* When the jury retires to consider the verdict, the court in its discretion may retain the alternate jurors during deliberations. If the court decides to retain the alternate jurors, it shall ensure that they do not discuss the case with any other person unless and until they replace a juror during deliberations. If an alternate replaces a regular juror after deliberations have begun, the court shall instruct the jury to begin its deliberations anew.

(c) Alternate Jurors.

(1) ***In General.*** The court may impanel up to 6 alternate jurors to replace any jurors who are unable to perform or who are disqualified from performing their duties.

(2) ***Procedure.***

(A) Alternate jurors must have the same qualifications and be selected and sworn in the same manner as any other juror.

(B) Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror has the same authority as the other jurors.

(3) ***Retention of Alternate Jurors.*** The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew.

(4) ***Peremptory Challenges.*** Each side is entitled to the number of additional peremptory challenges to prospective alternate jurors specified below, which may be used only to remove alternate jurors.

(A) *One or Two Alternates.* One additional peremptory challenge is permitted when one or two alternates are impaneled.

(B) *Three or Four Alternates.* Two additional peremptory challenges are permitted when three or four alternates are impaneled.

(C) *Five or Six Alternates.* Three additional peremptory challenges are permitted when five or six alternates are impaneled.

Committee Notes
Rule 24
May 10, 2000

COMMITTEE NOTE

The language of Rule 24 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

In restyling Rule 24(a), the Committee deleted the language that authorized the defendant to conduct voir dire of prospective jurors. The Committee believed that the current language was potentially ambiguous and could lead one incorrectly to conclude that a defendant, represented by counsel, could personally conduct voir dire or additional voir dire. The Committee believed that the intent of the current provision was to permit a defendant to participate personally in voir dire only if the defendant was acting pro se. Amended Rule 24(a) refers only to attorneys for the parties, i.e. the defense counsel and the attorney for the government, with the understanding that if the defendant is not represented by counsel, the court may still, in its discretion, permit the defendant to participate in voir dire. In summary, the Committee intends no change in practice.

Finally, the rule authorizes the court in multi-defendant cases to grant additional peremptory challenges to the defendants. If the court does so, the prosecution may request additional challenges in a multi-defendant case, not to exceed the total number available to the defendants jointly. The court, however, is not required to equalize the number of challenges where additional challenges are granted to the defendant.

Rule 25. Judge; Disability	Rule 25. Judge's Disability
(a) During Trial. If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying familiarity with the record of the trial, may proceed with and finish the trial.	**(a) During Trial.** Any judge regularly sitting in or assigned to the court may complete a jury trial if: **(1)** the judge before whom the trial began cannot proceed because of death, sickness, or other disability; and **(2)** the judge completing the trial certifies familiarity with the trial record.
(b) After Verdict or Finding of Guilt. If by reason of absence, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if that judge is satisfied that a judge who did not preside at the trial cannot perform those duties or that it is appropriate for any other reason, that judge may grant a new trial.	**(b) After a Verdict or Finding of Guilty.** **(1)** After a verdict or finding of guilty, any judge regularly sitting in or assigned to a court may complete the court's duties if the judge who presided at trial cannot perform those duties because of absence, death, sickness, or other disability. **(2)** The successor judge may grant a new trial if satisfied that: (A) a judge other than the one who presided at the trial cannot perform the post-trial duties; or (B) a new trial is necessary for some other reason.

Committee Notes
Rule 25
May 10, 2000

COMMITTEE NOTE

The language of Rule 25 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 25(b)(2) addresses the possibility of a new trial when a judge determines that no other judge could perform post-trial duties or when the judge determines that there is some other reason for doing so. The current rule indicates that those reasons must be "appropriate." The Committee, however, believed that a better term would be "necessary," because that term includes notions of manifest necessity. No change in meaning or practice is intended.

Rule 26. Taking of Testimony	Rule 26. Taking Testimony
In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress, or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court.	In all trials the testimony of witnesses must be taken orally in open court, unless otherwise provided by an Act of Congress or by rules adopted under 28 U.S.C. §§ 2072-2077.

Rule 26.1. Determination of Foreign Law	Rule 26.1. Foreign Law Determination
A party who intends to raise an issue concerning the law of a foreign country shall give reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.	A party intending to raise an issue of foreign law must provide the court and all parties with reasonable written notice. Issues of foreign law are questions of law, but in deciding such issues a court may consider any relevant material or source — including testimony — without regard to the Federal Rules of Evidence.

Committee Notes
Rule 26.1
May 10, 2000

COMMITTEE NOTE

The language of Rule 26.1 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 26.2. Production of Witness Statements	Rule 26.2. Producing a Witness's Statement
(a) Motion for Production. After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the government or the defendant and the defendant's attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.	**(a) Motion to Produce.** After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, must order an attorney for the government or the defendant and the defendant's attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in the possession and that relates to the subject matter of the witnesses's testimony.
(b) Production of Entire Statement. If the entire contents of the statement relate to the subject matter concerning which the witness has testified, the court shall order that the statement be delivered to the moving party.	**(b) Producing the Entire Statement.** If the entire statement relates to the subject matter of the witness's testimony, the court must order that the statement be delivered to the moving party.
(c) Production of Excised Statement. If the other party claims that the statement contains privileged information or matter that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise the portions of the statement that are privileged or that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion of the statement that is withheld from the defendant over the defendant's objection must be preserved by the attorney for the government, and, if the defendant appeals a conviction, must be made available to the appellate court for the purpose of determining the correctness of the decision to excise the portion of the statement.	**(c) Producing a Redacted Statement.** If the party who called the witness claims that the statement contains information that is privileged or does not relate to the subject matter of the witness's testimony, the court must inspect the statement in camera. After excising any privileged or unrelated portions, the court must order delivery of the redacted statement to the moving party. If the defendant objects to an excision, the court must preserve the entire statement with the excised portion indicated, under seal, as part of the record.
(d) Recess for Examination of Statement. Upon delivery of the statement to the moving party, the court, upon application of that party, may recess the proceedings so that counsel may examine the statement and prepare to use it in the proceedings.	**(d) Recess to Examine a Statement.** The court may recess the proceedings to allow time for a party to examine the statement and prepare for its use.
(e) Sanction for Failure to Produce Statement. If the other party elects not to comply with an order to deliver a statement to the moving party, the court shall order that the testimony of the witness be stricken from the record and that the trial proceed, or, if it is the attorney for the government who elects not to comply, shall declare a mistrial if required by the interest of justice.	**(e) Sanction for Failure to Produce or Deliver a Statement.** If the party who called the witness disobeys an order to produce or deliver a statement, the court must strike the witness's testimony from the record. If an attorney for the government disobeys the order, the court must declare a mistrial if justice so requires.

(f) Definition. As used in this rule, a "statement" of a witness means: **(1)** a written statement made by the witness that is signed or otherwise adopted or approved by the witness; **(2)** a substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof; or **(3)** a statement, however taken or recorded, or a transcription thereof, made by the witness to a grand jury.	**(f) Definition.** As used in this rule, a witness's "statement" means: **(1)** a written statement that the witness makes and signs, or otherwise adopts or approves; **(2)** a substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in any recording or any transcription of a recording; or **(3)** the witness's statement to a grand jury, however taken or recorded, or a transcription of such a statement.
(g) Scope of Rule. This rule applies at a suppression hearing conducted under Rule 12, at trial under this rule, and to the extent specified: **(1)** in Rule 32(c)(2) at sentencing; **(2)** in Rule 32.1(c) at a hearing to revoke or modify probation or supervised release; **(3)** in Rule 46(i) at a detention hearing; **(4)** in Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255; and **(5)** in Rule 5.1 at a preliminary examination.	**(g) Scope.** This rule applies at trial, at a suppression hearing under Rule 12, and to the extent specified in the following rules: **(1)** Rule 5.1(h) (preliminary hearing); **(2)** Rule 32(h)(2) (sentencing); **(3)** Rule 32.1(c) (hearing to revoke or modify probation or supervised release); **(4)** Rule 46(j) (detention hearing); and **(5)** Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255.

Committee Notes
Rule 26.2
May 10, 2000

COMMITTEE NOTE

The language of Rule 26.2 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Current Rule 26.2(c) states that if the court withholds a portion of a statement, over the defendant's objection, "the attorney for the government" must preserve the statement. The Committee believed that the better rule would be for the court to simply seal the entire statement as a part of the record, in the event that there is an appeal.

Also, the terminology in Rule 26.2(c) has been changed. The rule now speaks in terms of a "redacted" statement instead of an "excised" statement. No change in practice is intended.

Finally, the list of proceedings has been placed in numerical order by rule in Rule 26.2(g).

Rule 26.3. Mistrial	Rule 26.3. Mistrial
Before ordering a mistrial, the court shall provide an opportunity for the government and for each defendant to comment on the propriety of the order, including whether each party consents or objects to a mistrial, and to suggest any alternatives.	Before ordering a mistrial, the court must give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives.

Committee Notes
Rule 26.3
May 10, 2000

COMMITTEE NOTE

The language of Rule 26.3 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 27. Proof of Official Record	Rule 27. Proof of Official Record
An official record or an entry therein or the lack of such a record or entry may be proved in the same manner as in civil actions.	A party may prove an official record, an entry in such a record, or the lack of a record or entry in the same manner as in a civil action.

Committee Notes
Rule 27
May 10, 2000

COMMITTEE NOTE

The language of Rule 27 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 28. Interpreters	Rule 28. Interpreters
The court may appoint an interpreter of its own selection and may fix the reasonable compensation of such interpreter. Such compensation shall be paid out of funds provided by law or by the government, as the court may direct.	The court may select, appoint, and fix the reasonable compensation for an interpreter. The compensation must be paid from funds provided by law or by the government, as the court may direct.

Committee Notes
Rule 28
May 10, 2000

COMMITTEE NOTE

The language of Rule 28 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 29. Motion for Judgment of Acquittal	Rule 29. Motion for Judgment of Acquittal
(a) Motion Before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If the defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.	**(a) Before Submission to the Jury.** After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense as to which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.
(b) Reservation of Decision on Motion. The court may reserve decision on a motion for judgment of acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves a decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.	**(b) Reserving Decision.** The court may reserve decision on a motion for judgment of acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.
(c) Motion After Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.	**(c) After Jury Verdict or Discharge.** **(1)** ***In General.*** A defendant may move for judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the court discharges the jury, whichever is later, or within any other time the court fixes during the 7-day period. **(2)** ***Ruling on Motion.*** If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter judgment of acquittal. **(3)** ***No Prior Motion.*** A defendant is not required to move for judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.

(d) Same: Conditional Ruling on Grant of Motion. If a motion for judgment of acquittal after verdict of guilty under this Rule is granted, the court shall also determine whether any motion for a new trial should be granted if the judgment of acquittal is thereafter vacated or reversed, specifying the grounds for such determination. If the motion for a new trial is granted conditionally, the order thereon does not affect the finality of the judgment. If the motion for a new trial has been granted conditionally and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. If such motion has been denied conditionally, the appellee on appeal may assert error in that denial, and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.	**(d) Conditional Ruling on a Motion for a New Trial.** **(1)** ***Motion for a New Trial.*** If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed. The court must specify the reasons for that determination. **(2)** ***Finality.*** The court's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal. **(3)** ***Appeal.*** (A) *Grant of a Motion for a New Trial.* If the court conditionally grants a motion for a new trial, and an appellate court later reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise. (B) *Denial of a Motion for a New Trial.* If the court conditionally denies a motion for a new trial, an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial court must proceed as the appellate court directs.

Committee Notes
Rule 29
May 10, 2000

COMMITTEE NOTE

The language of Rule 29 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

In Rule 29(a), the first sentence abolishing "directed verdicts" has been deleted because it is unnecessary. The rule continues to recognize that a judge may sua sponte enter a judgment of acquittal.

Rule 29(c)(1) addresses the issue of the timing of a motion for acquittal. The amended rule now includes language that the motion must be made within 7 days after a guilty verdict or after the judge discharges the jury, whichever occurs later. That change reflects the fact that in a capital case or in case involving criminal forfeiture, for example, the jury may not be discharged until it has completed its sentencing duties. The court may still set another time for the defendant to make or renew the motion, if it does so within the 7-day period.

Rule 29.1. Closing Argument	29.1. Closing Argument
After the closing of evidence the prosecution shall open the argument. The defense shall be permitted to reply. The prosecution shall then be permitted to reply in rebuttal.	Closing arguments proceed in the following order: (a) the government argues; (b) the defense argues; and (c) the government rebuts.

Committee Notes
Rule 29.1
May 10, 2000

COMMITTEE NOTE

The language of Rule 29.1 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 30. Instructions	Rule 30. Jury Instructions
At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to all parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court may instruct the jury before or after the arguments are completed or at both times. No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.	**(a) In General.** Any party may request in writing that the court instruct the jury on the law as specified in the request. The request must be made at the close of the evidence or at any earlier time during the trial that the court reasonably directs. When the request is made, the requesting party must furnish a copy to every other party. **(b) Ruling on a Request.** The court must inform the parties before closing arguments how it intends to rule on the requested instructions. **(c) Time for Giving Instructions.** The court may instruct the jury before or after the arguments are completed, or at both times. **(d) Objections to Instructions.** A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate. An opportunity must be given to object out of the jury's hearing and, on request, out of the jury's presence.

Committee Notes
Rule 30
May 10, 2000

COMMITTEE NOTE

The language of Rule 30 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted, below.

Rule 30(d) has been changed to clarify what, if anything, counsel must do to preserve error regarding an instruction or failure to instruct. The rule retains the requirement of a contemporaneous and specific objection (before the jury retires to deliberate). As the Supreme Court recognized in *Jones v. United States*, 119 S.Ct. 2090, 2102 (1999), read literally, current Rule 30 could be construed to bar any appellate review when in fact a court may conduct a limited review under a plain error standard. The topic of plain error is not addressed in Rule 30 because it is already covered in Rule 52. No change in practice is intended by the amendment.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 30 is one of those rules. This proposed revision of Rule 30 includes only proposed style changes. Another version of Rule 30 includes a substantive amendment that would authorize a court to require the parties to file requests for instructions before trial. That version of Rule 30 is being published simultaneously in a separate pamphlet.

Rule 31. Verdict	Rule 31. Jury Verdict
(a) Return. The verdict shall be unanimous. It shall be returned by the jury to the judge in open court.	**(a) Return.** The jury must return its verdict to a judge in open court. The verdict must be unanimous.
(b) Several Defendants. If there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.	**(b) Partial Verdicts, Mistrial, and Retrial.** **(1)** ***Multiple Defendants.*** If there are multiple defendants, the jury may return a verdict at any time during its deliberations as to any defendant as to whom it has agreed. **(2)** ***Multiple Counts.*** If the jury cannot agree on all counts as to any defendant, the jury may return a verdict on those counts as to which it has agreed. **(3)** ***Mistrial and Retrial.*** If the jury cannot agree on a verdict as to all counts, the court may declare a mistrial as to those counts. The government may retry any defendant on any count as to which the jury could not agree.
(c) Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.	**(c) Lesser Offense or Attempt.** A defendant may be found guilty of any of the following: **(1)** an offense necessarily included in the offense charged; **(2)** an attempt to commit the offense charged; or **(3)** an attempt to commit an offense necessarily included in the offense charged, if the attempt is an offense in its own right.
(d) Poll of Jury. After a verdict is returned but before the jury is discharged, the court shall, on a party's request, or may on its own motion, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.	**(d) Jury Poll.** After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.
(e) Criminal Forfeiture. [Abrogated][2]	**(e) Criminal Forfeiture.** [Abrogated]

[2] Supreme Court approved amendment in April 2000. The amendments take effect on December 1, 2000, unless Congress takes action otherwise.

Committee Notes
Rule 31
May 10, 2000

COMMITTEE NOTE

The language of Rule 31 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 31(b) has been amended to clarify that a jury may return partial verdicts, either as to multiple defendants or multiple counts, or both. *See, e.g., United States v. Cunningham*, 145 F.3d 1385, 1388-89 (D.C. Cir. 1998) (partial verdicts on multiple defendants and counts). No change in practice is intended.

VII. JUDGMENT	TITLE VII. POST-CONVICTION PROCEDURES
Rule 32. Sentence and Judgment	**Rule 32. Sentencing and Judgment**
(f) Definitions. For purposes of this rule — **(1)** "victim" means any individual against whom an offense has been committed for which a sentence is to be imposed, but the right of allocution under subdivision (c)(3)(E) may be exercised instead by — **(A)** a parent or legal guardian if the victim is below the age of eighteen years or incompetent; or **(B)** one or more family members or relatives designated by the court if the victim is deceased or incapacitated; if such person or persons are present at the sentencing hearing, regardless of whether the victim is present; and **(2)** "crime of violence or sexual abuse" means a crime that involved the use or attempted or threatened use of physical force against the person or property of another, or a crime under chapter 109A of title 18, United States Code.	**(a) Definitions.** The following definitions apply under this rule: **(1)** "Victim" means an individual against whom the defendant committed an offense for which the court will impose sentence. **(2)** "Crime of violence or sexual abuse" means: (A) a crime that involves the use, attempted use, or threatened use of physical force against another's person or property; or (B) a crime under 18 U.S.C. §§ 2241–2248 or §§ 2251-2257.
(a) In General; Time for Sentencing. When a presentence investigation and report are made under subdivision (b)(1), sentence should be imposed without unnecessary delay following completion of the process prescribed by subdivision (b)(6). The time limits prescribed in subdivision (b)(6) may be either shortened or lengthened for good cause.	**(b) Time of Sentencing.** **(1)** ***In General.*** The court must impose sentence without unnecessary delay. **(2)** ***Changing Time Limits.*** The court may, for good cause, change any time limits prescribed in Rule 32.

(b) Presentence Investigation and Report. **(1) When Made.** The probation officer must make a presentence investigation and submit a report to the court before sentence is imposed unless: **(A)** the court finds that the information in the record enables it to exercise its sentencing authority meaningfully under 18 U.S.C. § 3553; and **(B)** the court explains this finding on the record. Notwithstanding the preceding sentence, a presentence investigation and report, or other report containing information sufficient for the court to enter an order of restitution, as the court may direct, shall be required in any case in which restitution is required to be ordered.	**(c) Presentence Investigation.** **(1)** ***Required Investigation.*** (A) *In General.* The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless: (i) 18 U.S.C. § 3593(c) or another statute requires otherwise; or (ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record. (B) *Restitution.* If the law requires restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.
(2) Presence of Counsel. On request, the defendant's counsel is entitled to notice and a reasonable opportunity to attend any interview of the defendant by a probation officer in the course of a presentence investigation.	**(2)** ***Interviewing the Defendant.*** The probation officer who interviews a defendant as part of a presentence investigation must, on request, give the defendant's attorney notice and a reasonable opportunity to attend the interview.
(3) Nondisclosure. The report must not be submitted to the court or its contents disclosed to anyone unless the defendant has consented in writing, has pleaded guilty or nolo contendere, or has been found guilty.	

(4) Contents of the Presentence Report. The presentence report must contain — **(A)** information about the defendant's history and characteristics, including any prior criminal record, financial condition, and any circumstances that, because they affect the defendant's behavior, may be helpful in imposing sentence or in correctional treatment; **(B)** the classification of the offense and of the defendant under the categories established by the Sentencing Commission under 28 U.S.C. § 994(a), as the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission under 28 U.S.C. § 994(a)(1); and the probation officer's explanation of any factors that may suggest a different sentence — within or without the applicable guideline — that would be more appropriate, given all the circumstances; **(C)** a reference to any pertinent policy statement issued by the Sentencing Commission under 28 U.S.C. § 994(a)(2);	**(d) Presentence Report.** **(1)** ***Contents of the Report.*** The presentence report must contain the following information: (A) the defendant's history and characteristics, including: (i) any prior criminal record; (ii) the defendant's financial condition; and (iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment; (B) the kinds of sentences and the sentencing range provided by the Sentencing Commission's guidelines, and the probation officer's explanation of any factors that may suggest a more appropriate sentence within or without an applicable guideline; (C) a reference to any pertinent Sentencing Commission policy statement;
(D) verified information, stated in a nonargumentative style, containing an assessment of the financial, social, psychological, and medical impact on any individual against whom the offense has been committed; **(E)** in appropriate cases, information about the nature and extent of nonprison programs and resources available for the defendant; **(F)** in appropriate cases, information sufficient for the court to enter restitution; **(G)** any report and recommendation resulting from a study ordered by the court under 18 U.S.C. § 3552(b); and **(H)** any other information required by the court.	(D) verified information, stated in a nonargumentative style, that assesses the financial, social, psychological, and medical impact on any individual against whom the offense has been committed; (E) when appropriate, the nature and extent of nonprison programs and resources available to the defendant; (F) when the law permits the court to order restitution, information sufficient for such an order; (G) if the court orders a study under 18 U.S.C. § 3552(b), any resulting report and recommendation; and (H) any other information that the court requires.

(5) Exclusions. The presentence report must exclude: **(A)** any diagnostic opinions that, if disclosed, might seriously disrupt a program of rehabilitation; **(B)** sources of information obtained upon a promise of confidentiality; or **(C)** any other information that, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons.	**(2)** ***Exclusions.*** The presentence report must exclude the following: (A) any diagnoses that, if disclosed, might seriously disrupt a rehabilitation program; (B) any sources of information obtained upon a promise of confidentiality; and (C) any other information that, if disclosed, might result in physical or other harm to the defendant or others.
(6) Disclosure and Objections. **(A)** Not less than 35 days before the sentencing hearing — unless the defendant waives this minimum period — the probation officer must furnish the presentence report to the defendant, the defendant's counsel, and the attorney for the Government. The court may, by local rule or in individual cases, direct that the probation officer not disclose the probation officer's recommendation, if any, on the sentence.	**(e) Disclosing the Report and Recommendation.** **(1)** ***Time to Disclose.*** Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty. **(2)** ***Minimum Required Notice.*** The probation officer must give the presentence report to the defendant, the defendant's attorney, and the attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period. **(3)** ***Sentence Recommendation.*** By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence.
(B) Within 14 days after receiving the presentence report, the parties shall communicate in writing to the probation officer, and to each other, any objections to any material information, sentencing classifications, sentencing guideline ranges, and policy statements contained in or omitted from the presentence report. After receiving objections, the probation officer may meet with the defendant, the defendant's attorney, and the attorney for the Government to discuss those objections. The probation officer may also conduct a further investigation and revise the presentence report as appropriate.	**(f) Objecting to the Report.** **(1)** ***Time to Object.*** Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report. **(2)** ***Serving Objections.*** An objecting party must provide a copy of its objections to every other party and to the probation officer. **(3)** ***Action on Objections.*** After receiving objections, the probation officer may meet with the parties to discuss the objections. The probation officer may then investigate further and revise the presentence report as appropriate.

(C) Not later than 7 days before the sentencing hearing, the probation officer must submit the presentence report to the court, together with an addendum setting forth any unresolved objections, the grounds for those objections, and the probation officer's comments on the objections. At the same time, the probation officer must furnish the revisions of the presentence report and the addendum to the defendant, the defendant's counsel, and the attorney for the Government. **(D)** Except for any unresolved objection under subdivision (b)(6)(B), the court may, at the hearing, accept the presentence report as its findings of fact. For good cause shown, the court may allow a new objection to be raised at any time before imposing sentence.	**(g) Submitting the Report.** At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them.

(c) Sentence. **(1) Sentencing Hearing.** At the sentencing hearing, the court must afford counsel for the defendant and for the Government an opportunity to comment on the probation officer's determinations and on other matters relating to the appropriate sentence, and must rule on any unresolved objections in the presentence report. The court may, in its discretion, permit the parties to introduce testimony or other evidence on the objections. For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing. A written record of these findings and determinations must be appended to any copy of the presentence report made available to the Bureau of Prisons. **(2) Production of Statements at Sentencing Hearing.** Rule 26.2(a)-(d) and (f) applies at a sentencing hearing under this rule. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the movant, the court may not consider the affidavit or testimony of the witness whose statement is withheld.	**(h) Sentencing.** **(1)** ***In General.*** At sentencing, the court: (A) must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report; (B) must give the defendant and the defendant's attorney a written summary of—or summarize in camera—any information excluded from the presentence report under Rule 32(d)(2) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information; (C) must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence; and (D) may, for good cause, allow a party to make a new objection at any time before sentence is imposed. **(2)** ***Introducing Evidence; Producing Statements.*** The court may permit the parties to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)-(d) and (f) applies. If a party does not comply with a Rule 26.2(a) order to produce a witness's statement, the court must not consider that witness's testimony.
(3) Imposition of Sentence. Before imposing sentence, the court must: **(A)** verify that the defendant and the defendant's counsel have read and discussed the presentence report made available under subdivision (b)(6)(A). If the court has received information excluded from the presentence report under subdivision (b)(5) the court — in lieu of making that information available — must summarize it in writing, if the information will be relied on in determining sentence.	**(3)** ***Court Determinations.*** At sentencing, the court: (A) may accept any undisputed portion of the presentence report as a finding of fact; (B) must — for any disputed portion of the presentence report or other controverted matter — rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and (C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.

The court must also give the defendant and the defendant's counsel a reasonable opportunity to comment on that information; **(B)** afford defendant's counsel an opportunity to speak on behalf of the defendant; **(C)** address the defendant personally and determine whether the defendant wishes to make a statement and to present any information in mitigation of the sentence; **(D)** afford the attorney for the Government an opportunity to speak equivalent to that of the defendant's counsel to speak to the court;	**(4)** ***Opportunity to Speak.*** (A) *By a Party.* Before imposing sentence, the court must: (i) provide the defendant's attorney an opportunity to speak on the defendant's behalf; (ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and (iii) provide the attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.
(E) if sentence is to be imposed for a crime of violence or sexual abuse, address the victim personally if the victim is present at the sentencing hearing and determine if the victim wishes to make a statement or present any information in relation to the sentence.	(B) *By a Victim.* Before imposing sentence, the court must address any victim of a crime of violence or sexual abuse who is present at sentencing and permit the victim to speak or submit any information concerning the sentence. Whether or not the victim is present, a victim's right to address the court may be exercised by the following persons if present: (i) a parent or legal guardian, if the victim is younger than 18 years or is incompetent; or (ii) one or more family members or relatives the court designates, if the victim is deceased or incapacitated.
(4) In Camera Proceedings. The court's summary of information under subdivision (c)(3)(A) may be in camera. Upon joint motion by the defendant and the attorney for the Government, the court may hear in camera the statements — made under subdivision (c)(3)(B), (C), (D), and (E) — by the defendant, the defendant's counsel, the victim, or the attorney for the government.	(C) *In Camera Proceedings.* Upon a party's motion the court may hear in camera any statement made under Rule 32(h)(4).
	(5) ***Notice of Possible Departure from Sentencing Guidelines.*** Before the court may depart from the Guidelines calculation on a ground not identified as a ground for departure either in the presentence report or in a prehearing submission by a party, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specifically identify the ground on which the court is contemplating a departure.

(5) Notification of Right to Appeal. After imposing sentence in a case which has gone to trial on a plea of not guilty, the court must advise the defendant of the right to appeal. After imposing sentence in any case, the court must advise the defendant of any right to appeal the sentence, and of the right of the person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. If the defendant so requests, the clerk of the court must immediately prepare and file a notice of appeal on behalf of the defendant.	**(i) Defendant's Right to Appeal.** **(1)** ***Advice of a Right to Appeal.*** (A) *Appealing a Conviction.* If the defendant pleaded not guilty and was convicted, after sentencing the court must advise the defendant of the right to appeal the conviction. (B) *Appealing a Sentence.* After sentencing — regardless of the defendant's plea — the court must advise the defendant of any right to appeal the sentence. (C) *Appeal Costs.* The court must advise a defendant who is unable to pay appeal costs of the right to ask for permission to appeal in forma pauperis. **(2)** ***Clerk's Filing of Notice.*** If the defendant so requests, the clerk must immediately prepare and file a notice of appeal on the defendant's behalf.
(d) Judgment. **(1) In General.** A judgment of conviction must set forth the plea, the verdict or findings, the adjudication, and the sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment must be entered accordingly. The judgment must be signed by the judge and entered by the clerk. **(2) Criminal Forfeiture.** Forfeiture procedures are governed by Rule 32.1. [1]	**(j) Judgment.** **(1)** ***In General.*** In the judgment of conviction, the court must set forth the plea, the jury verdict or the court's findings, the adjudication, and the sentence. If the defendant is found not guilty or is otherwise entitled to be discharged, the court must so enter judgment. The judge must sign the judgment, and the clerk must enter it. **(2)** ***Criminal Forfeiture.*** Forfeiture procedures are governed by Rule 32.2.
(e) Plea Withdrawal. If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.	

[1]The Supreme Court approved amendments in April 2000. The amendments take effect on December 1, 2000, unless Congress takes action otherwise.

Committee Notes
Rule 32
May 10, 2000

COMMITTEE NOTE

The language of Rule 32 [which reflects the amendments transmitted to Congress by the Supreme Court on April 17, 2000] has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The rule has been completely reorganized to make it easier to follow and apply. For example, the definitions in the rule have been moved to the first sections and the sequencing of the sections generally follows the procedure for presentencing and sentencing procedures.

Under current Rule 32(c)(1), the court is required to "rule on any unresolved objections in the presentence report." The rule does not specify, however, whether that provision should be read literally to mean every objection that might have been made to the report or only on those objections that might in some way actually affect the sentence. The Committee believed that a broad reading of the current rule might place an unreasonable burden on the court without providing any real benefit to the sentencing process. Revised Rule 32(h)(3) narrows the requirement for court findings to those instances when the objection addresses a "controverted matter." If the objection satisfies that criterion, the court must either make a finding on the objection or decide that a finding is not required because the matter will not affect sentencing or that the matter will not be considered at all in sentencing.

Rule 32(h)(4)(B) includes a change permitting a victim of a crime under 18 U.S.C. §§ 2251-57 (child pornography and related offenses) to address the court at sentencing. The Committee considered those victims to be similar to victims of sexual offenses under 18 U.S.C. §§ 2241-48, who already possess that right.

Rule 32(h)(4)(C) includes a change concerning who may request an in camera proceeding. Under current Rule 32(c)(4), the parties must file a joint motion for an in camera proceeding to hear the statements by defense counsel, the defendant, the attorney for the government, or any victim. Under the revised rule, any party may move that the court hear in camera any statement—by a party or a victim—made under revised Rule 32(h)(4).

Rule 32(h)(5) is a new provision that reflects *Burns v. United States*, 501 U.S. 129, 138-39 (1991). In *Burns*, the Court held that before a sentencing court could depart upward on a ground, not previously identified in the presentence report as a ground for departure, Rule 32 requires the court to give the parties reasonable notice that it is contemplating such

a ruling and to identify the specific ground for the departure. The Court also indicated that because the procedural entitlements in Rule 32 apply equally to both parties, it was equally appropriate to frame the issue as whether notice is required before the sentencing court departs either upward or downward. *Id.* at 135, n.4.

Finally, current Rule 32(e), which addresses the ability of a defendant to withdraw a guilty plea, has been moved to Rule 11(e).

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 32 is one of those rules. In revising Rule 32, the Committee decided to also propose a substantive change that would limit the occasions that the sentencing judge would have to rule on unresolved objections to the presentence report. That version of Rule 32 is being published simultaneously in a separate pamphlet.

Rule 32.1. Revocation or Modification of Probation or Supervised Release.	Rule 32.1. Revoking or Modifying Probation or Supervised Release
(a) Revocation of Probation or Supervised Release. **(1) Preliminary Hearing.** Whenever a person is held in custody on the ground that the person has violated a condition of probation or supervised release, the person shall be afforded a prompt hearing before any judge, or a United States magistrate who has been given the authority pursuant to 28 U.S.C. § 636 to conduct such hearings, in order to determine whether there is probably cause to hold the person for a revocation hearing. The person shall be given **(A)** notice of the preliminary hearing and its purpose and of the alleged violation; **(B)** an opportunity to appear at the hearing and present evidence in the person's own behalf; **(C)** upon request, the opportunity to question witnesses against the person unless, for good cause, the federal magistrate decides that justice does not require the appearance of the witness; and **(D)** notice of the person's right to be represented by counsel. The proceedings shall be recorded stenographically or by an electronic recording device. If probable cause is found to exist, the person shall be held for a revocation hearing. The person may be released pursuant to Rule 46(c) pending the revocation hearing. If probable cause is not found to exist, the proceeding shall be dismissed.	**(a) Initial Appearance.** **(1)** ***In Custody.*** A person held in custody for a violation of probation or supervised release must be taken without unnecessary delay before a magistrate judge. (A) If the defendant is held in custody in the district where an alleged violation occurred, the initial appearance must be in that district. (B) If the defendant is held in custody in a district other than where an alleged violation occurred, the initial appearance must be in that district, or in an adjacent district if the appearance can occur more promptly there. **(2)** ***Upon a Summons.*** When a person appears in response to a summons for a violation of probation or supervised release, a magistrate judge must proceed under this rule. **(3)** ***Advice.*** The judge must inform the person of the following: (A) the alleged violation of probation or supervised release; (B) the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; (C) the person's right, if held in custody, to a preliminary hearing under Rule 32.1(b)(1); and (D) the person's right not to make a statement concerning any alleged violation, and that any statement made may be used against the person.
	(4) ***Appearance in the District With Jurisdiction.*** If the person is arrested or appears in the district that has jurisdiction to conduct a revocation hearing — either originally or by transfer of jurisdiction — the court must proceed under Rule 32.1(b)–(e).

	(5) ***Appearance in a District Lacking Jurisdiction.*** If the person is arrested or appears in a district that does not have jurisdiction to conduct a revocation hearing, the magistrate judge must: (A) if the alleged violation occurred in the district of arrest, conduct a preliminary hearing under Rule 32.1(b) and either: (i) transfer the person to the district that has jurisdiction, if the judge finds probable cause to believe that a violation occurred; or (ii) dismiss the proceedings and so notify the court that has jurisdiction, if the judge finds no probable cause to believe that a violation occurred; or (B) if the alleged violation did not occur in the district of arrest, transfer the person to the district that has jurisdiction if: (i) the government produces certified copies of the judgment, warrant, and warrant application; and (ii) the judge finds that the person is the same person named in the warrant.
	(6) ***Release or Detention.*** The magistrate judge may release or detain the person under 18 U.S.C. § 3143(a) pending further proceedings. The burden of establishing that the person will not flee or pose a danger to any other person or to the community rests with the person.
	(b) Revocation. **(1)** ***Preliminary Hearing.*** (A) *In General.* If a person is in custody for violating a condition of probation or supervised release, a magistrate judge must conduct a prompt hearing to determine whether there is probable cause to believe that a violation occurred. The person may waive the hearing.

	(B) *Requirements.* The hearing must be recorded by a court reporter or by a suitable recording device. The judge must give the person: (i) notice of the hearing and its purpose, the alleged violation of probation or supervised release, and the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; (ii) an opportunity to appear at the hearing and present evidence; and (iii) upon request, an opportunity to question an adverse witness, unless the judge determines that the interest of justice does not require the witness to appear.
	(C) *Referral.* If the judge finds probable cause, the judge must conduct a revocation hearing. If the judge does not find probable cause, the judge must dismiss the proceeding.
(2) Revocation Hearing. The revocation hearing, unless waived by the person, shall be held within a reasonable time in the district of jurisdiction. The person shall be given: **(A)** written notice of the alleged violation; **(B)** disclosure of the evidence against the person; **(C)** an opportunity to appear and to present evidence in the person's own behalf; **(D)** the opportunity to question adverse witnesses; and **(E)** notice of the person's right to be represented by counsel.	**(2) *Revocation Hearing.*** Unless waived by the person, the court must hold the revocation hearing within a reasonable time in the district having jurisdiction. The person is entitled to: (A) written notice of the alleged violation; (B) disclosure of the evidence against the person; (C) an opportunity to appear, present evidence, and question adverse witnesses unless the court determines that the interest of justice does not require the witness to appear; and (D) notice of the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel.

(b) Modification of Probation or Supervised Release. A hearing and assistance of counsel are required before the terms or conditions of probation or supervised release can be modified, unless the relief to be granted to the person on probation or supervised release upon the person's request or on the court's own motion is favorable to the person, and the attorney for the government, after having been given notice of the proposed relief and a reasonable opportunity to object, has not objected. An extension of the term of probation or supervised release is not favorable to the person for the purposes of this rule.	**(c) Modification.** **(1)** ***In General.*** Before modifying the conditions of probation or supervised release, the court must hold a hearing, at which the person has the right to an attorney. **(2)** ***Exceptions.*** A hearing is not required if: (A) the person waives the hearing; or (B) the relief sought is favorable to the person and does not extend the term of probation or of supervised release; and (C) the attorney for the government has received notice of the relief sought, has had a reasonable opportunity to object, and has not done so.
	(d) Disposition of the Case. The court's disposition of the case is governed by 18 U.S.C. § 3563 and § 3565 (probation) and § 3583 (supervised release).
(c) Production of Statements. **(1) In General.** Rule 26.2(a)-(d) and (f) applies at any hearing under this rule. **(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.	**(e) Producing Statements.** Rule 26.2(a)–(d) and (f) applies at a hearing under this rule. If a party does not comply with a Rule26.2(a) order to produce a witness's statement, the court cannot consider that witness's testimony.

Committee Notes
Rule 32.1
May 10, 2000

COMMITTEE NOTE

The language of Rule 32.1 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Rule 32.1 has been completely revised and expanded. The Committee believed that it was important to spell out more completely in this rule the various procedural steps that must be met when dealing with a revocation or modification of probation or supervised release. To that end, some language formerly located in Rule 40 has been moved to revised Rule 32.1. Throughout the rule, the terms "magistrate judge," and "court" (*see* revised Rule 1(b)(Definitions) are used to reflect that in revocation cases, initial proceedings in both felony and misdemeanor cases will normally be conducted before a magistrate judge, although a district judge may also conduct them. But the revocation decision must be made by a district judge if the offense of conviction was a felony. *See* 18 U.S.C. § 3401(i) (recognizing that district judge may designate a magistrate judge to conduct hearing and submit proposed findings of fact and recommendations).

Revised Rule 32.1(a)(1)-(4) is new material. Presently, there is no provision in the rules for conducting initial appearances for defendants charged with violating probation or supervised release—although some districts apply such procedures. Although the rule labels these proceedings as initial appearances, the Committee believed that it was best to separate those proceedings from Rule 5 proceedings, because the procedures differ for persons who are charged with violating conditions of probation or supervised release. The Committee has added a requirement in Rule 32.1(a)(3)(D) that the person be apprised of the right to remain silent concerning the alleged violation of the terms of probation or supervised release. Although a question may arise as to whether the person has any residual privilege not to present incriminating information regarding the offense that originally lead to the conviction and terms of probation or supervised release, the person should have a privilege with regard to the alleged violation leading to the Rule 32.1 proceedings.

Revised Rule 32.1(a)(5) is derived from current Rule 40(d).

Revised Rule 32.1(a)(6), which is derived from current Rule 32.1(a)(1)(D), provides that the defendant bears the burden of showing that he or she will not flee or pose a danger pending a hearing on the revocation of probation or supervised release. The Committee believes that the new language is not a substantive change because it makes no change in practice.

Rule 32.1(b)(1)(B)(iii) and Rule 32.1(b)(2)(C) address the ability of a releasee to question adverse witnesses at the preliminary and revocation hearing. Those provisions recognize that the court should apply a balancing test at the hearing itself when considering the releasee's asserted right to cross-examine adverse witnesses. The court is to balance the person's interest in the constitutionally guaranteed right to confrontation against the government's good cause for denying it. *See, e.g.*, *Morrissey v. Brewer*, 408 U.S. 471, 489 (1973); *United States v. Comito*, 177 F.3d 1166 (9th Cir. 1999); *United States v. Walker*, 117 F.3d 417 (9th Cir. 1997); *United States v. Zentgraf*, 20 F.3d 906 (8th Cir. 1994).

Rule 32.1(c)(2)(A) permits the person to waive a hearing to modify the conditions of probation or supervised release. Although that language is new to the rule, the Committee believes that it reflects current practice.

The remainder of revised Rule 32.1 is derived from the current Rule 32.1.

Rule 32.2. Criminal Forfeiture	Rule 32.2. Criminal Forfeiture
(a) Notice to the Defendant. A court shall not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute.	**(a) Notice to the Defendant.** A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute.
(b) Entry of Preliminary Order of Forfeiture; Post Verdict Hearing. (1) As soon as practicable after entering a guilty verdict or accepting a plea of guilty or *nolo contendere* on any count in an indictment or information with regard to which criminal forfeiture is sought, the court shall determine what property is subject to forfeiture under the applicable statute. If forfeiture of specific property is sought, the court shall determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment against the defendant, the court shall determine the amount of money that the defendant will be ordered to pay. The court's determination may be based on evidence already in the record, including any written plea agreement or, if the forfeiture is contested, on evidence or information presented by the parties at a hearing after the verdict or finding of guilt. (2) If the court finds that property is subject to forfeiture, it shall promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment or directing the forfeiture of specific property without regard to any third party's interest in all or part of it. Determining whether a third party has such an interest shall be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c). (3) The entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence proceedings that comply with any statutes governing third-party rights. At sentencing—or at any time before sentencing if the defendant consents—the order of forfeiture becomes final as to the defendant and shall be made a part of the sentence and included in the judgment. The court may include in the order of forfeiture conditions reasonably necessary to preserve the property's value pending any appeal.	**(b) Entering Preliminary Order of Forfeiture; Post-Verdict Hearing.** **(1)** ***In General.*** As soon as practicable after entering a guilty verdict or accepting a plea of guilty or nolo contendere on any count in an indictment or information with regard to which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If forfeiture of specific property is sought, the court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment against the defendant, the court must determine the amount of money that the defendant will be ordered to pay. The court's determination may be based on evidence already in the record, including any written plea agreement or, if the forfeiture is contested, on evidence or information presented by the parties at a hearing after the verdict or finding of guilt. **(2)** ***Preliminary Order.*** If the court finds that property is subject to forfeiture, it must promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment or directing the forfeiture of specific property without regard to any third party's interest in all or part of it. Determining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c). **(3)** ***Seizing Property.*** The entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence proceedings that comply with any statutes governing third-party rights. At sentencing—or at any time before sentencing if the defendant consents—the order of forfeiture becomes final as to the defendant and must be made a part of the sentence and included in the judgment. The court may include in the order of forfeiture conditions reasonably necessary to preserve the property's value pending any appeal.

(4) Upon a party's request in a case in which a jury returns a verdict of guilty, the jury shall determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.	**(4)** ***Jury Determination.*** Upon a party's request in a case in which a jury returns a verdict of guilty, the jury must determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.
(c) Ancillary Proceeding; Final Order of Forfeiture. (1) If, as prescribed by statute, a third party files a petition asserting an interest in the property to be forfeited, the court shall conduct an ancillary proceeding but no ancillary proceeding is required to the extent that the forfeiture consists of a money judgment. (A) In the ancillary proceeding, the court may, on motion, dismiss the petition for lack of standing, for failure to state a claim, or for any other lawful reason. For purposes of the motion, the facts set forth in the petition are assumed to be true. (B) After disposing of any motion filed under Rule 32.2(c)(1)(A) and before conducting a hearing on the petition, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure if the court determines that discovery is necessary or desirable to resolve factual issues. When discovery ends, a party may move for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.	**(c) Ancillary Proceeding; Final Order of Forfeiture.** **(1)** ***In General.*** If, as prescribed by statute, a third party files a petition asserting an interest in the property to be forfeited, the court must conduct an ancillary proceeding but no ancillary proceeding is required to the extent that the forfeiture consists of a money judgment. (A) In the ancillary proceeding, the court may, on motion, dismiss the petition for lack of standing, for failure to state a claim, or for any other lawful reason. For purposes of the motion, the facts set forth in the petition are assumed to be true. (B) After disposing of any motion filed under Rule 32.2(c)(1)(A) and before conducting a hearing on the petition, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure if the court determines that discovery is necessary or desirable to resolve factual issues. When discovery ends, a party may move for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.
(2) When the ancillary proceeding ends, the court shall enter a final order of forfeiture by amending the preliminary order as necessary to account for any third-party rights. If no third party files a timely claim, the preliminary order becomes the final order of forfeiture, if the court finds that the defendant (or any combination of defendants convicted in the case) had an interest in the property that is forfeitable under the applicable statute. The defendant may not object to the entry of the final order of forfeiture on the ground that the property belongs, in whole or in part, to a codefendant or third party, nor may a third party object to the final order on the ground that the third party had an interest in the property. (3) If multiple third-party petitions are filed in the same case, an order dismissing or granting one petition is not appealable until rulings are made on all petitions, unless the court determines that there is no just reason for delay. (4) An ancillary proceeding is not part of sentencing.	**(2)** ***Entering a Final Order.*** When the ancillary proceeding ends, the court must enter a final order of forfeiture by amending the preliminary order as necessary to account for any third-party rights. If no third party files a timely petition, the preliminary order becomes the final order of forfeiture, if the court finds that the defendant (or any combination of defendants convicted in the case) had an interest in the property that is forfeitable under the applicable statute. The defendant may not object to the entry of the final order of forfeiture on the ground that the property belongs, in whole or in part, to a codefendant or third party, nor may a third party object to the final order on the ground that the third party had an interest in the property. **(3)** ***Multiple Petitions.*** If multiple third-party petitions are filed in the same case, an order dismissing or granting one petition is not appealable until rulings are made on all petitions, unless the court determines that there is no just reason for delay. **(4)** ***Ancillary Proceeding.*** An ancillary proceeding is not part of sentencing.

(d) Stay Pending Appeal. If a defendant appeals from a conviction or order of forfeiture, the court may stay the order of forfeiture on terms appropriate to ensure that the property remains available pending appellate review. A stay does not delay the ancillary proceeding or the determination of a third party's rights or interests. If the court rules in favor of any third party while an appeal is pending, the court may amend the order of forfeiture but shall not transfer any property interest to a third party until the decision on appeal becomes final, unless the defendant consents in writing or on the record.	**(d) Stay Pending Appeal.** If a defendant appeals from a conviction or order of forfeiture, the court may stay the order of forfeiture on terms appropriate to ensure that the property remains available pending appellate review. A stay does not delay the ancillary proceeding or the determination of a third party's rights or interests. If the court rules in favor of any third party while an appeal is pending, the court may amend the order of forfeiture but must not transfer any property interest to a third party until the decision on appeal becomes final, unless the defendant consents in writing or on the record.
(e) Subsequently Located Property; Substitute Property. (1) On the government's motion, the court may at any time enter an order of forfeiture or amend an existing order of forfeiture to include property that: (A) is subject to forfeiture under an existing order of forfeiture but was located and identified after that order was entered; or (B) is substitute property that qualifies for forfeiture under an applicable statute.	**(e) Subsequently Located Property; Substitute Property.** **(1)** ***In General.*** On the government's motion, the court may at any time enter an order of forfeiture or amend an existing order of forfeiture to include property that: (A) is subject to forfeiture under an existing order of forfeiture but was located and identified after that order was entered; or (B) is substitute property that qualifies for forfeiture under an applicable statute.
(2)If the government shows that the property is subject to forfeiture under Rule 32.2(e)(1), the court shall: (A) enter an order forfeiting that property, or amend an existing preliminary or final order to include it; and (B) if a third party files a petition claiming an interest in the property, conduct an ancillary proceeding under Rule 32.2(c). (3) There is no right to trial by jury under Rule 32.2(e).	**(2)** ***Procedure.*** If the government shows that the property is subject to forfeiture under Rule 32.2(e)(1), the court must: (A) enter an order forfeiting that property, or amend an existing preliminary or final order to include it; and (B) if a third party files a petition claiming an interest in the property, conduct an ancillary proceeding under Rule 32.2(c). **(3)** ***Jury Trial Limited.*** There is no right to trial by jury under Rule 32.2(e).

Committee Notes
Rule 32.2
May 10, 2000

COMMITTEE NOTE

The language of Rule 32.2 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 33. New Trial	Rule 33. New Trial
On a defendant's motion, the court may grant a new trial to that defendant if the interests of justice so require. If trial was by the court without a jury, the court may— on defendant's motion for new trial— vacate the judgment, take additional testimony, and direct the entry of a new judgment. A motion for a new trial based on newly discovered evidence may be made only within three years after the verdict or finding of guilty. But 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 may be made only 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.	**(a) Defendant's Motion.** Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment. **(b) Time to File.** **(1)** ***Newly Discovered Evidence.*** A defendant must file a motion for a new trial grounded on newly discovered evidence within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case. **(2)** ***Other Grounds.*** A defendant must file a motion for a new trial grounded on any reason other than newly discovered evidence within 7 days after the verdict or finding of guilty, or within such further time the court sets during the 7-day period.

Committee Notes
Rule 33
May 10, 2000

COMMITTEE NOTE

The language of Rule 33 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 34. Arrest of Judgment	Rule 34. Arresting Judgment
The court on motion of a defendant shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 7 days after verdict or finding of guilty, or after plea of guilty or *nolo contendere,* or within such further time as the court may fix during the 7-day period.	**(a) In General.** Upon the defendant's motion or on its own, the court must arrest judgment if: **(1)** the indictment or information does not charge an offense; or **(2)** the court did not have jurisdiction of the charged offense. **(b) Time to File.** The defendant must move to set aside a verdict or finding of guilty within 7 days after verdict or finding of guilty, or after plea of guilty or nolo contendere, or within such further time as the court may set during the 7-day period.

Committee Notes
Rule 34
May 10, 2000

COMMITTEE NOTE

The language of Rule 34 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 35. Correction or Reduction of Sentence	Rule 35. Correcting or Reducing a Sentence
(a) Correction of Sentence on Remand. The court shall correct a sentence that is determined on appeal under 18 U.S.C. 3742 to have been imposed in violation of law, to have been imposed as a result of an incorrect application of the sentencing guidelines, or to be unreasonable, upon remand of the case to the court– **(1)** for imposition of a sentence in accord with the findings of the court of appeals; or **(2)** for further sentencing proceedings if, after such proceedings, the court determines that the original sentence was incorrect.	**(a) Correcting Clear Error.** Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.
(b) Reduction of Sentence for Substantial Assistance. If the Government so moves within one year after the sentence is imposed, the court may reduce a sentence to reflect a defendant's subsequent, substantial assistance in investigating or prosecuting another person in accordance with the guidelines and policy statements issued by the Sentencing Commission under 28 U.S.C. § 994. The court may consider a government motion to reduce a sentence made one year or more after the sentence is imposed if the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after sentence is imposed. In evaluating whether substantial assistance has been rendered, the court may consider the defendant's pre-sentence assistance. In applying this subdivision, the court may reduce the sentence to a level below that established by statute as a minimum sentence.	**(b) Reducing a Sentence for Substantial Assistance.** **(1)** ***In General.*** Upon the government's motion made within one year of sentencing, the court may reduce a sentence if: (A) the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person; and (B) reducing the sentence accords with the Sentencing Commission's guidelines and policy statements. **(2)** ***Later Motion.*** The court may consider a government motion to reduce a sentence made one year or more after sentencing if the defendant's substantial assistance involved information not known until more than one year after sentencing. **(3)** ***Evaluating Substantial Assistance.*** In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's presentence assistance. **(4)** ***Below Statutory Minimum.*** When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.
(c) Correction of Sentence by Sentencing Court. The court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as the result of arithmetical, technical, or other clear error.	

Committee Notes
Rule 35
May 10, 2000

COMMITTEE NOTE

The language of Rule 35 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The Committee deleted current Rule 35(a) (Correction on Remand). That rule, which currently addresses the issue of the district court's actions following a remand on the issue of sentencing, was added by Congress in 1984. P.L. No. 98-473. The rule cross-references 18 U.S.C. § 3742, also enacted in 1984, which provides detailed guidance on the various options available to the appellate courts in addressing sentencing errors. In reviewing both provisions, the Committee concluded that Rule 35(a) was no longer needed. First, the statute clearly covers the subject matter, and second, it is not necessary to address an issue that would be very clear to a district court following a decision by a court of appeals.

Former Rule 35(c), which addressed the authority of the court to correct certain errors in the sentence, is now located in Rule 35(a).

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 35 is one of those rules. Another version of Rule 35, which includes a substantive change, is being published simultaneously in a separate pamphlet. That version includes an amendment that would authorize a court to hear a motion to reduce a sentence, more than one year after sentence was imposed, when the defendant's substantial assistance involved information known to the defendant within one year after sentencing, but no motion was filed because the significance or usefulness of the information was not apparent until after the one year period had elapsed.

Rule 36. Clerical Mistakes.	Rule 36. Clerical Error
Clerical mistakes in judgments, orders, or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.	After giving any notice it considers appropriate, the court may at any time correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission.

Committee Notes
Rule 36
May 10, 2000

COMMITTEE NOTE

The language of Rule 36 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

VIII. APPEAL	
Rule 37. Taking Appeal. [Abrogated 1968.]	**Rule 37. [Reserved]**

Rule 38. Stay of Execution	**Rule 38. Staying a Sentence or a Disability**
(a) Stay of Execution. A sentence of death shall be stayed if an appeal is taken from the conviction or sentence.	**(a) Death Sentence.** The court must stay a death sentence if the defendant appeals the conviction or sentence.
(b) Imprisonment. A sentence of imprisonment shall be stayed if an appeal is taken from the conviction or sentence and the defendant is released pending disposition of appeal pursuant to Rule 9(b) of the Federal Rules of Appellate Procedure. If not stayed, the court may recommend to the Attorney General that the defendant be retained at, or transferred to, a place of confinement near the place of trial or the place where an appeal is to be heard, for a period reasonably necessary to permit the defendant to assist in the preparation of an appeal to the court of appeals.	**(b) Imprisonment.** **(1)** ***Stay Granted.*** If the defendant is released pending appeal, the court must stay a sentence of imprisonment. **(2)** ***Stay Denied.*** If the defendant is not released pending appeal, the court may recommend to the Attorney General that the defendant be confined near the place of the trial or appeal for a period reasonably necessary to permit the defendant to assist in preparing the appeal.
(c) Fine. A sentence to pay a fine or a fine and costs, if an appeal is taken, may be stayed by the district court or by the court of appeals upon such terms as the court deems proper. The court may require the defendant pending appeal to deposit the whole or any part of the fine and costs in the registry of the district court, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make any appropriate order to restrain the defendant from dissipating such defendant's assets.	**(c) Fine.** If the defendant appeals, the district court, or the court of appeals under Federal Rule of Appellate Procedure 8, may stay a sentence to pay a fine or a fine and costs. The court may stay the sentence on any terms considered proper and may require the defendant to: **(1)** deposit all or part of the fine and costs into the district court's registry pending appeal; **(2)** post a bond to pay the fine and costs; or **(3)** submit to an examination concerning the defendant's assets and, if appropriate, order the defendant to refrain from dissipating assets.
(d) Probation. A sentence of probation may be stayed if an appeal from the conviction or sentence is taken. If the sentence is stayed, the court shall fix the terms of the stay.	**(d) Probation.** If the defendant appeals, the court may stay a sentence of probation. The court must set the terms of any stay.

(e) Notice to Victims and Restitution. [2] A sanction imposed as part of the sentence pursuant to 18 U.S.C. 3555 or 3556 may, if an appeal of the conviction or sentence is taken, be stayed by the district court or by the court of appeals upon such terms as the court finds appropriate. The court may issue such orders as may be reasonably necessary to ensure compliance with the sanction upon disposition of the appeal, including the entering of a restraining order or an injunction or requiring a deposit in whole or in part of the monetary amount involved into the registry of the district court or execution of a performance bond.	**(e) Restitution and Notice to Victims.** **(1)** ***In General.*** If the defendant appeals, the district court, or the court of appeals under Federal Rule of Appellate Procedure 8, may stay — on any terms considered appropriate — any sentence providing for notice under 18 U.S.C. § 3555 or restitution under 18 U.S.C. § 3556. **(2)** ***Ensuring Compliance.*** The court may issue any order reasonably necessary to ensure compliance with a notice or restitution order after disposition of an appeal, including: (A) a restraining order; (B) an injunction; (C) an order requiring the defendant to deposit all or part of any monetary restitution into the district court's registry; or (D) an order requiring the defendant to post a bond.
(f) Disabilities. A civil or employment disability arising under a Federal statute by reason of the defendant's conviction or sentence may, if an appeal is taken, be stayed by the district court or by the court of appeals upon such terms as the court finds appropriate. The court may enter a restraining order or an injunction, or take any other action that may be reasonably necessary to protect the interest represented by the disability pending disposition of the appeal.	**(f) Forfeiture.** A stay of a forfeiture order is governed by Rule 32.2(d). **(g) Disability.** If the defendant's conviction or sentence creates a civil or employment disability under federal law, the district court, or the court of appeals under Federal Rule of Appellate Procedure 8, may stay the disability pending appeal on any terms considered appropriate. The court may issue any order reasonably necessary to protect the interest represented by the disability pending appeal, including a restraining order or an injunction.

[2] The Supreme Court approved amendments in April 2000. The amendments take effect on December 1, 2000, unless Congress takes action otherwise.

Committee Notes
Rule 38
May 10, 2000

COMMITTEE NOTE

The language of Rule 38 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The reference to Appellate Rule 9(b) is deleted. The Committee believed that the reference was unnecessary and its deletion was not intended to be substantive in nature.

Rule 39. Supervision of Appeal [Abrogated 1968]	Rule 39. [Reserved]

IX. SUPPLEMENTARY AND SPECIAL PROCEEDINGS	TITLE VIII. SUPPLEMENTARY AND SPECIAL PROCEEDINGS
Rule 40. Commitment to Another District	**Rule 40. Arrest for Failing to Appear in Another District**
(a) Appearance Before Federal Magistrate Judge. If a person is arrested in a district other than that in which the offense is alleged to have been committed, that person shall be taken without unnecessary delay before the nearest available federal magistrate judge, in accordance with the provisions of Rule 5. Preliminary proceedings concerning the defendant shall be conducted in accordance with Rules 5 and 5.1, except that if no preliminary examination is held because an indictment has been returned or an information filed or because the defendant elects to have the preliminary hearing conducted in the district in which the prosecution is pending, the person shall be held to answer upon a finding that such person is the person named in the indictment, information, or warrant. If held to answer, the defendant shall be held to answer in the district court in which the prosecution is pending — provided that a warrant is issued in that district if the arrest was made without a warrant — upon production of the warrant or a certified copy thereof. The warrant or certified copy may be produced by facsimile transmission.	**(a) In General.** A person arrested under a warrant issued in another district for failing to appear — as required by the terms of that person's release under 18 U.S.C. §§ 3141 - 3156 or by a subpoena — must be taken without unnecessary delay before a magistrate judge in the district of the arrest. **(b) Proceedings.** The judge must proceed under Rule 5(c)(2) as applicable. **(c) Release or Detention Order.** The judge may modify any previous release or detention order issued in another district, but must state in writing the reasons for doing so.
(b) Statement by Federal Magistrate Judge. In addition to the statements required by Rule 5, the federal magistrate judge shall inform the defendant of the provisions of Rule 20.	
(c) Papers. If a defendant is held or discharged, the papers in the proceeding and any bail taken shall be transmitted to the clerk of the district court in which the prosecution is pending.	
(d) Arrest of Probationer or Supervised Releasee. If a person is arrested for a violation of probation or supervised release in a district other than the district having jurisdiction, such person must be taken without unnecessary delay before the nearest available federal magistrate judge. The person may be released under Rule 46(c). The federal magistrate judge shall: **(1)** Proceed under Rule 32.1 if jurisdiction over the person is transferred to that district; **(2)** Hold a prompt preliminary hearing if the alleged violation occurred in that district, and either (i) hold the person to answer in the district court of the district having jurisdiction or (ii) dismiss the proceedings and so notify the court; or **(3)** Otherwise order the person held to answer in the district court of the district having jurisdiction upon production of certified copies of the judgment, the warrant, and the application for the warrant, and upon a finding that the person before the magistrate judge is the person named in the warrant.	

(e) Arrest for Failure to Appear. If a person is arrested on a warrant in a district other than that in which the warrant was issued, and the warrant was issued because of the failure of the person named therein to appear as required pursuant to a subpoena or the terms of that person's release, the person arrested must be taken without unnecessary delay before the nearest available federal magistrate judge. Upon production of the warrant or a certified copy thereof and a finding that the person before the magistrate judge is the person named in the warrant, the federal magistrate judge shall hold the person to answer in the district in which the warrant was issued.	
(f) Release or Detention. If a person was previously detained or conditionally released, pursuant to chapter 207 of title 18, United States Code, in another district where a warrant, information, or indictment issued, the federal magistrate judge shall take into account the decision previously made and the reasons set forth therefor, if any, but will not be bound by that decision. If the federal magistrate judge amends the release or detention decision or alters the conditions of release, the magistrate judge shall set forth the reasons therefor in writing.	

Committee Notes
Rule 40
May 10, 2000

COMMITTEE NOTE

The language of Rule 40 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 40 has been completely revised. The Committee believed that it would be much clearer and more helpful to locate portions of Rule 40 in Rules 5 (initial appearances), 5.1 (preliminary hearings), and 32.1 (revocation or modification of probation or supervised release). Accordingly, current Rule 40(a) has been relocated in Rules 5 and 5.1. Current Rule 40(b) has been relocated to Rule 5(c)(2)(B) and current Rule 40(c) has been moved to Rule 5(c)(2)(F).

Current Rule 40(d) has been relocated in Rule 32.1(a)(5). Current Rule 40(e)(1) is now located in revised Rule 40(a). Current Rule 40(e)(2) is now in revised Rule 40(b) and current Rule 40(f) is revised Rule 40(c).

Rule 41. Search and Seizure	Rule 41. Search and Seizure
(a) Authority to Issue Warrant. Upon the request of a federal law enforcement officer or an attorney for the government, a search warrant authorized by this rule may be issued (1) by a federal magistrate judge, or a state court of record within the federal district, for a search of property or for a person within the district and (2) by a federal magistrate judge for a search of property or for a person either within or outside the district if the property or person is within the district when the warrant is sought but might move outside the district before the warrant is executed.	**(a) Scope and Definitions.** **(1)** ***Scope.*** This rule does not modify any statute regulating search or seizure, or the issuance and execution of a search warrant in special circumstances.
	(2) ***Definitions.*** The following definitions apply under this rule: (A) "Property" includes documents, books, papers, any other tangible objects, and information. (B) "Daytime" means the hours between 6:00 a.m. and 10:00 p.m. according to local time. (C) "Federal law enforcement officer" means a government agent (other than an attorney for the government) who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant.

	(b) **Authority to Issue a Warrant.** At the request of a federal law enforcement officer or an attorney for the government: (1) a magistrate judge having authority in the district — or if none is reasonably available, a judge of a state court of record in the district — may issue a warrant to search for and seize a person or property located within the district; and (2) a magistrate judge may issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move outside the district before the warrant is executed.
(b) Property or Persons Which May be Seized With a Warrant. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of the crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.	(c) **Persons or Property Subject to Search or Seizure.** A warrant may be issued for any of the following: (1) evidence of the commission of a crime; (2) contraband, fruits of crime, or other items illegally possessed; (3) property designed for use, intended for use, or used in committing a crime; or (4) a person to be arrested or a person who is unlawfully restrained.

(c) Issuance and Contents. **(1) Warrant Upon Affidavit.** A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the federal magistrate judge or state judge and establishing grounds for issuing the warrant. If the federal magistrate judge or state judge is satisfied that the grounds for the application exist or that there is probable cause to believe that they exist, that magistrate judge or state judge shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate judge or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses the affiant may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit.	**(d) Obtaining a Warrant.** **(1) *Probable Cause.*** After receiving an affidavit or other information, a magistrate judge or a judge of a state court of record must issue the warrant if there is probable cause to search for and seize a person or property under Rule 41(c). **(2) *Requesting a Warrant in the Presence of a Judge.*** (A) *Warrant on an Affidavit.* When a federal law enforcement officer or an attorney for the government presents an affidavit in support of a warrant, the judge may require the affiant to appear personally and may examine under oath the affiant and any witness the affiant produces. (B) *Warrant on Sworn Testimony.* The judge may wholly or partially dispense with a written affidavit and base a warrant on sworn testimony if doing so is reasonable under the circumstances. (C) *Recording Testimony.* Testimony taken in support of a warrant must be recorded by a court reporter or by a suitable recording device, and the judge must file the transcript or recording with the clerk, along with any affidavit.
The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States.	
It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property or person specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorized its execution at times other than daytime. It shall designate a federal magistrate judge to whom it shall be returned.	

(2) Warrant Upon Oral Testimony. **(A) General Rule.** If the circumstances make it reasonable to dispense, in whole or in part, with a written affidavit, a Federal magistrate judge may issue a warrant based upon sworn testimony communicated by telephone or other appropriate means, including facsimile transmission. **(B) Application.** The person who is requesting the warrant shall prepare a document to be known as a duplicate original warrant and shall read such duplicate original warrant, verbatim, to the Federal magistrate judge. The Federal magistrate judge shall enter, verbatim, what is so read to such magistrate judge on a document to be known as the original warrant. The Federal magistrate judge may direct that the warrant be modified.	**(3) *Requesting a Warrant by Telephonic or Other Means.*** (A) *In General.* A magistrate judge may issue a warrant based on information communicated by telephone or other appropriate means, including facsimile transmission. (B) *Recording Testimony.* Upon learning that an applicant is requesting a warrant, a magistrate judge must: (i) place under oath the applicant and any person on whose testimony the application is based; and (ii) make a verbatim record of the conversation with a suitable recording device, if available, or by court reporter, or in writing.
(C) Issuance. If the Federal magistrate judge is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and that the grounds for the application exist or that there is probable cause to believe that they exist, the Federal magistrate judge shall order the issuance of a warrant by directing the person requesting the warrant to sign the Federal magistrate judge's name on the duplicate original warrant. The Federal magistrate judge shall immediately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was ordered to be issued. The finding of probable cause for a warrant upon oral testimony may be based on the same kind of evidence as is sufficient for a warrant upon affidavit.	

(D) Recording and Certification of Testimony. When a caller informs the Federal magistrate judge that the purpose of the call is to request a warrant, the Federal magistrate judge shall immediately place under oath each person whose testimony forms a basis of the application and each person applying for that warrant. If a voice recording device is available, the Federal magistrate judge shall record by means of such device all of the call after the caller informs the Federal magistrate judge that the purpose of the call is to request a warrant. Otherwise a stenographic or longhand verbatim record shall be made. If a voice recording device is used or a stenographic record made, the Federal magistrate judge shall have the record transcribed, shall certify the accuracy of the transcription, and shall file a copy of the original record and the transcription with the court. If a longhand verbatim record is made, the Federal magistrate judge shall file a signed copy with the court.	(C) *Certifying Testimony.* The magistrate judge must have any recording or court reporter's notes transcribed, certify the transcription's accuracy, and file a copy of the record and the transcription with the clerk. Any written verbatim record must be signed by the magistrate judge and filed with the clerk. (D) *Suppression Limited.* Absent a finding of bad faith, evidence obtained from a warrant issued under Rule 41(d)(3)(A) is not subject to suppression on the ground that issuing the warrant in that manner was unreasonable under the circumstances.
(E) Contents. The contents of a warrant upon oral testimony shall be the same as the contents of a warrant upon affidavit.	**(e) Issuing the Warrant.** **(1)** ***In General.*** The magistrate judge or a judge of a state court of record must issue the warrant to an officer authorized to execute it and deliver a copy to the district clerk. **(2)** ***Contents of the Warrant.*** The warrant must identify the person or property to be searched or covertly observed, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned. The warrant must command the officer to: (A) execute the warrant within a specified time no longer than 10 days; (B) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution of the warrant at another time; and (C) return the warrant to the magistrate judge designated in the warrant.

(F) Additional Rule for Execution. The person who executes the warrant shall enter the exact time of execution on the face of the duplicate original warrant.	**(3) *Warrant by Telephonic or Other Means.*** If a magistrate judge decides to issue a warrant under Rule 41(d)(3)(A), the following additional procedures apply: (A) *Preparing a Proposed Duplicate Original Warrant.* The applicant must prepare a "proposed duplicate original warrant" and must read or otherwise transmit the contents of that document verbatim to the magistrate judge. (B) *Preparing an Original Warrant.* The magistrate judge must enter the contents of the proposed duplicate original warrant into an original warrant. (C) *Modifications.* The magistrate judge may direct the applicant to modify the proposed duplicate original warrant. In that case, the judge must also modify the original warrant.
(G) Motion to Suppress Precluded. Absent a finding of bad faith, evidence obtained pursuant to a warrant issued under this paragraph is not subject to a motion to suppress on the ground that the circumstances were not such as to make it reasonable to dispense with a written affidavit.	(D) *Signing the Original Warrant and the Duplicate Original Warrant.* Upon determining to issue the warrant, the magistrate judge must immediately sign the original warrant, enter on its face the exact time when it is issued, and direct the applicant to sign the judge's name on the duplicate original warrant.

(d) Execution and Return with Inventory. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken.	**(f) Executing and Returning the Warrant.** **(1)** ***Notation of Time.*** The officer executing the warrant must enter on the face of the warrant the exact date and time it is executed. **(2)** ***Inventory.*** An officer executing the warrant must also prepare and verify an inventory of any property seized and must do so in the presence of: (A) another officer, and (B) the person from whom, or from whose premises, the property was taken, if present; or (C) if either of these persons is not present, at least one other credible person. **(3)** ***Receipt.*** The officer executing the warrant must: (A) give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken; or (B) leave a copy of the warrant and receipt at the place where the officer took the property.
The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The federal magistrate judge shall upon request deliver a copy of the inventory to the person from or from whose premises the property was taken and to the applicant for the warrant.	**(4)** ***Return.*** The officer executing the warrant must promptly return it— together with a copy of the inventory — to the magistrate judge designated on the warrant. The judge must, on request, give a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) Motion for Return of Property. A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property. The court shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be returned to the movant, although reasonable conditions may be imposed to protect access and use of the property in subsequent proceedings. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.	**(g) Motion to Return Property.** A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.
(f) Motion to Suppress. A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12.	**(h) Motion to Suppress.** A defendant may move to suppress evidence in the court where the trial will occur, as Rule 12 provides.
(g) Return of Papers to Clerk. The federal magistrate judge before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.	**(i) Forwarding Papers to the Clerk.** The magistrate judge to whom the warrant is returned must attach to the warrant a copy of the return, inventory, and all other related papers and must deliver them to the clerk in the district where the property was seized.
(h) Scope and Definitions. This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects. The term "daytime" is used in this rule mean hours from 6:00 a.m. to 10:00 p.m. according to local time. The phrase "federal law enforcement officer" is used in this rule to mean an government agent, other than an attorney for the government as defined in Rule 54(c), who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant.	

Committee Notes
Rule 41
May 10, 2000

COMMITTEE NOTE

The language of Rule 41 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. Rule 41 has been completely reorganized to make it easier to read and apply its key provisions.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 41 is one of those rules. Another version of Rule 41, which includes a substantive change that would permit a judge to issue a warrant for a covert entry for purposes of noncontinuous observation, is being published simultaneously in a separate pamphlet.

Rule 42. Criminal Contempt	Rule 42. Criminal Contempt
(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. The defendant is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.	**(a) Disposition After Notice.** Any person who commits criminal contempt may be punished for that contempt after prosecution on notice. **(1)** ***Notice.*** The court must give the person notice in open court, in an order to show cause, or in an arrest order. The notice must: (A) state the time and place of the trial; (B) allow the defendant a reasonable time to prepare a defense; and (C) state the essential facts constituting the charged criminal contempt and describe it as such. **(2)** ***Appointing a Prosecutor.*** The court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires appointment of another attorney. If the government declines the request, the court must appoint another attorney to prosecute the contempt. **(3)** ***Trial and Disposition.*** A person being prosecuted for criminal contempt is entitled to a jury trial in any case in which federal law so provides and must be released or detained as Rule 46 provides. If the criminal contempt involves disrespect toward or criticism of a judge, that judge is disqualified from presiding at the contempt trial or hearing unless the defendant consents. Upon a finding or verdict of guilty, the court must impose the punishment.
(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.	**(b) Summary Disposition.** Notwithstanding any other provision of these rules, the court may summarily punish a person who commits criminal contempt in its presence if the judge saw or heard the contemptuous conduct and so certifies. The contempt order must recite the facts, be signed by the judge, and be filed with the clerk.

Committee Notes
Rule 42
May 10, 2000

COMMITTEE NOTE

The language of Rule 42 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The revised rule is intended to more clearly set out the procedures for conducting a criminal contempt proceeding. The current rule implicitly recognizes that an attorney for the government may be involved in the prosecution of such cases. Revised Rule 42(a)(2) now explicitly addresses the appointment of a "prosecutor" and adopts language to reflect the holding in *Young v. United States ex rel Vuitton*, 481 U.S. 787 (1987). In that case the Supreme Court indicated that ordinarily the court should request that an attorney for the government prosecute the contempt; only if that request is denied, should the court appoint a private prosecutor. The rule envisions that a disinterested counsel should be appointed to prosecute the contempt.

Finally, Rule 42(b) has been amended to make it clear that a court may summarily punish a person for committing contempt in the court's presence without regard to whether other rules, such as Rule 32 (sentencing procedures), might otherwise apply. *See, e.g., United States v. Martin-Trigona*, 759 F.2d 1017 (2d Cir. 1985).

X. GENERAL PROVISIONS	TITLE IX. GENERAL PROVISIONS
Rule 43. Presence of the Defendant	**Rule 43. Defendant's Presence**
(a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.	**(a) When Required.** Unless this rule provides otherwise, the defendant must be present at: **(1)** the initial appearance, arraignment, and plea; **(2)** every trial stage, including jury impanelment and the return of the verdict; and **(3)** sentencing.
(b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict, and the imposition of sentence, will not be prevented and the defendant will be considered to have waived the right to be present whenever a defendant, initially present at trial, or having pleaded guilty or nolo contendere, **(1)** is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial), **(2)** in a noncapital case, is voluntarily absent at the imposition of sentence, or **(3)** after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.	**(b) When Not Required.** A defendant need not be present under any of the following circumstances: **(1)** ***Organizational Defendant.*** The defendant is an organization represented by counsel who is present. **(2)** ***Misdemeanor Offense.*** The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur in the defendant's absence. **(3)** ***Conference or Hearing on a Legal Question.*** The proceeding involves only a conference or hearing on a question of law. **(4)** ***Sentence Correction.*** The proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c).

(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(b) or (c) or 18 U.S.C. § 3582(c).	**(c) Waiving Continued Presence.** **(1)** ***In General.*** A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances: (A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial; (B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or (C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.
	(2) ***Waiver's Effect.*** If the defendant waives the right to be present under this rule, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.

Committee Notes
Rule 43
May 10, 2000

COMMITTEE NOTE

The language of Rule 43 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 43 is one of those rules. Another version of Rule 43, which recognizes that the proposed Rules 5 and 10 would authorize video teleconferencing of certain proceedings, is being published simultaneously in a separate pamphlet.

Rule 44. Right to and Assignment of Counsel	Rule 44. Right to and Appointment of Counsel
(a) Right to Assigned Counsel. Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent that defendant at every stage of the proceedings from initial appearance before the federal magistrate judge or the court through appeal, unless the defendant waives such appointment.	**(a) Right to Appointed Counsel.** A defendant who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right.
(b) Assignment Procedure. The procedures for implementing the right set out in subdivision (a) shall be those provided by law and by local rules of court established pursuant thereto.	**(b) Appointment Procedure.** Federal law and local court rules govern the procedure for implementing the right to counsel.
(c) Joint Representation. Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as maybe appropriate to protect each defendant's right to counsel.	**(c) Inquiry Into Joint Representation.** **(1)** ***Joint Representation.*** Joint representation occurs when: (A) two or more defendants have been charged jointly under Rule 8(b) or have been joined for trial under Rule 13; and (B) the defendants are represented by the same counsel, or counsel who are associated in law practice. **(2)** ***Court's Responsibilities in Cases of Joint Representation.*** The court must promptly inquire about the propriety of joint representation and must personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless there is good cause to believe that no conflict of interest is likely to arise, the court must take appropriate measures to protect each defendant's right to counsel.

Committee Notes
Rule 44
May 10, 2000

COMMITTEE NOTE

The language of Rule 44 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Revised Rule 44 now refers to the "appointment" of counsel, rather than the assignment of counsel; the Committee believed the former term was more appropriate. *See* 18 U.S.C. § 3006A. In Rule 44(c), the term "assigned or appointed" has been deleted as being unnecessary, without changing the court's responsibility to conduct an inquiry where joint representation occurs.

Rule 45. Time	Rule 45. Computing and Extending Time
(a) Computation. In computing any period of time the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of some paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When a period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in these rules, "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.	**(a) Computing Time.** The following rules apply in computing any period of time specified in these rules, any local rule, or any court order: **(1)** ***Day of the Event Excluded.*** Exclude the day of the act, event, or default that begins the period. **(2)** ***Exclusion from Brief Periods.*** Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days. **(3)** ***Last Day.*** Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or a day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible. **(4)** ***"Legal Holiday" Defined.*** As used in this rule, "legal holiday" means: (A) New Year's Day; (B) Martin Luther King, Jr.'s Birthday; (C) Presidents' Day;
	(D) Memorial Day; (E) Independence Day; (F) Labor Day; (G) Columbus Day; (H) Veterans' Day; (I) Thanksgiving Day; (J) Christmas Day; and (K) any other day declared a holiday by the President, Congress, or the state where the district court is held.

(b) Enlargement. When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done if the failure to act was the result of excusable neglect; but the court may not extend the time for taking any action under Rules 29, 33, 34 and 35, except to the extent and under the conditions stated in them.	**(b) Extending Time.** **(1)** ***In General.*** When an act must or may be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party's motion made: (A) before the originally prescribed or previously extended time expires; or (B) after the time expires if the party failed to act due to excusable neglect. **(2)** ***Exceptions.*** The court may not extend the time to take any action under Rules 29, 33, 34, and 35, except as stated in those rules.
[(c) Unaffected by Expiration of Term.] Rescinded Feb. 28, 1966, eff. July 1, 1966.	
(d) For Motions; Affidavits. A written motion, other than one which may be heard *ex parte,* and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing unless a different period is fixed by rule or order of the court. For cause shown such an order may be made on *ex parte* application. When a motion is supported by an affidavit, the affidavit shall be served with the motion; and opposing affidavits may be served not less than 1 day before the hearing unless the court permits them to be served at a later time.	
(e) Additional Time After Service by Mail. Whenever a party has the right or is required to do an act within a prescribed period after the service of a notice or other paper upon that party and the notice or other paper is served by mail, 3 days shall be added to the prescribed period.	**(c) Additional Time After Service by Mail.** When these rules permit or require a party to act within a specified period after a notice or a paper has been served on that party, three days are added to the period if service occurs by mail.

Committee Notes
Rule 45
May 10, 2000

COMMITTEE NOTE

The language of Rule 45 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

In Rule 45(a)(4)(C), the term "Presidents' Day" is used instead of "Washington's Birthday"—the term used in the statute. The former term reflects the prevalent modern usage and was selected to conform the rule to the recently restyled Federal Rules of Appellate Procedure.

Rule 45(d), which governs the timing of written motions and affidavits, has been moved to Rule 47.

Rule 46. Release from Custody	Rule 46. Release from Custody; Supervising Detention
(a) Release Prior to Trial. Eligibility for release prior to trial shall be in accordance with 18 U.S.C. §§ 3142 and 3144.	**(a) Before Trial.** The provisions of 18 U.S.C. §§ 3142 and 3144 govern pretrial release.
(b) Release During Trial. A person released before trial shall continue on release during trial under the same terms and conditions as were previously imposed unless the court determines that other terms and conditions or termination of release are necessary to assure such person's presence during the trial or to assure that such person's conduct will not obstruct the orderly and expeditious progress of the trial.	**(b) During Trial.** A person released before trial continues on release during trial under the same terms and conditions. But the court may order different terms and conditions or terminate the release if necessary to ensure that the person will be present during trial or that the person's conduct will not obstruct the orderly and expeditious progress of the trial.
(c) Pending Sentence and Notice of Appeal. Eligibility for release pending sentence or pending notice of appeal or expiration of the time allowed for filing notice of appeal, shall be in accordance with 18 U.S.C. § 3143. The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant.	**(c) Pending Sentencing or Appeal.** The provisions of 18 U.S.C. § 3143 govern release pending sentencing or appeal. The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant.
	(d) Pending Hearing on a Violation of Probation or Supervised Release. Rule 32.1(a)(6) governs release pending a hearing on a violation of probation or supervised release.
(d) Justification of Sureties. Every surety, except a corporate surety which is approved as provided by law, shall justify by affidavit and may be required to describe in the affidavit the property by which the surety proposes to justify and the encumbrances thereon, the number and amount of other bonds and undertakings for bail entered into by the surety and remaining undischarged and all the other liabilities of the surety. No bond shall be approved unless the surety thereon appears to be qualified.	**(e) Surety.** The court must not approve a bond unless any surety appears to be qualified. Every surety, except a legally approved corporate surety, must demonstrate by affidavit that its assets are adequate. The court may require the affidavit to describe the following: **(1)** the property that the surety proposes to use as security; **(2)** any encumbrance on that property; **(3)** the number and amount of any other undischarged bonds and bail undertakings the surety has issued; and **(4)** any other liability of the surety.

(e) Forfeiture. **(1) Declaration.** If there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail. **(2) Setting Aside.** The court may direct that a forfeiture be set aside in whole or in part, upon such conditions as the court may impose, if a person released upon an execution of an appearance bond with a surety is subsequently surrendered by the surety into custody or if it otherwise appears that justice does not require the forfeiture.	**(f) Bail Forfeiture.** (1) ***Declaration.*** The court must declare the bail forfeited if a condition of the bond is breached. (2) ***Setting Aside.*** The court may set aside in whole or in part a bail forfeiture upon any condition the court may impose, if: (A) the surety later surrenders into custody the person released on the surety's appearance bond; or (B) it appears that justice does not require bail forfeiture.
(3) Enforcement. When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. By entering into a bond the obligors submit to the jurisdiction of the district court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the obligors to their last known addresses. **(4) Remission.** After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision.	(3) ***Enforcement.*** (A) *Default Judgment and Execution.* If it does not set aside a bail forfeiture, the court must upon the government's motion enter a default judgment. (B) *Jurisdiction and Service.* By entering into a bond, each surety submits to the district court's jurisdiction and irrevocably appoints the district clerk as its agent to receive service of any filings affecting its liability. (C) *Motion to Enforce.* The court may upon the government's motion enforce the surety's liability without an independent action. The government must serve any motion, and notice as the court prescribes, on the district clerk. If so served, the clerk must promptly mail a copy to the surety at its last known address. (4) ***Remission.*** After entering a judgment under Rule 46(f)(3), the court may remit in whole or in part the judgment under the same conditions specified in Rule 46(f)(2).
(f) Exoneration. When a condition of the bond has been satisfied or the forfeiture thereof has been set aside or remitted, the court shall exonerate the obligors and release any bail. A surety may be exonerated by a deposit of cash in the amount of the bond or by a timely surrender of the defendant into custody.	**(g) Exoneration.** The court must exonerate the surety and release any bail when a bond condition has been satisfied or when the court has set aside or remitted the forfeiture. The court must exonerate a surety who deposits cash in the amount of the bond or timely surrenders the defendant into custody.

(g) Supervision of Detention Pending Trial. The court shall exercise supervision over the detention of defendants and witnesses within the district pending trial for the purpose of eliminating all unnecessary detention. The attorney for the government shall make a biweekly report to the court listing each defendant and witness who has been held in custody pending indictment, arraignment, or trial for a period in excess of ten days. As to each witness so listed the attorney for the government shall make a statement of the reasons why such witness should not be released with or without the taking of a deposition pursuant to Rule 15(a). As to each defendant so listed the attorney for the government shall make a statement of the reasons why the defendant is still held in custody.	**(h) Supervising Detention Pending Trial.** **(1)** ***In General.*** To eliminate unnecessary detention, the court must supervise the detention within the district of any defendants awaiting trial and of any persons held as material witnesses. **(2)** ***Reports.*** The attorney for the government must report biweekly to the court, listing each material witness held in custody for more than 10 days pending indictment, arraignment, or trial. For each material witness listed in the report, the attorney for the government must state why the witness should not be released with or without a deposition being taken under Rule 15(a).
(h) Forfeiture of Property. Nothing in this rule or in chapter 207 of title 18, United States Code, shall prevent the court from disposing of any charge by entering an order directing forfeiture of property pursuant to 18 U.S.C. 3142(c)(1)(B)(xi) if the value of the property is an amount that would be an appropriate sentence after conviction of the offense charged and if such forfeiture is authorized by statute or regulation.	**(i) Forfeiture of Property.** The court may dispose of a charged offense by ordering forfeiture of 18 U.S.C. § 3142(c)(1)(B)(xi) property under 18 U.S.C. § 3146 (b), if a fine in the amount of the property's value would be an appropriate sentence for the charged offense.
(i) Production of Statements. **(1) In General.** Rule 26.2(a)-(d) and (f) applies at a detention hearing held under 18 U.S.C. § 3142, 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, at the detention hearing the court may not consider the testimony of a witness whose statement is withheld.	**(j) Producing Statements.** **(1)** ***In General.*** Unless the court for good cause rules otherwise, Rule 26.2(a)–(d) and (f) applies at a detention hearing under 18 U.S.C. § 3142. **(2)** ***Sanctions for Failure to Produce a Statement.*** If a party disobeys a Rule 26.2(a) order to produce a witness's statement, the court must not consider that witness's testimony at the detention hearing.

Committee Notes
Rule 46
May 10, 2000

COMMITTEE NOTE

The language of Rule 46 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Although the general rule is that an appeal to a circuit court deprives the district court of jurisdiction, Rule 46(c) recognizes the apparent exception to that rule—that the district court retains jurisdiction to decide whether the defendant should be detained, even if a notice of appeal has been filed. *See, e.g.*, *United States v. Meyers*, 95 F.3d 1475 (10th Cir. 1996), *cert. denied*, 522 U.S. 1006 (1997) (initial decision of whether to release defendant pending appeal is to be made by district court); *United States v. Affleck*, 765 F.2d 944 (10th Cir. 1985); *Jago v. United States District Court*, 570 F.2d 618 (6th Cir. 1978) (release of defendant pending appeal must first be sought in district court). *See also* Federal Rule of Appellate Procedure 9(b) and the accompanying Committee Note.

Revised Rule 46(b) deletes the requirement that the attorney for the government file bi-weekly reports with the court concerning the status of any defendants in pretrial detention. The Committee believed that the requirement was no longer necessary in light of the Speedy Trial Act provisions. 18 U.S.C. §§ 3161, et. seq. On the other hand, the requirement that the attorney for the government file reports regarding detained material witnesses has been retained in the rule.

Rule 46(i) addresses the ability of a court to order forfeiture of property where a defendant has failed to appear as required by the court. The language in the current rule, Rule 46(h), was originally included by Congress. The new language has been restyled with no change in substance or practice intended. Under this provision, the court may only forfeit property as permitted under 18 U.S.C. §§ 3146(b) and 3142(c)(1)(B)(xi). The term "appropriate sentence" means a sentence that is consistent with the Sentencing Guidelines.

Rule 47. Motions	Rule 47. Motions and Supporting Affidavits
An application to the court for an order shall be by motion. A motion other than one made during a trial or hearing shall be in writing unless the court permits it to be made orally. It shall state the grounds upon which it is made and shall set forth the relief or order sought. It may be supported by affidavit.	**(a) In General.** A party applying to the court for an order must do so by motion. **(b) Form and Content of a Motion.** A motion — except when made during a trial or hearing — must be in writing unless the court permits the party to make the motion by other means. A motion must state the grounds on which it is based and the relief or order sought. A motion may be supported by affidavit.
	(c) Timing of a Motion. A party must serve a written motion — other than one that the court may hear ex parte — and any hearing notice at least 5 days before the hearing date, unless a rule or court order sets a different period. For good cause, the court may set a different period upon ex parte application. **(d) Affidavit Supporting a Motion.** The moving party must serve any supporting affidavit with the motion. A responding party must serve any opposing affidavit at least one day before the hearing, unless the court permits later service.

Committee Notes
Rule 47
May 10, 2000

COMMITTEE NOTE

The language of Rule 47 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

In Rule 47(a), the word "orally" has been deleted. The Committee believed first, that the term should not act as a limitation on those who are not able to speak orally and second, a court may wish to entertain motions through electronic or other reliable means.

[**Reporter's Note**: In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what is considered at least one major substantive change. Deletion of the term "orally" in Rule 47 comports with a similar change in Rule 26, regarding the taking of testimony during trial, which is one of the rules being published simultaneously in a separate pamphlet. In place of that word, the Committee substituted the broader phrase "by other means."]

Rule 48. Dismissal	Rule 48. Dismissal
(a) By Attorney for Government. The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information, or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant. **(b) By Court.** If there is unnecessary delay in presenting the charge to the grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information, or complaint.	**(a) By the Government.** The government may with leave of court dismiss an indictment, information, or complaint. The government may not dismiss the prosecution during trial without the defendant's consent. **(b) By the Court.** The court may dismiss an indictment, information, or complaint if unnecessary delay occurs in: **(1)** presenting a charge to a grand jury; **(2)** filing an information against a defendant; or **(3)** bringing a defendant to trial.

Committee Notes
Rule 48
May 10, 2000

COMMITTEE NOTE

The language of Rule 48 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The Committee considered the relationship between Rule 48(b) and the Speedy Trial Act. *See* 18 U.S.C. §§ 3161, et seq. Rule 48(b), of course, operates independently from the Act. *See, e.g., United States v. Goodson*, 204 F.3d 508 (4th Cir. 2000) (noting purpose of Rule 48(b)); *United States v. Carlone*, 666 F.2d 112 (7th Cir. 1981) (suggesting that Rule 48(b) could provide alternate basis in an extreme case, without reference to Speedy Trial Act); *United States v. Balochi*, 527 F.2d 562, 563-64 (4th Cir. 1976) (per curiam) (Rule 48(b) is broader in compass). In re-promulgating Rule 48(b), the Committee intends no change in the relationship between that rule and the Speedy Trial Act.

Rule 49. Service and Filing of Papers	Rule 49. Serving and Filing Papers
(a) Service: When Required. Written motions other than those which are heard *ex parte,* written notices, designations of record on appeal and similar papers shall be served upon each of the parties.	**(a) When Required.** A party must serve on every other party any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper.
(b) Service: How Made. Whenever under these rules or by an order of the court service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party personally is ordered by the court. Service upon the attorney or upon a party shall be made in the manner provided in civil actions.	**(b) How Made.** Service must be made in the manner provided for a civil action. When these rules or a court order requires or permits service on a party represented by an attorney, service must be made on the attorney instead of the party unless the court orders otherwise.
(c) Notice of Orders. Immediately upon the entry of an order made on a written motion subsequent to arraignment the clerk shall mail to each party a notice thereof and shall make a note in the docket of the mailing. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted by Rule 4(b) of the Federal Rules of Appellate Procedure.	**(c) Notice of a Court Order.** When the court issues an order on any post-arraignment motion, the clerk must provide notice in a manner provided for a civil action. Except as Federal Rule of Appellate Procedure 4(b) provides otherwise, the clerk's failure to give notice does not affect the time to appeal, or relieve — or authorize the court to relieve — a party's failure to appeal within the allowed time.
(d) Filing. Papers required to be served shall be filed with the court. Papers shall be filed in the manner provided in civil actions.	**(d) Filing.** A party must file with the court a copy of any paper the party is required to serve. A paper must be filed in the manner provided for a civil action.
[**(e)** Abrogated April 27, 1995, eff. December 1, 1995]	

Committee Notes
Rule 49
May 10, 2000

COMMITTEE NOTE

The language of Rule 49 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules.

Rule 49(c) has been amended to reflect changes in the Civil Rules of Procedure which permit (but do not require) a court to provide notice of its orders and judgments through electronic means. *See* Federal Rules of Civil Procedure 5(b) and 77(d). As amended, Rule 49(c) now parallels a similar extant provision in Rule 49(b), regarding service of papers.

Rule 50. Calendars; Plan for Prompt Disposition	Rule 50. Prompt Disposition
(a) Calendars. The district courts may provide for placing criminal proceedings upon appropriate calendars. Preference shall be given to criminal proceedings as far as practicable. **(b) Plans for Achieving Prompt Disposition of Criminal Cases.** To minimize undue delay and to further the prompt disposition of criminal cases, each district court shall conduct a continuing study of the administration of criminal justice in the district court and before United States magistrate judges of the district and shall prepare plans for the prompt disposition of criminal cases in accordance with the provisions of Chapter 208 of Title 18, United States Code.	Scheduling preference must be given to criminal proceedings as far as practicable.

Committee Notes
Rule 50
May 10, 2000

COMMITTEE NOTE

The language of Rule 50 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The first sentence in current Rule 50(a), which says that a court may place criminal proceedings on a calendar, has been deleted. The Committee believed that the sentence simply stated a truism and was no longer necessary.

Current Rule 50(b), which simply mirrors 18 U.S.C. § 3165, has been deleted in its entirety. The rule was added in 1971 to meet congressional concerns in pending legislation about deadlines in criminal cases. Provisions governing deadlines were later enacted by Congress and protections were provided in the Speedy Trial Act. The Committee concluded that in light of those enactments, Rule 50(b) was no longer necessary.

Rule 51. Exceptions Unnecessary.	Rule 51. Preserving Claimed Error
Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which that party desires the court to take or that party's objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does thereafter prejudice that party.	**(a) Exceptions Unnecessary.** Exceptions to rulings or orders of the court are unnecessary. **(b) Preserving a Claim of Error.** A party may preserve a claim of error by informing the court — when the court ruling or order is made or sought — of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

Committee Notes
Rule 51
May 10, 2000

COMMITTEE NOTE

The language of Rule 51 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The Rule includes a new sentence that explicitly states that any rulings regarding evidence are governed by Federal Rule of Evidence 103. The sentence was added because of concerns about the Supersession Clause, 28 U.S.C. § 2072(b), of the Rules Enabling Act, and the possibility that an argument might have been made that Congressional approval of this rule would supersede that Rule of Evidence.

Rule 52. Harmless Error and Plain Error	Rule 52. Harmless and Plain Error
(a) Harmless Error. Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.	**(a) Harmless Error.** Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.	**(b) Plain Error.** A plain error or defect that affects substantial rights may be considered even though it was not brought to the court's attention.

Committee Notes
Rule 52
May 10, 2000

COMMITTEE NOTE

The language of Rule 52 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 53. Regulation of Conduct in the Court Room.	Rule 53. Courtroom Photographing and Broadcasting Prohibited
The taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court.	Except as otherwise provided by statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.

Committee Notes
Rule 53
May 10, 2000

COMMITTEE NOTE

The language of Rule 53 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Although the word "radio" has been deleted from the rule, the Committee does not believe that the amendment is a substantive change but rather one that accords with judicial interpretation applying the current rule to other forms of broadcasting and functionally equivalent means. *See, e.g., United States v. Hastings*, 695 F.2d 1278, 1279, n. 5 (11th Cir. 1983) (television proceedings prohibited); *United States v. McVeigh*, 931 F. Supp. 753 (D. Colo. 1996) (release of tape recordings of proceedings prohibited). Given modern technology capabilities, the Committee believed that a more generalized reference to "broadcasting" is appropriate.

Also, although the revised rule does not explicitly recognize exceptions within the rules themselves, the restyled rule recognizes that other rules might permit, for example, video teleconferencing, which clearly involves "broadcasting" of the proceedings, even if only for limited purposes.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. That separate publication includes substantive amendments to Rules 5 and 10 that would permit video teleconferencing of initial appearances and arraignments and would thus impact on Rule 53.

Rule 54. Application and Exception	Rule 54. (Reserved)[1]
(a) Courts. These rules apply to all criminal proceedings in the United States District Courts; in the District Court of Guam; in the District Court for the Northern Mariana Islands, except as otherwise provided in articles IV and V of the covenant provided by the Act of March 24, 1976 (90 Stat. 263); and in the District Court of the Virgin Islands; in the United States Courts of Appeals; and in the Supreme Court of the United States; except that the prosecution of offenses in the District Court of the Virgin Islands shall be by indictment or information as otherwise provided by law.	
(b) Proceedings. **(1) Removed Proceedings.** These rules apply to criminal prosecutions removed to the United States district courts from state courts and govern all procedure after removal, except that dismissal by the attorney for the prosecution shall be governed by state law. **(2) Offenses Outside a District or State.** These rules apply to proceedings for offenses committed upon the high seas or elsewhere out of the jurisdiction of any particular state or district, except that such proceedings may be had in any district authorized by 18 U.S.C. § 3238. **(3) Peace Bonds.** These rules do not alter the power of judges of the United States or of United States magistrate judges to hold security of the peace and for good behavior under Revised Statutes, § 4069, 50 U.S.C. § 23, but in such cases the procedure shall conform to these rules so far as they are applicable. **(4) Proceedings Before United States Magistrate Judges.** Proceedings involving misdemeanors and other petty offenses are governed by Rule 58. **(5) Other Proceedings.** These rules are not applicable to extradition and rendition of fugitives; civil forfeiture of property for violation of a statute of the United States; or the collection of fines and penalties. Except as provided in Rule 20(d) they do not apply to proceedings under 18 U.S.C. Chapter 403 — Juvenile Delinquency — so far as they are inconsistent with that chapter. They do not apply to summary trials for offenses against the navigation laws under Revised Statutes §§ 4300-4305, 33 U.S.C. §§ 391-396, or to proceedings involving disputes between seamen under Revised Statutes §§ 4079-4081, as amended, 22 U.S.C. §§ 256-258, or to proceedings for fishery offenses under the Act of June 28, 1937, c. 392, 50 Stat. 325-327, 16 U.S.C. §§ 772-772i, or to proceedings against a witness in a foreign country under 28 U.S.C. § 1784.	

[1] All of Rule 54 was moved to Rule 1.

(c) Application of Terms. As used in these rules the following terms have the designated meanings. "Act of Congress" includes any act of Congress locally applicable to and in force in the District of Columbia, in Puerto Rico, in a territory or in any insular possession. "Attorney for the government" means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney, when applicable to cases arising under the laws of Guam the Attorney General of Guam or such other person or persons as may be authorized by the laws of Guam to act therein, and when applicable to cases arising under the laws of the Northern Mariana Islands the Attorney General of the Northern Mariana Islands or any other person or persons as may be authorized by the laws of the Northern Marianas to act therein. "Civil action" refers to a civil action in a district court. The words "demurrer," "motion to quash," "plea in abatement," "plea in bar" and "special plea in bar," or words to the same effect, in any act of Congress shall be construed to mean the motion raising a defense or objection provided in Rule 12. "District court" includes all district courts named in subdivision (a) of this rule. "Federal magistrate judge" means a United States magistrate judge as defined in 28 U.S.C. §§ 631-639, a judge of the United States or another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates. "Judge of the United States" includes a judge of the district court, court of appeals, or the Supreme Court. "Law" includes statutes and judicial decisions.	

"Magistrate judge" includes a United States magistrate judge as defined in 28 U.S.C. §§ 631-639, a judge of the United States, another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates, and a state or local judicial officer, authorized by 18 U.S.C. § 3041 to perform the functions prescribed by Rules 3, 4, and 5. "Oath" includes affirmations. "Petty offense" is defined in 18 U.S.C. § 19. "State" includes District of Columbia, Puerto Rico, territory and insular possession. "United States magistrate judge" means the officer authorized by 28 U.S.C. §§ 631-639.	

Committee Notes
Rule 54
May 10, 2000

COMMITTEE NOTE

Certain provisions in current Rule 54 have been moved to revised Rule 1 as part of a general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. Other provisions in Rule 54 have been deleted as being unnecessary.

Rule 55. Records	Rule 55. Records
The clerk of the district court and each United States magistrate judge shall keep records in criminal proceedings in such form as the Director of the Administrative Office of the United States Courts may prescribe. The clerk shall enter in the records each order or judgment of the court and the date such entry is made.	The clerk of the district court must keep records of criminal proceedings in the form prescribed by the Director of the Administrative Office of the United States Courts. The clerk must enter in the records every court order or judgment and the date of entry.

Committee Notes
Rule 55
May 10, 2000

COMMITTEE NOTE

The language of Rule 55 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 56. Courts and Clerks	Rule 56. When Court Is Open
The district court shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a court may provide by local rule or order that its clerk's office shall be open for specified hours on Saturdays or particular legal holidays other than New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day.	**(a) In General.** A district court is considered always open for any filing, and for issuing and returning process, making a motion, or entering an order. **(b) Office Hours.** The clerk's office — with the clerk or a deputy in attendance — must be open during business hours on all days except Saturdays, Sundays, and legal holidays. **(c) Special Hours.** A court may provide by local rule or order that its clerk's office will be open for specified hours on Saturdays or legal holidays other than New Year's Day, Martin Luther King, Jr.'s Birthday, Presidents' Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

Committee Notes
Rule 56
May 10, 2000

COMMITTEE NOTE

The language of Rule 56 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

In Rule 56(c) the term "Presidents' Day" is used in lieu of the term, "Washington's Birthday." Although the latter term is used in the statute, the former reflects the prevalent modern usage and is the term used in the recently restyled Federal Rules of Appellate Procedure. *See also* Rule 45(a).

Rule 57. Rules by District Courts	Rule 57. District Court Rules
(a) In General **(1)** Each district court acting by a majority of its district judges may, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice. A local rule shall be consistent with — but not duplicative of — Acts of Congress and rules adopted under 28 U.S.C. § 2072 and shall conform to any uniform numbering system prescribed by the Judicial Conference of the United States. **(2)** A local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of nonwillful failure to comply with the requirement.	**(a) In General.** **(1)** Each district court acting by a majority of its district judges may, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice. A local rule must be consistent with — but not duplicative of — federal statutes and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. **(2)** A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of an unintentional failure to comply with the requirement.
(b) Procedure When There Is No Controlling Law. A judge may regulate practice in any manner consistent with federal law, these rules, and local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.	**(b) Procedure When There Is No Controlling Law.** A judge may regulate practice in any manner consistent with federal law, these rules, and the local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator was furnished with actual notice of the requirement before the noncompliance.
(c) Effective Date and Notice. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of the rules and amendments so made by any district court shall upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts and shall be made available to the public.	**(c) Effective Date and Notice.** A local rule adopted under this Rule takes effect on the date specified by the district court and remains in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of local rules and their amendments, when promulgated, must be furnished to the judicial council and the Administrative Office of the United States Courts and must be made available to the public.

Committee Notes
Rule 57
May 10, 2000

COMMITTEE NOTE

The language of Rule 57 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 58. Procedure for Misdemeanors and Other Petty Offenses	Rule 58. Petty Offenses and Other Misdemeanors
(a) Scope. **(1) In General.** This rule governs the procedure and practice for the conduct of proceedings involving misdemeanors and other petty offenses, and for appeals to district judges in such cases tried by United States magistrate judges. **(2) Applicability of Other Federal Rules of Criminal Procedure.** In proceedings concerning petty offenses for which no sentence of imprisonment will be imposed the court may follow such provisions of these rules as it deems appropriate, to the extent not inconsistent with this rule. In all other proceedings the other rules govern except as specifically provided in this rule. **(3) Definition.** The term "petty offenses for which no sentence of imprisonment will be imposed" as used in this rule, means any petty offenses as defined in 18 U.S.C. § 19 as to which the court determines, that, in the event of conviction, no sentence of imprisonment will actually be imposed.	**(a) Scope.** **(1)** ***In General.*** These rules apply in petty offense and other misdemeanor cases and on appeal to a district judge in a case tried by a magistrate judge, unless this rule provides otherwise. **(2)** ***Petty Offense Case Without Imprisonment.*** In a case involving a petty offense for which no sentence of imprisonment will be imposed, the court may follow any provision of these rules that is not inconsistent with this rule and that the court considers appropriate. **(3)** ***Definition.*** As used in this rule, the term "petty offense for which no sentence of imprisonment will be imposed" means a petty offense for which the court determines that, in the event of conviction, no sentence of imprisonment will be imposed.
(b) Pretrial Procedures. **(1) Trial Document.** The trial of a misdemeanor may proceed on an indictment, information, or complaint or, in the case of a petty offense, on a citation or violation notice.	**(b) Pretrial Procedure.** **(1)** ***Charging Document.*** The trial of a misdemeanor may proceed on an indictment, information, or complaint. The trial of a petty offense may also proceed on a citation or violation notice.

(2) Initial Appearance. At the defendant's initial appearance on a misdemeanor or other petty offense charge, the court shall inform the defendant of: **(A)** the charge, and the maximum possible penalties provided by law, including payment of a special assessment under 18 U.S.C. § 3013, and restitution under 18 U.S.C. § 3663; **(B)** the right to retain counsel; **(C)** the right to request the appointment of counsel if the defendant is unable to retain counsel, unless the charge is a petty offense for which an appointment of counsel is not required; **(D)** the right to remain silent and that any statement made by the defendant may be used against the defendant; **(E)** the right to trial, judgment, and sentencing before a district judge, unless: (i) the charge is a Class B misdemeanor motor-vehicle offense, a Class C misdemeanor, or an infraction; or (ii) the defendant consents to trial, judgment, and sentencing before the magistrate judge; **(F)** the right to trial by jury before either a United States magistrate judge or a district judge, unless the charge is a petty offense; and **(G)** the right to a preliminary examination in accordance with 18 U.S.C. § 3060, and the general circumstances under which the defendant may secure pretrial release, if the defendant is held in custody and charged with a misdemeanor other than a petty offense.	(2) ***Initial Appearance.*** At the defendant's initial appearance on a petty offense or other misdemeanor charge, the magistrate judge must inform the defendant of the following: (A) the charge, and the minimum and maximum penalties, including special assessment under 18 U.S.C. § 3013 and restitution under 18 U.S.C. § 3556; (B) the right to retain counsel; (C) the right to request the appointment of counsel if the defendant is unable to retain counsel — unless the charge is a petty offense for which the appointment of counsel is not required; (D) the right to remain silent and that the prosecution may use against the defendant any statement that the defendant makes; (E) the right to trial, judgment, and sentencing before a district judge — unless: (i) the charge is a Class B misdemeanor motor-vehicle offense, a Class C misdemeanor, or an infraction; or (ii) the defendant consents to trial, judgment, and sentencing before a magistrate judge; (F) the right to a jury trial before either a magistrate judge or a district judge — unless the charge is a petty offense; and (G) if the defendant is held in custody and charged with a misdemeanor other than a petty offense, the right to a preliminary hearing under Rule 5.1, and the general circumstances, if any, under which the defendant may secure pretrial release.

(3) Consent and Arraignment. **(A) Plea Before a United States Magistrate Judge.** A magistrate judge shall take the defendant's plea in a Class B misdemeanor charging a motor vehicle-offense, a class C misdemeanor, or an infraction. In every other misdemeanor case, a magistrate judge may take the plea only if the defendant consents either in writing or orally on the record to be tried before the magistrate judge and specifically waives trial before a district judge. The defendant may plead not guilty, guilty, or with the consent of the magistrate judge, nolo contendere. **(B) Failure to Consent.** In a misdemeanor case — other than a Class B misdemeanor charging a motor-vehicle offense, a Class C misdemeanor, or an infraction — magistrate judge shall order the defendant to appear before a district judge for further proceedings on notice, unless the defendant consents to the trial before the magistrate judge.	(3) ***Arraignment.*** (A) *Plea Before a Magistrate Judge.* A magistrate judge may take the defendant's plea in a Class B misdemeanor charging a motor vehicle-offense, a class C misdemeanor, or an infraction. In every other misdemeanor case, a magistrate judge may take the plea only if the defendant consents either in writing or on the record to be tried before a magistrate judge and specifically waives trial before a district judge. The defendant may plead not guilty, guilty, or with the consent of the magistrate judge, nolo contendere. (B) *Failure to Consent.* Except for a Class B misdemeanor charging a motor-vehicle offense, a Class C misdemeanor, or an infraction, the magistrate judge must order a defendant who does not consent to trial before a magistrate judge to appear before a district judge for further proceedings.
(c) Additional Procedures Applicable Only to Petty Offenses for Which No Sentence of Imprisonment Will be Imposed. With respect to petty offenses for which no sentence of imprisonment will be imposed, the following additional procedures are applicable: **(1) Plea of Guilty or Nolo Contendere.** No plea of guilty or nolo contendere shall be accepted unless the court is satisfied that the defendant understands the nature of the charge and the maximum possible penalties provided by law. **(2) Waiver of Venue for Plea and Sentence.** A defendant who is arrested, held, or present in a district other than that in which the indictment, information, complaint, citation, or violation notice is pending against that defendant may state in writing a wish to plead guilty or nolo contendere, to waive venue and trial in the district in which the proceeding is pending, and to consent to disposition of the case in the district in which that defendant was arrested, is held, or is present. Unless the defendant thereafter pleads not guilty, the prosecution shall be had as if venue were in such district, and notice of same shall be given to the magistrate judge in the district where the proceeding was originally commenced. The defendant's statement of a desire to plead guilty or nolo contendere is not admissible against the defendant.	**(c) Additional Procedures in Certain Petty Offense Cases.** The following procedures also apply in cases involving a petty offense for which no sentence of imprisonment will be imposed: **(1) *Guilty or Nolo Contendere Plea.*** The court must not accept a guilty or nolo contendere plea unless satisfied that the defendant understands the nature of the charge and the maximum possible penalty. **(2) *Waiving Venue.*** (A) *Conditions of Waiving Venue.* If a defendant is arrested, held, or present in a district different from the one where the indictment, information, complaint, citation, or violation notice is pending, the defendant may state in writing a desire to plead guilty or nolo contendere, to waive venue and trial in the district where the proceeding is pending, and to consent to the court's disposing of the case in the district where the defendant was arrested, is held, or is present.
	(B) *Effect of Waiving Venue.* Unless the defendant later pleads not guilty, the prosecution will proceed in the district where the defendant was arrested, is held, or is present. The district clerk must notify the clerk in the original district of the defendant's waiver of venue. The defendant's statement of a desire to plead guilty or nolo contendere is not admissible against the defendant.

(3) Sentence. The court shall afford the defendant an opportunity to be heard in mitigation. The court shall then immediately proceed to sentence the defendant, except that in the discretion of the court, sentencing may be continued to allow an investigation by the probation service or submission of additional information by either party. **(4) Notification of Right to Appeal.** After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal including any right to appeal the sentence. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere, except the court shall advise the defendant of any right to appeal the sentence.	**(3)** ***Sentencing.*** The court must give the defendant an opportunity to be heard in mitigation and then proceed immediately to sentencing. The court may, however, postpone sentencing to allow the probation service to investigate or to permit either party to submit additional information. **(4)** ***Notice of a Right to Appeal.*** After imposing sentence in a case tried on a not-guilty plea, the court must advise the defendant of a right to appeal the conviction and of any right to appeal the sentence. If the defendant was convicted on a plea of guilty or nolo contendere, the court must advise the defendant of any right to appeal the sentence.
(d) Securing the Defendant's Appearance; Payment in Lieu of Appearance. **(1) Forfeiture of Collateral.** When authorized by local rules of the district court, payment of a fixed sum may be accepted in suitable cases in lieu of appearance and as authorizing termination of the proceedings. Local rules may make provision for increases in fixed sums not to exceed the maximum fine which could be imposed. **(2) Notice to Appear.** If a defendant fails to pay a fixed sum, request a hearing, or appear in response to a citation or violation notice, the clerk or a magistrate judge may issue a notice for the defendant to appear before the court on a date certain. The notice may also afford the defendant an additional opportunity to pay a fixed sum in lieu of appearance, and shall be served upon the defendant by mailing a copy to the defendant's last known address. **(3) Summons or Warrant.** Upon an indictment or a showing by one of the other documents specified in subdivision (b)(1) of probable cause to believe that an offense has been committed and that the defendant has committed it, the court may issue an arrest warrant or, if no warrant is requested by the attorney for the prosecution, a summons. The showing of probable cause shall be made in writing upon oath or under penalty of perjury, but the affiant need not appear before the court. If the defendant fails to appear before the court in response to a summons, the court may summarily issue a warrant for the defendant's immediate arrest and appearance before the court.	**(d) Paying a Fixed Sum in Lieu of Appearance.** **(1)** ***In General.*** If the court has a local rule governing forfeiture of collateral, the court may accept a fixed-sum payment in lieu of the defendant's appearance and end the case, but the fixed sum may not exceed the maximum fine allowed by law. **(2)** ***Notice to Appear.*** If the defendant fails to pay a fixed sum, request a hearing, or appear in response to a citation or violation notice, the district clerk or a magistrate judge may issue a notice for the defendant to appear before the court on a date certain. The notice may give the defendant an additional opportunity to pay a fixed sum in lieu of appearance. The district clerk must serve the notice on the defendant by mailing a copy to the defendant's last known address. **(3)** ***Summons or Warrant.*** Upon an indictment, or upon a showing by one of the other charging documents specified in Rule 58(b)(1) of probable cause to believe that an offense has been committed and that the defendant has committed it, the court may issue an arrest warrant or, if no warrant is requested by the attorney for the government, a summons. The showing of probable cause must be made under oath or under penalty of perjury, but the affiant need not appear before the court. If the defendant fails to appear before the court in response to a summons, the court may summarily issue a warrant for the defendant's arrest.
(e) Record. Proceedings under this rule shall be taken down by a reporter or recorded by suitable sound equipment.	**(e) Record.** The court must record any proceedings under this rule by using a court reporter or suitable recording device.
(f) New Trial. The provisions of Rule 33 shall apply.	**(f) New Trial.** Rule 33 applies to a motion for a new trial.

(g) Appeal.	**(g) Appeal.**
(1) Decision, Order, Judgment or Sentence by a District Judge. An appeal from a decision, order, judgment or conviction or sentence by a district judge shall be taken in accordance with the Federal Rules of Appellate Procedure.	**(1)** ***From a District Judge's Order or Judgment.*** The Federal Rules of Appellate Procedure govern an appeal from a district judge's order or a judgment of conviction and sentence.
(2) Decision, Order, Judgment or Sentence by a United States Magistrate Judge.	**(2)** ***From a Magistrate Judge's Order or Judgment.***
(A) Interlocutory Appeal. A decision or order by a magistrate judge which, if made by a district judge, could be appealed by the government or defendant under any provision of law, shall be subject to an appeal to a district judge provided such appeal is taken within 10 days of the entry of the decision or order. An appeal shall be taken by filing with the clerk of court a statement specifying the decision or order from which an appeal is taken and by serving a copy of the statement upon the adverse party, personally or by mail, and by filing a copy with the magistrate judge.	(A) *Interlocutory Appeal.* Either party may appeal an order of a magistrate judge to a district judge within 10 days of its entry if a district judge's order could similarly be appealed. The party appealing must file a notice with the clerk specifying the order being appealed and serve a copy on the adverse party.
(B) Appeal from Conviction or Sentence. An appeal from a judgment of conviction or sentence by a magistrate judge to a district judge shall be taken within 10 days after entry of judgment. An appeal shall be taken by filing with the clerk of the court a statement specifying the judgment from which an appeal is taken, and by serving a copy of the statement upon the United States Attorney, personally or by mail, and by filing a copy with the magistrate judge.	(B) *Appeal from a Conviction or Sentence.* A defendant may appeal a magistrate judge's judgment of conviction or sentence to a district judge within 10 days of its entry. To appeal, the defendant must file a notice with the clerk specifying the judgment being appealed and serve a copy on the attorney for the government.
(C) Record. The record shall consist of the original papers and exhibits in the case together with any transcript, tape, or other recording of the proceedings and a certified copy of the docket entries which shall be transmitted promptly to the clerk of court. For purposes of the appeal, a copy of the record of such proceedings shall be made available at the expense of the United States to a person who establishes by affidavit the inability to pay or give security therefor, and the expense of such copy shall be paid by the Director of the Administrative Office of the United States Courts.	(C) *Record.* The record consists of the original papers and exhibits in the case; any transcript, tape, or other recording of the proceedings; and a certified copy of the docket entries. For purposes of the appeal, a copy of the record of the proceedings must be made available to a defendant who establishes by affidavit an inability to pay or give security for the record. The Director of the Administrative Office of the United States Courts must pay for those copies.
(D) Scope of Appeal. The defendant shall not be entitled to a trial de novo by a district judge. The scope of appeal shall be the same as an appeal from a judgment of a district court to a court of appeals.	(D) *Scope of Appeal.* The defendant is not entitled to a trial de novo by a district judge. The scope of the appeal is the same as in an appeal to the court of appeals from a judgment entered by a district judge.
(3) Stay of Execution; Release Pending Appeal. The provisions of Rule 38 relating to stay of execution shall be applicable to a judgment of conviction or sentence. The defendant may be released pending an appeal in accordance with the provisions of law relating to release pending appeal from a judgment of a district court to a court of appeals.	**(3)** ***Stay of Execution and Release Pending Appeal.*** Rule 38 applies to a stay of a judgment of conviction or sentence. The court may release the defendant pending appeal under the law relating to release pending appeal from a district court to a court of appeals.

Committee Notes
Rule 58
May 10, 2000

COMMITTEE NOTE

The language of Rule 58 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The title of the rule has been changed to "Petty Offenses and Other Misdemeanors." In Rule 58(c)(2)(B) (regarding waiver of venue), the Committee amended the rule to require that the "district clerk," instead of the magistrate judge, inform the original district clerk if the defendant waives venue and the prosecution proceeds in the district where the defendant was arrested. The Committee intends no change in practice.

In Rule 58(g)(1) and (g)(2)(A), the Committee deleted as unnecessary the word "decision" because its meaning is covered by existing references to an "order, judgment, or sentence" by a district judge or magistrate judge. In the Committee's view, deletion of that term does not amount to a substantive change.

Rule 59. Effective Date	Rule 59. Effective Date
These rules take effect on the day which is 3 months subsequent to the adjournment of the first regular session of the 79th Congress, but if that day is prior to September 1, 1945, then they take effect on September 1, 1945. They govern all criminal proceedings thereafter commenced and so far as just and practicable all proceedings then pending.	[Abrogated.]

Committee Notes
Rule 59
May 10, 2000

COMMITTEE NOTE

Rule 59, which dealt with the effective date of the Federal Rules of Criminal Procedure, is no longer necessary and has been abrogated.

Rule 60. Title	Rule 60. Title[2]
These rules may be known and cited as the Federal Rules of Criminal Procedure.	

[2] This was moved to Rule 1(b).

Committee Notes
Rule 60
May 10, 2000

COMMITTEE NOTE

The language of Rule 60, which reflected the title of the Federal Rules of Criminal Procedure, has been deleted as being unnecessary.

Item 8B

APPENDIX B

SUBSTANTIVE PACKAGE
RULES 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41 & 43

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

~~**Rule 5. Initial Appearance Before the Magistrate Judge**~~

~~**(a) In General.** Except as otherwise provided in this rule, an officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate judge or, if a federal magistrate judge is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. If a person arrested without a warrant is brought before a magistrate judge, a complaint, satisfying the probable cause requirements of Rule 4(a), shall be promptly filed. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate judge, the magistrate judge shall proceed in accordance with the applicable subdivisions of~~

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

~~this rule. An officer making an arrest under a warrant issued upon a complaint charging solely a violation of 18 U.S.C. § 1073 need not comply with this rule if the person arrested is transferred without unnecessary delay to the custody of appropriate state or local authorities in the district of arrest and an attorney for the government moves promptly, in the district in which the warrant was issued, to dismiss the complaint.~~

~~**(b) Misdemeanors and Other Petty Offenses.** If the charge against the defendant is a misdemeanor or other petty offense triable by a United States magistrate judge under 18 U.S.C. § 3401, the magistrate judge shall proceed in accordance with Rule 58.~~

~~**(c) Offenses Not Triable by the United States Magistrate Judge.** If the charge against the defendant is not triable by the United States magistrate judge, the defendant shall not be called upon to plead. The magistrate judge shall inform~~

~~the defendant of the complaint against the defendant and of any affidavit filed therewith, of the defendant's right to retain counsel or to request the assignment of counsel if the defendant is unable to obtain counsel, and of the general circumstances under which the defendant may secure pretrial release. The magistrate judge shall inform the defendant that the defendant is not required to make a statement and that any statement made by the defendant may be used against the defendant. The magistrate judge shall also inform the defendant of the right to a preliminary examination. The magistrate judge shall allow the defendant reasonable time and opportunity to consult counsel and shall detain or conditionally release the defendant as provided by statute or in these rules. A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district~~

~~court. If the defendant waives preliminary examination, the magistrate judge shall forthwith hold the defendant to answer in the district court. If the defendant does not waive the preliminary examination, the magistrate judge shall schedule a preliminary examination. Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if the defendant is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination. With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times by~~

~~a federal magistrate judge. In the absence of such consent by the defendant, time limits may be extended by a judge of the United States only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.~~

Rule 5. Initial Appearance

(a) In General.

(1) ***Appearance Upon Arrest.***

(A) A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge, or before a state or local judicial officer as Rule 5(c) provides.

(B) A person making an arrest outside the United States must take the defendant without unnecessary delay before a magistrate judge.

(2) ***Exceptions.***

(A) An officer making an arrest under a warrant issued upon a complaint charging solely a violation of 18 U.S.C. § 1073 need not comply with this rule if:

(i) the person arrested is transferred without unnecessary delay to the custody of appropriate state or local authorities in the district of arrest; and

(ii) an attorney for the government moves promptly, in the district where the warrant was issued, to dismiss the complaint.

(B) If a defendant is arrested for a violation of probation or supervised release, Rule 32.1 applies.

(C) If a defendant is arrested for failing to appear in another district, Rule 40 applies.

(3) ***Appearance Upon a Summons.*** When a defendant appears in response to a summons under Rule 4, a magistrate judge must proceed under Rule 5(d) or (e), as applicable.

(b) **Complaint Required.** If a defendant is arrested without a warrant, a complaint meeting Rule 4(a)'s requirement of probable cause must be promptly filed in the district where the offense was allegedly committed.

(c) **Initial Appearance; Transfer to Another District.**

(1) ***Arrest in the District Where the Offense Was Allegedly Committed.*** If the defendant is arrested in the district where the offense was allegedly committed:

(A) the initial appearance must be in that district; and

(B) if a magistrate judge is not reasonably available, the initial appearance may be before a state or local judicial officer.

(2) ***Arrest in District Other Than the District Where the Offense Was Allegedly Committed.*** If the defendant is arrested in a district other than where the offense was allegedly committed, the following procedures apply:

(A) the initial appearance must be in that district, or in an adjacent district if the appearance can occur more promptly there;

(B) the judge must inform the defendant of the provisions of Rule 20;

(C) if the defendant was arrested without a warrant, the district court where the prosecution is pending must first issue a

warrant before the magistrate judge transfers the defendant to that district;

(D) the judge must conduct a preliminary hearing as required under Rule 5.1 or Rule 58(b)(2)(G);

(E) the judge must transfer the defendant to the district where the prosecution is pending if:

(i) the government produces the warrant, a certified copy of the warrant, a facsimile of either, or other appropriate form of either; and

(ii) the judge finds that the defendant is the same person named in the indictment, information, or warrant; and

(F) when a defendant is transferred or discharged, the court must promptly transmit the papers and any

bail to the clerk in the district where the prosecution is pending.

(d) Procedure in a Felony Case.

(1) ***Advice.*** If the offense charged is a felony, the judge must inform the defendant of the following:

(A) the complaint against the defendant, and any affidavit filed with it;

(B) the defendant's right to retain counsel or to request that counsel be appointed if the defendant cannot obtain counsel;

(C) the circumstances, if any, under which the defendant may secure pretrial release;

(D) any right to a preliminary hearing; and

(E) the defendant's right not to make a statement, and that any statement made may be used against the defendant.

(2) ***Consultation with Counsel.*** The judge must allow the defendant reasonable opportunity to consult with counsel.

(3) ***Detention or Release.*** The judge must detain or release the defendant as provided by statute or these rules.

(4) ***Plea.*** A defendant may be asked to plead only under Rule 10.

(e) **Procedure in a Misdemeanor Case.** If the defendant is charged with a misdemeanor only, the judge must inform the defendant in accordance with Rule 58(b)(2).

(f) **Video Teleconferencing.** Video teleconferencing may be used to conduct an appearance under this rule if the defendant waives the right to be present.

[ALTERNATIVE VERSION]

(f) **Video Teleconferencing.** Video teleconferencing may be used to conduct an appearance under this rule.

Rule 5
Substantive Change Package
May 10, 2000

COMMITTEE NOTE

The language of Rule 5 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic, except as noted below.

Rule 5 has been completely revised to more clearly set out the procedures for initial appearances and to recognize that such appearances may be required at various stages of a criminal proceeding, for example, where a defendant has been arrested for violating the terms of probation.

Rule 5(a), which governs initial appearances by an arrested defendant before a magistrate judge, includes several changes. The first is a clarifying change; revised Rule 5(a)(1) provides that a person making the arrest must bring the defendant "without unnecessary delay" before a magistrate judge, instead of the current reference to "nearest available" magistrate. This language parallels changes in Rule 4 and reflects the view that time is of the essence. The Committee intends no change in practice. In using the term, the Committee recognizes that on occasion there may be necessary delay in presenting the defendant, for example, due to weather conditions or other natural causes. A second change is non-stylistic, and reflects the stated preference (as in other provisions throughout the rules) that the defendant be brought before a federal judicial officer. Only if a magistrate judge is not available should the defendant be taken before a state or local officer.

The third sentence in current Rule 5(a), which states that a magistrate judge must proceed in accordance with the rule where a defendant is arrested without a warrant or given a summons, has been deleted because it is unnecessary.

Rule 5(a)(1)(B) codifies the caselaw reflecting that the right to an initial appearance applies not only when a person is arrested within the United States but also when the an arrest occurs outside the United States. *See, e.g.*, *United States v. Purvis*, 768 F.2d 1237 (11th Cir. 1985); *United States v. Yunis*, 859 F.2d 953 (D.C. Cir. 1988). In these circumstances, the Committee believes—and the rule so provides—that the initial appearance should be before a federal magistrate judge rather than a state or local judicial officer.

Rule 5(a)(2)(A) consists of language currently located in Rule 5, that addresses the procedure to be followed where a defendant has been arrested under a warrant issued on a complaint charging solely a violation of 18 U.S.C. § 1073 (unlawful flight to avoid prosecution). Rule 5(a)(2)(B) and 5(a)(2)(C) are new provisions. They are intended to make it clear that when a defendant is arrested for a violating probation or supervised release, or

for failing to appear in another district, Rules 32.1 and 40 apply. No change in practice is intended.

Rule 5(a)(3) is new and fills a perceived gap in the rules. It recognizes that a defendant may be subjected to an initial appearance under this rule if a summons was issued under Rule 4, instead of an arrest warrant. If the defendant is appearing pursuant to a summons in a felony case, Rule 5(d) applies and if the defendant is appearing in a misdemeanor case, Rule 5(e) applies.

Rule 5(b) carries forward the requirement in former Rule 5(a) that if the defendant is arrested without a warrant, a complaint must be promptly filed.

Rule 5(c) is a new provision and sets out where an initial appearance is to take place. If the defendant is arrested in the district where the offense was allegedly committed, under Rule 5(c)(1), the defendant must be taken to a magistrate in that district. If no magistrate is reasonably available, a state or local judicial officer may conduct the initial appearance. On the other hand, if the defendant is arrested in a district other than the district where the offense was allegedly committed, Rule 5(c)(2) governs. In those instances, the defendant must be taken to a magistrate within the district of arrest, unless the appearance can take place more promptly in an adjacent distinct. The Committee recognized that in some cases, the nearest magistrate may actually be across a district's lines. The remainder of Rule 5(c)(2) includes material formerly located in Rule 40.

Rule 5(d), derived from current Rule 5(c), has been retitled to more clearly reflect the subject of that subdivision, the procedure to be used if the defendant is charged with a felony. Rule 5(d)(4) has been added to make clear that a defendant may only be called upon to enter a plea under the provisions of Rule 10. That language is intended to reflect and reaffirm current practice.

The remaining portions of current Rule 5(c) have been moved to Rule 5.1, which deals with preliminary hearings in felony cases.

[**Alternate Version for Video Teleconferencing—Defendant's Consent Required.** The major substantive change is in new Rule 5(e), which permits video teleconferencing for an appearance under this rule, if the defendant consents. This change reflects the growing practice among state courts to use video teleconferencing to conduct initial proceedings. A similar amendment has been made to Rule 10 concerning arraignments. In amending Rules 5, 10, and 43 (which generally requires the defendant's presence at all proceedings), the Committee was very much aware of the argument that permitting a defendant to appear by video teleconferencing might be considered an erosion of an important element of the judicial process. The Committee nonetheless believed that in appropriate circumstances the court, and the defendant, should have the option of using video teleconferencing, as long as the defendant consents to that procedure. The question of when it would be appropriate for a defendant to consent is not spelled out in the rule. That is left to the defendant and the

court in each case. Nor does the rule specify any particular technical requirements regarding the system to be used.

[**Alternate Version for Video Teleconferencing —Defendant's Consent Not Required:** The major substantive change is in new Rule 5(e), which permits video teleconferencing for an appearance under this rule, even if the defendant does not consent. This change reflects the growing practice among state courts to use video teleconferencing to conduct initial proceedings. A similar amendment has been made to Rule 10 concerning arraignments. In amending Rules 5, 10, and 43 (which generally requires the defendant's presence at all proceedings), the Committee was very much aware of the argument that permitting a defendant to appear by video teleconferencing might be considered an erosion of an important element of the judicial process. The Committee nonetheless believed that in appropriate circumstances the court should have the option of using video teleconferencing, even if the defendant does not consent to that procedure. The question of when it would be appropriate to do so is not spelled out in the rule. That is left to the court in each case. Nor does the rule specify any particular technical requirements regarding the system to be used.]

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 5 is one of those rules. In revising Rule 5, the Committee decided to also propose a substantive change that would permit video teleconferencing of initial appearances. Another version of Rule 5, which does not include proposed Rule 5(f) is being published simultaneously in a separate pamphlet. The version published here, in turn, includes two alternatives for conducting video teleconferences. One version requires that the defendant consent to the procedure. The other version does not require a defendant's consent. The Committee decided to publish alternate versions to obtain a wider range of public comments on the proposal, and in recognition of the view of some that if the defendant is required to consent, video teleconferencing will rarely be used and its benefits largely unrealized.

~~**Rule 5.1. Preliminary Examination.**~~

~~**(a) Probable Cause Finding.** If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the federal magistrate judge shall forthwith hold the defendant to answer in district court. The finding of probable cause may be based upon hearsay evidence in whole or in part. The defendant may cross-examine adverse witnesses and may introduce evidence. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12.~~

~~**(b) Discharge of Defendant.** If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the defendant committed it, the federal magistrate judge shall dismiss the complaint~~

~~and discharge the defendant. The discharge of the defendant shall not preclude the government from instituting a subsequent prosecution for the same offense.~~

~~**(c) Records.** After concluding the proceeding the federal magistrate judge shall transmit forthwith to the clerk of the district court all papers in the proceeding. The magistrate judge shall promptly make or cause to be made a record or summary of such proceeding.~~

~~(1) On timely application to a federal magistrate judge, the attorney for a defendant in a criminal case may be given the opportunity to have the recording of the hearing on preliminary examination made available to that attorney in connection with any further hearing or preparation for trial. The court may, by local rule, appoint the place for and define the conditions under which such opportunity may be afforded counsel.~~

~~(2) On application of a defendant addressed to the court or any judge thereof, an order may issue that the federal magistrate judge make available a copy of the transcript, or of a portion thereof, to defense counsel. Such order shall provide for prepayment of costs of such transcript by the defendant unless the defendant makes a sufficient affidavit that the defendant is unable to pay or to give security therefor, in which case the expense shall be paid by the Director of the Administrative Office of the United States Courts from available appropriated funds. Counsel for the government may move also that a copy of the transcript, in whole or in part, be made available to it, for good cause shown, and an order may be entered granting such motion in whole or in part, on appropriate terms, except that the government need not prepay costs nor furnish security therefor.~~

~~**(d) Production of Statements.**~~

~~(1) In General. Rule 26.2(a)-(d) and (f) applies at any hearing under this rule, unless the court, for good cause shown, rules otherwise in a particular case.~~

~~(2) Sanctions for Failure to Produce Statement. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, the court may not consider the testimony of a witness whose statement is withheld.~~

Rule 5.1. Preliminary Hearing in a Felony Case

(a) In General. If a defendant is charged with a felony, a magistrate judge must conduct a preliminary hearing unless:

(1) the defendant waives the hearing;

(2) the defendant is indicted; or

(3) the government files an information under Rule 7(b).

(b) Election of District

A defendant arrested in a district other than where the offense was allegedly committed may elect to have the preliminary hearing conducted in the district where the prosecution is pending.

(c) Scheduling. The magistrate judge must hold the preliminary hearing within a reasonable time, but no later than 10 days after the initial appearance if the defendant is in custody and no later than 20 days if not in custody.

(d) Extending the Time. With the defendant's consent and upon a showing of good cause — taking into account the public interest in the prompt disposition of criminal cases — a magistrate judge may extend the time limits in Rule 5.1(c) one or more times. If the defendant does not consent, the magistrate judge may extend the time limits only on a showing that extraordinary circumstances exist and justice requires the delay.

(e) **Hearing and Finding.** At the preliminary hearing, the defendant may cross-examine adverse witnesses and may introduce evidence but cannot object to evidence on the ground that it was unlawfully acquired. If the magistrate judge finds probable cause to believe an offense has been committed and the defendant committed it, the magistrate judge must promptly require the defendant to appear for further proceedings.

(f) **Discharging the Defendant.** If the magistrate judge finds no probable cause to believe an offense has been committed or the defendant committed it, the magistrate judge must dismiss the complaint and discharge the defendant. A discharge does not preclude the government from later prosecuting the defendant for the same offense.

(g) **Records.** The preliminary hearing must be recorded by a court reporter or by a suitable recording device. A recording of the proceeding may be made available to any

party upon request. A copy of the recording and a transcript may be provided to any party upon request and upon payment as required by applicable Judicial Conference regulations.

(h) Production of Statements.

(1) ***In General.*** Rule 26.2(a)-(d) and (f) applies at any hearing under this rule, unless the magistrate judge for good cause rules otherwise in a particular case.

(2) ***Sanctions for Failure to Produce Statement.*** If a party disobeys a Rule 26.2(a) order to deliver a statement to the moving party, the magistrate judge must not consider the testimony of a witness whose statement is withheld.

Rule 5.1
Substantive Change Package
May 10, 2000

COMMITTEE NOTE

The language of Rule 5.1 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic, except as noted below.

First, the title of the rule has been changed. Although the underlying statute, 18 U.S.C. § 3060, uses the phrase *preliminary examination*, the Committee believes that the phrase *preliminary hearing* is more accurate. What happens at this proceeding is more than just an examination; it includes an evidentiary hearing, argument, and a judicial ruling. Further, the phrase *preliminary hearing* predominates in actual usage.

Rule 5.1(a) is composed of the first sentence of the second paragraph of current Rule 5(c). Rule 5.1(b) addresses the ability of a defendant to elect where a preliminary hearing will be held. That provision rule is taken from current Rule 40(a).

Rule 5.1(c) and (d) include material currently located in Rule 5(c): scheduling and extending the time limits for the hearing. Although the rule continues to refer to proceedings before a "court," the Committee is aware that in most districts, magistrate judges perform these functions. That point is also reflected in the definition of "court" in Rule 1(b), which in turn recognizes that magistrate judges may be authorized to act.

Rule 5.1(d) contains a significant change in practice. The revised rule includes language that expands the authority of a United States Magistrate Judge to grant a continuance for a preliminary hearing conducted under the rule. Currently, the rule authorizes a magistrate judge to grant a continuance only in those cases in which the defendant has consented to the continuance. If the defendant does not consent, then the government must present the matter to a district court judge, usually on the same day. The proposed amendment conflicts with 18 U.S.C. § 3060, which tracks the original language of the rule and permits only district court judges to grant continuances when the defendant objects. The Committee believes that this restriction is an anomaly and that it can lead to needless consumption of judicial and other resources. Magistrate judges are routinely required to make probable cause determinations and other difficult decisions regarding the defendant's liberty interests, reflecting that the magistrate judge's role has developed toward a higher level of responsibility for pre-indictment matters. The Committee believes that the change in the rule will provide greater judicial economy and that it is entirely appropriate to seek this change to the rule through the Rules Enabling Act procedures. *See* 28 U.S.C. § 2072(b). Under those procedures, approval by Congress of this rule change would supersede the parallel provisions in 18 U.S.C. § 3060.

Rule 5.1(e), addressing the issue of probable cause, contains the language currently located in Rule 5.1(a), with the exception of the sentence, "The finding of probable cause may be based upon hearsay evidence in whole or in part." That language was included in the original promulgation of the rule in 1972. Similar language was added to Rule 4 in 1974. In the Committee Note on the 1974 amendment, the Advisory Committee explained that the language was included to make it clear that a finding of probable cause may be based upon hearsay, noting that there had been some uncertainty in the federal system about the propriety of relying upon hearsay at the preliminary examination. *See* Advisory Committee Note to Rule 5.1 (citing cases and commentary). Federal law is now clear on that proposition. Thus, the Committee believed that the reference to hearsay was no longer necessary. Further, the Committee believed that the matter was best addressed in Rule 1101(d)(3), Federal Rules of Evidence. That rule explicitly states that the Federal Rules of Evidence do not apply to "preliminary examinations in criminal cases,...issuance of warrants for arrest, criminal summonses, and search warrants." The Advisory Committee Note accompanying that rule recognizes that: "The nature of the proceedings makes application of the formal rules of evidence inappropriate and impracticable." The Committee did not intend to make any substantive changes in practice by deleting the reference to hearsay evidence.

Rule 5.1(f), which deals with the discharge of a defendant, consists of former Rule 5.1(b).

Rule 5.1(g) is a revised version of the material in current Rule 5.1(c). Instead of including detailed information in the rule itself concerning records of preliminary hearings, the Committee opted simply to direct the reader to the applicable Judicial Conference regulations governing records. The Committee did not intend to make any substantive changes in the way in which those records are currently made available.

Finally, although the rule speaks in terms of initial appearances being conducted before a magistrate judge, Rule 1(c) makes clear that a district judge may perform any function in these rules that a magistrate judge may perform.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 5.1 is one of those rules. In revising Rule 5.1, the Committee decided to also propose a substantive change that would permit a United States Magistrate Judge to grant a continuance for a preliminary hearing conducted under the rule where the defendant has not consented to such a continuance. Another version of Rule 5.1 that does not include that proposed change is being published simultaneously in a separate pamphlet.

~~**Rule 10. Arraignment**~~

~~Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead thereto. The defendant shall be given a copy of the indictment or information before being called upon to plead.~~

Rule 10. Arraignment

(a) In General. Arraignment must be conducted in open court and must consist of:

(1) ensuring that the defendant has a copy of the indictment or information;

(2) reading the indictment or information to the defendant or stating to the defendant the substance of the charge; and then

(3) asking the defendant to plead to the indictment or information.

(b) **Waiving Appearance.** A defendant need not be present for the arraignment if:

(1) the defendant has been charged by indictment or misdemeanor information;

(2) the defendant, in a written waiver signed by both the defendant and defense counsel, has waived appearance and has affirmed that the defendant received a copy of the indictment or information and that the plea is not guilty; and

(3) the court accepts the waiver.

(c) **Video Teleconferencing.** Video teleconferencing may be used to arraign a defendant if the defendant waives the right to be arraigned in open court.

[ALTERNATIVE VERSION]

(c) **Video Teleconferencing.** Video teleconferencing may be used to arraign a defendant.

Rule 10
Substantive Change Package
May 10, 2000

COMMITTEE NOTE

The language of Rule 10 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Read together, Rules 10 and 43 require the defendant to be physically present in court for the arraignment. *See, e.g.*, *Valenzuela-Gonzales v. United States*, 915 F.2d 1276, 1280 (9th Cir. 1990)(Rules 10 and 43 are broader in protection than the Constitution). The amendments to Rule 10 create two exceptions to that requirement. The first provides that the court may hold an arraignment in the defendant's absence when the defendant has waived the right to be present in writing and the court consents to that waiver. The second permits the court to hold arraignments by video teleconferencing, when the defendant is at a different location. A conforming amendment has also been made to Rule 43.

In amending Rule 10 and Rule 43, the Committee was concerned that permitting a defendant to be absent from the arraignment could be viewed as an erosion of an important element of the judicial process. First, it may be important for a defendant to see and experience first-hand the formal impact of the reading of the charge. Second, it may be necessary for the court to personally see and speak with the defendant at the arraignment, especially when there is a real question whether the defendant actually understands the gravity of the proceedings. And third, there may be difficulties in providing the defendant with effective and confidential assistance of counsel if counsel, but not the defendant, appears at the arraignment.

The Committee nonetheless believed that in appropriate circumstances the court, and the defendant, should have the option of conducting the arraignment in the defendant's absence. The question of when it would be appropriate for a defendant to waive an appearance is not spelled out in the rule. That is left to the defendant and the court in each case.

A critical element to the amendment is that no matter how convenient or cost effective a defendant's absence might be, the defendant's right to be present in court stands unless he or she waives that right in writing. Under the amendment, both the defendant and the defendant's attorney must sign the waiver. Further, the amendment requires that the waiver specifically state that the defendant has received a copy of the charging instrument.

If the trial court has reason to believe that in a particular case the defendant should not be permitted to waive the right, the court may reject the waiver and require that the

defendant actually appear in court. That might be particularly appropriate when the court wishes to discuss substantive or procedural matters in conjunction with the arraignment and the court believes that the defendant's presence is important in resolving those matters.

The amendment does not permit waiver of an appearance when the defendant is charged with a felony information. In that instance, the defendant is required by Rule 7(b) to be present in court to waive the indictment. Nor does the amendment permit a waiver of appearance when the defendant is standing mute, (see Rule 11(a)(4)) or entering a conditional plea, (see Rule 11(a)(2)), a nolo contendere plea, (see Rule 11(a)(3)), or a guilty plea, (see Rule 11(a)(1)). In each of those instances the Committee believed that it was more appropriate for the defendant to appear personally before the court.

It is important to note that the amendment does not permit the defendant to waive the arraignment itself, which may be a triggering mechanism for other rules.

[**Alternate Version for Video Teleconferencing—Defendant's Consent Required.** Rule 10(c) addresses the second substantive change in the rule. That provision permits the court to conduct arraignments through video teleconferencing, if the defendant waives the right to be arraigned in court. Although the practice is now used in state courts and in some federal courts, Rules 10 and 43 have generally prevented federal courts from using that method for arraignments in criminal cases. *See, e.g.*, *Valenzuela-Gonzales v. United States*, *supra* (Rules 10 and 43 mandate physical presence of defendant at arraignment and that arraignment take place in open court; thus, pilot program for video teleconferencing not permitted). A similar amendment was proposed by the Committee in 1993 and published for public comment. The amendment was later withdrawn from consideration in order to consider the results of several planned pilot programs for civil cases. Upon further consideration, the Committee believed that the benefits of using video teleconferencing outweighed the costs of doing so. This amendment also parallels an amendment in Rule 5.1(d) that would permit initial appearances to be conducted by video teleconferencing.

The arguments for opposing video teleconferencing of arraignments generally parallel those noted, *supra*, for permitting the defendant to waive the right to be personally brought before a judicial officer. Yet, if one accepts the argument that the defendant may voluntarily waive a personal appearance altogether at the arraignment, the same defendant should be able to consent to an arraignment from a remote location. Further, the Committee was persuaded in part by the fact that some districts deal with a very high volume of arraignments of defendants who are in custody and because of the distances involved, must be transported long distances. That potentially presents security risks to law enforcement and court personnel.

Although the rule requires the defendant to waive a personal appearance for an arraignment, the rule does not require that the waiver for video teleconferencing be in writing. Nor does it require that the defendant waive that appearance in person, in open court. It would normally be sufficient for the defendant to waive an appearance while participating through a video teleconference.]

[**Alternate Version for Video Teleconferencing—Defendant's Consent Not Required.** Rule 10(c) addresses the second substantive change in the rule. That provision permits the court to conduct arraignments through video teleconferencing, even if the defendant does not waive the right to be arraigned in court. Although the practice is now used in state courts and in some federal courts, Rules 10 and 43 have generally prevented federal courts from using that method for arraignments in criminal cases. *See, e.g.*, *Valenzuela-Gonzales v. United States*, *supra* (Rules 10 and 43 mandate physical presence of defendant at arraignment and that arraignment take place in open court; thus, pilot program for video teleconferencing not permitted). A similar amendment was proposed by the Committee in 1993 and published for public comment. The amendment was later withdrawn from consideration in order to consider the results of several planned pilot programs for civil cases. Upon further consideration, the Committee believed that the benefits of using video teleconferencing outweighed the costs of doing so. This amendment also parallels an amendment in Rule 5 that would permit initial appearances to be conducted by video teleconferencing. In providing for video teleconferencing of arraignments, even without the consent of the defendant, the Committee was persuaded in part by the fact that some districts deal with a very high volume of arraignments of defendants who are in custody and because of the distances involved, must be transported long distances. That potentially presents security risks to law enforcement and court personnel. The Committee believed that the beneficial use of video teleconferenced arraignments would be lost if the defendant's consent was required. Indeed, the pilot programs noted, *supra*, were hampered by the fact that defendants rarely consented to use of video teleconferencing.]

The amendment leaves to the courts the decision first, whether to permit video arraignments, and second, the procedures to be used. The Committee was satisfied that the technology has progressed to the point that video teleconferencing can address the concerns raised in the past about the ability of the court and the defendant to see each other and for the defendant and counsel to be in contact with each other, either at the same location or by a secure remote connection.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 10 is one of those rules. This proposed revision of Rule 10 includes an amendment that would permit the defendant to waive any appearance at an arraignment and a second amendment that would permit use of video teleconferencing for arraignments. Another version of Rule 10, which does not include these significant amendments is being published simultaneously in a separate pamphlet. This version of Rule 10, in turn, includes alternate language relating to video teleconferencing, with or without the defendant's consent. One version requires that the defendant consent to the procedure.

The other version does not require a defendant's consent. The Committee opted to publish alternate versions to obtain a wider range of public comments on the proposal, and in recognition of the view of some that if the defendant is required to consent, the beneficial uses of video teleconferencing will rarely be used.

~~**Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition**~~

~~**(a) Defense of Insanity.** If a defendant intends to rely upon the defense of insanity at the time of the alleged offense, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.~~

~~**(b) Expert Testimony of Defendant's Mental Condition.** If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental~~

~~condition of the defendant bearing upon the issue of guilt, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.~~

~~**(c) Mental Examination of Defendant.** In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to an examination pursuant to 18 U.S.C. 4241 or 4242. No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be~~

~~admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony.~~

~~**(d) Failure to Comply.** If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's guilt.~~

~~**(e) Inadmissibility of Withdrawn Intention.** Evidence of an intention as to which notice was given under subdivision (a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.~~

Rule 12.2. Notice of Insanity Defense; Mental Examination

(a) **Notice of an Insanity Defense.** A defendant who intends to assert a defense of insanity at the time of the alleged offense must notify the attorney for the government in writing within the time provided for filing a pretrial motion, or at any later time the court directs. A defendant who fails to do so cannot rely on an insanity defense. The court may — for good cause — allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.

(b) **Notice of Expert Evidence of a Mental Condition.** If a defendant intends to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on either (1) the issue of guilt or (2) the issue of punishment in a capital case, the defendant must — within the time provided for the filing of pretrial motions or at a later time as the court directs — notify the attorney for the government in writing of this intention

and file a copy of the notice with the clerk. The court may, for good cause, allow late filing of the notice or grant additional time to the parties to prepare for trial or make any other appropriate order.

(c) Mental Examination.

(1) ***Authority to Order Examination; Procedures.***

(A) The court may upon motion of an attorney for the government order the defendant to submit to a competency examination under 18 U.S.C. § 4241.

(B) If the defendant provides notice under Rule 12.2(a), the court must, upon the government's motion, order the defendant to be examined under 18 U.S.C. § 4242. If the defendant provides notice under Rule 12.2(b) the court may, upon the government's motion,

order the defendant to be examined under procedures ordered by the court.

(2) ***Disclosing Results and Reports of Capital Sentencing Examination.*** The results and reports of any examination conducted solely under Rule 12.2(c)(1) after notice under Rule 12.2(b)(2) must be sealed and must not be disclosed to any attorney for the government or the defendant unless the defendant is found guilty of one or more capital crimes and the defendant confirms an intent to offer during sentencing proceedings expert evidence on mental condition.

(3) ***Disclosing Results and Reports of the Defendant's Expert Examination.*** After disclosure under Rule 12.2(c)(2) of the results and reports of the government's examination, the defendant must disclose to the government the results and reports of

any examination on mental condition conducted by the defendant's expert about which the defendant intends to introduce expert evidence.

(4) ***Inadmissibility of a Defendant's Statements.*** No statement made by a defendant in the course of any examination conducted under this rule (whether conducted with or without the defendant's consent), no testimony by the expert based on the statement, and no other fruits of the statement may be admitted into evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant:

(A) has introduced evidence of incompetency or after notice under Rule 12.2(a) or (b)(1), or

(B) has introduced expert evidence after notice under Rule 12.2(b)(2).

(d) **Failure to Comply.** If the defendant fails to give notice under Rule 12.2(b) or does not submit to an examination when ordered under Rule 12.2(c), the court may exclude any expert evidence from the defendant on the issue of the defendant's mental disease, mental defect, or any other mental condition bearing on the defendant's guilt or the issue of punishment in a capital case.

(e) **Inadmissibility of Withdrawn Intention.** Evidence of an intention as to which notice was given under Rule 12.2(a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

Rule 12.2
Substantive Change Package
May 10, 2000

COMMITTEE NOTE

The language of Rule 12.2 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The substantive changes to Rule 12.2 are designed to address five issues. First, the amendments clarify that a court may order a mental examination for a defendant who has indicated an intention to raise a defense of mental condition bearing on the issue of guilt. Second, the defendant is required to give notice of an intent to present expert evidence of the defendant's mental condition during a capital sentencing proceeding. Third, the amendments address the ability of the trial court to order a mental examination for a defendant who has given notice of an intent to present evidence of mental condition during capital sentencing proceedings and when the results of that examination may be disclosed. Fourth, the amendment addresses the timing of disclosure of the results and reports of the defendant's expert examination. Finally, the amendment extends the sanctions for failure to comply with the rule's requirements to the punishment phase of a capital case.

Under current Rule 12.2(b), a defendant who intends to offer expert testimony on the issue of his or her mental condition on the question of guilt must provide a pretrial notice of that intent. The amendment extends that notice requirement to a defendant who intends to offer expert evidence, testimonial or otherwise, on his or her mental condition during a capital sentencing proceeding. As several courts have recognized, the better practice is to require pretrial notice of that intent so that any mental examinations can be conducted without unnecessarily delaying capital sentencing proceedings. *See, e.g., United States v. Beckford*, 962 F. Supp. 748, 754-64 (E.D. Va. 1997); *United States v. Haworth*, 942 F. Supp. 1406, 1409 (D.N.M. 1996). The amendment adopts that view.

A change to Rule 12.2(c)(1) clarifies the authority of the court to order mental examinations for a defendant. As currently written, the subdivision implies that the trial court has discretion to grant a government motion for a mental examination of a defendant who has indicated under Rule 12.2(a) an intent to raise the defense of insanity. But the corresponding statute, 18 U.S.C. § 4242, requires the court to order an examination if the defendant has provided notice of an intent to raise that defense and the government moves for the examination. The amendment conforms Rule 12.2(c) to the statute. Any examination conducted on the issue of the insanity defense would thus be conducted in accordance with the procedures set out in the statutory provision.

While the authority of a trial court to order a mental examination of a defendant who has registered an intent to raise the insanity defense seems clear, the authority under the rule to order an examination of a defendant who intends only to present expert testimony on his or her mental condition on the issue of guilt is not as clear. Some courts have concluded that a court may order such an examination. *See, e.g., United States v. Stackpole*, 811 F.2d 689, 697 (1st Cir. 1987); *United States v. Buchbinder*, 796 F.2d 910, 915 (1st Cir. 1986); and *United States v. Halbert*, 712 F.2d 388 (9th Cir. 1983). In *United States v. Davis*, 93 F.3d 1286 (6th Cir. 1996), however, the court in a detailed analysis of the issue concluded that the district court lacked the authority under the rule to order a mental examination of a defendant who had provided notice of an intent to offer evidence on a defense of diminished capacity. The court noted first that the defendant could not be ordered to undergo commitment and examination under 18 U.S.C. § 4242, because that provision relates to situations when the defendant intends to rely on the defense of insanity. The court also rejected the argument that the examination could be ordered under Rule 12.2(c) because this was, in the words of the rule, an "appropriate case." The court concluded, however, that the trial court had the inherent authority to order such an examination.

The amendment clarifies that the authority of a court to order a mental examination under Rule 12.2(c)(1)(B) extends to those cases when the defendant has provided notice, under Rule 12.2(b), of an intent to present expert testimony on the defendant's mental condition, either on the merits or at capital sentencing. *See, e.g., United States v. Hall*, 152 F.3d 381 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 1767 (1999).

The amendment to Rule 12.2(c)(1) is not intended to affect any statutory or inherent authority a court may have to order other mental examinations.

The amendment leaves to the court the determination of what procedures should be used for a court-ordered examination on the defendant's mental condition (apart from insanity). As currently provided in the rule, if the examination is being ordered in connection with the defendant's stated intent to present an insanity defense, the procedures are dictated by 18 U.S.C. § 4242. On the other hand, if the examination is being ordered in conjunction with a stated intent to present expert testimony on the defendant's mental condition (not amounting to a defense of insanity) either at the guilt or sentencing phases, no specific statutory counterpart is available. Accordingly, the court is given the discretion to specify the procedures to be used. In so doing, the court may certainly be informed by other provisions, which address hearings on a defendant's mental condition. *See, e.g.*, 18 U.S.C. § 4241, et. seq.

Additional changes address the question when the results of an examination ordered under Rule 12.2(b)(2) may, or must, be disclosed. The Supreme Court has recognized that use of a defendant's statements during a court-ordered examination may compromise the defendant's right against self-incrimination. *See Estelle v. Smith*, 451 U.S. 454 (1981) (defendant's privilege against self-incrimination violated when he was not advised of right to remain silent during court-ordered examination and prosecution introduced statements during capital sentencing hearing). But subsequent cases have indicated that the defendant

waives the privilege if the defendant introduces expert testimony on his or her mental condition. *See, e.g., Powell v. Texas*, 492 U.S. 680, 683-84 (1989); *Buchanan v. Kentucky*, 483 U.S. 402, 421-24 (1987); *Presnell v. Zant*, 959 F.2d 1524, 1533 (11th Cir. 1992); *Williams v. Lynaugh*, 809 F.2d 1063, 1068 (5th Cir. 1987); *United States v. Madrid*, 673 F.2d 1114, 1119-21 (10th Cir. 1982). That view is reflected in Rule 12.2(c) which indicates that the statements of the defendant may be used against the defendant only after the defendant has introduced testimony on his or her mental condition. What the current rule does not address is if, and to what extent, the prosecution may see the results of the examination, which may include the defendant's statements, when evidence of the defendant's mental condition is being presented solely at a capital sentencing proceeding.

The proposed change in Rule 12.2(c)(2) adopts the procedure used by some courts to seal or otherwise insulate the results of the examination until it is clear that the defendant will introduce expert evidence about his or her mental condition at a capital sentencing hearing; i.e., after a verdict of guilty on one or more capital crimes, and a reaffirmation by the defendant of an intent to introduce expert mental-condition evidence in the sentencing phase. *See, e.g., United States v. Beckford*, 962 F. Supp. 748 (E.D. Va. 1997). Most courts that have addressed the issue have recognized that if the government obtains early access to the accused's statements, it will be required to show that it has not made any derivative use of that evidence. Doing so can consume time and resources. *See, e.g., United States v. Hall, supra*, 152 F.3d at 398 (noting that sealing of record, although not constitutionally required, "likely advances interests of judicial economy by avoiding litigation over [derivative use issue]").

Except as provided in Rule 12.2(c)(3), the rule does not address the time for disclosing results and reports of any expert examination conducted by the defendant. New Rule 12.2(c)(3) provides that upon disclosure under subdivision (c)(2) of the results and reports of the government's examination, disclosure of the results and reports of the defendant's expert examination is mandatory, if the defendant intends to introduce expert evidence relating to the examination.

Rule 12.2(c), as previously written, restricted admissibility of the defendant's statements during the course of an examination conducted under the rule to an issue respecting mental condition on which the defendant "has introduced testimony" — expert or otherwise. As amended, Rule 12.2(c)(4) provides that the admissibility of such evidence in a capital sentencing proceeding is triggered only by the defendant's introduction of expert evidence. The Committee believed that, in this context, it was appropriate to limit the government's ability to use the results of its expert mental examination to instances in which the defendant has first introduced expert evidence on the issue.

Rule 12.2(d) has been amended to extend sanctions for failure to comply with the rule to the penalty phase of a capital case. The selection of an appropriate remedy for the failure of a defendant to provide notice or submit to an examination under subdivisions (b) and (c) is entrusted to the discretion of the court. While subdivision (d) recognizes that the court may exclude the evidence of the defendant's own expert in such a situation, the court should

also consider "the effectiveness of less severe sanctions, the impact of preclusion on the evidence at trial and the outcome of the case, the extent of prosecutorial surprise or prejudice, and whether the violation was willful." *Taylor v. Illinois*, 484 U.S. 400, 414 n.19 (1988) (citing *Fendler v. Goldsmith*, 728 F.2d 1181 (9th Cir. 1983)).

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 12.2 is one of those rules. As outlined in the Committee Note, this proposed revision of Rule 12.2 includes five substantive amendments. Another version of Rule 12.2, which does not include these significant amendments, is being published simultaneously in a separate pamphlet.

~~**Rule 26. Taking of Testimony**~~

~~In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress, or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court.~~

Rule 26. Taking Testimony

(a) In General. In all trials the testimony of witnesses must be taken in open court, unless otherwise provided by an Act of Congress or by rules adopted under 28 U.S.C. §§ 2072-2077.

(b) Transmitting Testimony from Different Location. In the interest of justice, the court may authorize contemporaneous video presentation in open court of testimony from a witness who is at a different location if:

(1) the requesting party establishes compelling circumstances for such transmission;

(2) appropriate safeguards for the transmission are used; and

(3) the witness is unavailable within the meaning of Rule 804(a)(4)-(5) of the Federal Rules of Evidence.

Rule 26
Substantive Change Package
May 10, 2000

COMMITTEE NOTE

The language of Rule 26 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Rule 26(a) is amended, by deleting the word "orally," to accommodate witnesses who are not able to present oral testimony in open court and may need, for example, a sign language interpreter. The change conforms the rule, in that respect, to Federal Rule of Civil Procedure 43.

A substantive change has been made to Rule 26(b). That amendment permits a court to receive the video transmission of an absent witness if certain conditions are met. As currently written, Rule 26 indicates that normally only testimony given in open court will be considered, unless otherwise provided by these rules, an Act of Congress, or any other rule adopted by the Supreme Court. An example of a rule that provides otherwise is Rule 15. That Rule recognizes that depositions may be used to preserve testimony if there are exceptional circumstances in the case and it is in the interest of justice to do so. If the person is "unavailable" under Federal Rule of Evidence 804(a), then the deposition may be used at trial as substantive evidence. The amendment to Rule 26(b) extends the logic underlying that exception to contemporaneous video testimony of an unavailable witness. The amendment generally parallels a similar provision in Federal Rule of Civil Procedure 43.

The Committee believed that permitting use of video transmission of testimony only in those instances when deposition testimony could be used is a prudent and measured step. The proponent of the testimony must establish that there are exceptional circumstances for such transmission. A party against whom a deposition may be introduced at trial will normally have no basis for objecting if contemporaneous testimony is used instead. Indeed, the use of such transmitted testimony is in most regards superior to other means of presenting testimony in the courtroom. The participants in the courtroom can see for themselves the demeanor of the witness and hear any pauses in the testimony, matters that are not normally available in non-video deposition testimony. Although deposition testimony is normally taken with all counsel and parties present with the witness, those are not absolute requirements. *See, e.g., United States v. Salim*, 855 F.2d 944, 947-48 (2d Cir. 1988) (conviction affirmed where deposition testimony used although defendant and her counsel were not permitted in same room with witness, witness's lawyer answered some questions, lawyers were not permitted to question witness directly, and portions of proceedings were not transcribed verbatim).

The Committee recognized that there is a need for the trial court to impose appropriate safeguards and procedures to insure the accuracy and quality of the transmission, the ability of the jurors to hear and view the testimony, and the ability of the judge, counsel, and the witness to hear and understand each other during questioning. *See, e.g., United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999). Deciding what safeguards are appropriate is left to the sound discretion of the trial court.

The Committee believed that including the requirement of "unavailability" as that term is defined in Federal Rule of Evidence 804(a)(4) to (5) will insure that the defendant's Confrontation Clause rights are not infringed. In deciding whether to permit contemporaneous transmission of the testimony of a government witness, the Supreme Court's decision in *Maryland v. Craig*, 497 U.S. 836 (1990) is instructive. In that case, the prosecution presented the testimony of a child sexual assault victim from another room by one-way closed circuit television. The Court outlined four elements which underlie Confrontation Clause issues: (1) physical presence; (2) the oath; (3) cross-examination; and (4) the opportunity for the trier-of-fact to observe the witness's demeanor. *Id.* at 847. The Court rejected the notion that a defendant's Confrontation Clause rights could be protected only if all four elements were present. The trial court had explicitly concluded that the procedure was necessary to protect the child witness, i.e., the witness was psychologically unavailable to testify in open court. The Supreme Court noted that any harm to the defendant resulting from the transmitted testimony was minimal because the defendant received most of the protections contemplated by the Confrontation Clause, i.e., the witness was under oath, counsel could cross-examine the absent witness, and the jury could observe the demeanor of the witness. *See also United States v. Gigante, supra* (use of remote transmission of unavailable witness's testimony did not violate confrontation clause).

Although the amendment is not limited to instances such as those encountered in *Craig*, it is limited to situations when the witness is unavailable for any of the reasons set out in Federal Rule of Evidence 804(a)(4) and (5). Whether under particular circumstances a proposed transmission will satisfy some, or all, of the four protective factors identified by the Supreme Court in *Craig,* is a decision left to the trial court.

By defining unavailability—for the purposes of this rule—in the context of Federal Rule of Evidence 804(a)(4) and (5), the rule indicates a preference for remote transmission of live testimony as opposed to a deposition. The Committee was aware that Rule 804(a)(5) generally recognizes a preference for deposition testimony where the ground for unavailability in that rule is based upon the witness's absence from the jurisdiction. Under Rule 804(a)(5), a proponent may not rely upon the hearsay exceptions, other than the exception for former testimony in 804(b)(1), unless the proponent first demonstrates that the declarant is absent from the jurisdiction and that the proponent has been unable to obtain the declarant's attendance or testimony. The Committee recognizes that the amendment may have an impact on the operation of Rule 804, for example, in those cases where the declarant's ability to testify by remote transmission may preclude counsel from relying upon Rule 804(a)(5).

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 26 is one of those rules. This proposed revision of Rule 26 includes an amendment that would authorize a court to receive testimony from a remote location. Another version of Rule 26, which does not include this significant amendment, is being published simultaneously in a separate pamphlet.

~~**Rule 30. Instructions**~~

~~At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to all parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court may instruct the jury before or after the arguments are completed or at both times. No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.~~

Rule 30. Jury Instructions

(a) In General. Any party may request in writing that the court instruct the jury on the law as specified in the request. The request must be made at the close of the evidence or at any earlier time that the court reasonably directs. When the request is made, the requesting party must furnish a copy to every other party.

(b) Ruling on a Request. The court must inform the parties before closing arguments how it intends to rule on the requested instructions.

(c) Time for Giving Instructions. The court may instruct the jury before or after the arguments are completed, or at both times.

(d) Objections to Instructions. A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate. An opportunity must be given to

object out of the jury's hearing and, on request, out of the jury's presence.

Rule 30
Substantive Change Package
May 10, 2000

COMMITTEE NOTE

The language of Rule 30 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted, below.

Rule 30(a) is amended to reflect a change in the timing of requests for instructions and now mirrors Federal Rule of Civil Procedure 51. As currently written, the trial court may not direct the parties to file such requests before trial without violating Rules 30 and 57. While the amendment falls short of requiring all requests to be made before trial in all cases, the amendment permits a court to do so in a particular case or as a matter of local practice under local rules promulgated under Rule 57.

Rule 30(d) has been changed to clarify what, if anything, counsel must do to preserve error regarding an instruction or failure to instruct. The rule retains the requirement of a contemporaneous and specific objection (before the jury retires to deliberate). As the Supreme Court recognized in *Jones v. United States*, 119 S.Ct. 2090, 2102 (1999), read literally, current Rule 30 could be construed to bar any appellate review absent a timely objection when in fact a court may conduct a limited review under a plain error standard. The topic of plain error is not addressed in Rule 30 because it is already covered in Rule 52. No change in practice is intended by the amendment.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 30 is one of those rules. This proposed revision of Rule 30 includes an amendment that would authorize a court to require the parties to file requests for instructions before trial. Another version of Rule 30, which does not include this substantive amendment, is being published simultaneously in a separate pamphlet.

~~**Rule 32. Sentence and Judgment**~~

~~**(a) In General; Time for Sentencing.** When a presentence investigation and report are made under subdivision (b)(1), sentence should be imposed without unnecessary delay following completion of the process prescribed by subdivision (b)(6). The time limits prescribed in subdivision (b)(6) may be either shortened or lengthened for good cause.~~

~~**(b) Presentence Investigation and Report.**~~

~~**(1) When Made.** The probation officer must make a presentence investigation and submit a report to the court before sentence is imposed unless:~~

~~**(A)** the court finds that the information in the record enables it to exercise its sentencing authority meaningfully under 18 U.S.C. § 3553; and~~

~~**(B)** the court explains this finding on the record.~~

~~Notwithstanding the preceding sentence, a presentence investigation and report, or other report containing information sufficient for the court to enter an order of restitution, as the court may direct, shall be required in any case in which restitution is required to be ordered.~~

~~**(2) Presence of Counsel.** On request, the defendant's counsel is entitled to notice and a reasonable opportunity to attend any interview of the defendant by a probation officer in the course of a presentence investigation.~~

~~**(3) Nondisclosure.** The report must not be submitted to the court or its contents disclosed to anyone unless the defendant has consented in writing, has pleaded guilty or nolo contendere, or has been found guilty.~~

~~**(4) Contents of the Presentence Report.** The presentence report must contain —~~

~~(A) information about the defendant's history and characteristics, including any prior criminal record, financial condition, and any circumstances that, because they affect the defendant's behavior, may be helpful in imposing sentence or in correctional treatment;~~

~~(B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission under 28 U.S.C. § 994(a), as the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission under 28 U.S.C. § 994(a)(1); and the probation officer's explanation of any factors that may suggest a different sentence — within or without~~

~~the applicable guideline — that would be more appropriate, given all the circumstances;~~

~~**(C)** a reference to any pertinent policy statement issued by the Sentencing Commission under 28 U.S.C. § 994(a)(2);~~

~~**(D)** verified information, stated in a nonargumentative style, containing an assessment of the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;~~

~~**(E)** in appropriate cases, information about the nature and extent of nonprison programs and resources available for the defendant;~~

~~**(F)** in appropriate cases, information sufficient for the court to enter restitution;~~

~~**(G)** any report and recommendation resulting from a study ordered by the court under 18 U.S.C. § 3552(b); and~~

~~(H) any other information required by the court.~~

~~**(5) Exclusions.** The presentence report must exclude:~~

~~(A) any diagnostic opinions that, if disclosed, might seriously disrupt a program of rehabilitation;~~

~~(B) sources of information obtained upon a promise of confidentiality; or~~

~~(C) any other information that, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons.~~

~~**(6) Disclosure and Objections.**~~

~~(A) Not less than 35 days before the sentencing hearing — unless the defendant waives this minimum period — the probation officer must furnish the presentence report to the defendant, the defendant's counsel, and the attorney for the Government. The court may, by local rule or in individual cases, direct~~

~~that the probation officer not disclose the probation officer's recommendation, if any, on the sentence.~~

~~**(B)** Within 14 days after receiving the presentence report, the parties shall communicate in writing to the probation officer, and to each other, any objections to any material information, sentencing classifications, sentencing guideline ranges, and policy statements contained in or omitted from the presentence report. After receiving objections, the probation officer may meet with the defendant, the defendant's attorney, and the attorney for the Government to discuss those objections. The probation officer may also conduct a further investigation and revise the presentence report as appropriate.~~

~~**(C)** Not later than 7 days before the sentencing hearing, the probation officer must submit the presentence report to the court, together with an addendum setting forth any unresolved objections, the grounds for those objections, and the probation officer's comments on the objections. At the same time, the~~

~~probation officer must furnish the revisions of the presentence report and the addendum to the defendant, the defendant's counsel, and the attorney for the Government.~~

~~**(D)** Except for any unresolved objection under subdivision (b)(6)(B), the court may, at the hearing, accept the presentence report as its findings of fact. For good cause shown, the court may allow a new objection to be raised at any time before imposing sentence.~~

~~**(c) Sentence.**~~

~~**(1) Sentencing Hearing.** At the sentencing hearing, the court must afford counsel for the defendant and for the Government an opportunity to comment on the probation officer's determinations and on other matters relating to the appropriate sentence, and must rule on any unresolved objections in the presentence report. The court may, in its discretion, permit the parties to introduce testimony or~~

~~other evidence on the objections. For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing. A written record of these findings and determinations must be appended to any copy of the presentence report made available to the Bureau of Prisons.~~

~~**(2) Production of Statements at Sentencing Hearing.** Rule 26.2(a)-(d) and (f) applies at a sentencing hearing under this rule. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the movant, the court may not consider the affidavit or testimony of the witness whose statement is withheld.~~

~~**(3) Imposition of Sentence.** Before imposing sentence, the court must:~~

~~(A) verify that the defendant and the defendant's counsel have read and discussed the presentence report made available under subdivision (b)(6)(A). If the court has received information excluded from the presentence report under subdivision (b)(5) the court — in lieu of making that information available — must summarize it in writing, if the information will be relied on in determining sentence.~~

~~The court must also give the defendant and the defendant's counsel a reasonable opportunity to comment on that information;~~

~~(B) afford defendant's counsel an opportunity to speak on behalf of the defendant;~~

~~(C) address the defendant personally and determine whether the defendant wishes to make a statement and to present any information in mitigation of the sentence;~~

~~**(D)** afford the attorney for the Government an opportunity to speak equivalent to that of the defendant's counsel to speak to the court;~~

~~**(E)** if sentence is to be imposed for a crime of violence or sexual abuse, address the victim personally if the victim is present at the sentencing hearing and determine if the victim wishes to make a statement or present any information in relation to the sentence.~~

~~**(4) In Camera Proceedings.** The court's summary of information under subdivision (c)(3)(A) may be in camera. Upon joint motion by the defendant and the attorney for the Government, the court may hear in camera the statements made under subdivision (c)(3)(B), (C), (D), and (E) by the defendant, the defendant's counsel, the victim, or the attorney for the government.~~

~~**(5) Notification of Right to Appeal.** After imposing sentence in a case which has gone to trial on a plea of not~~

~~guilty, the court must advise the defendant of the right to appeal. After imposing sentence in any case, the court must advise the defendant of any right to appeal the sentence, and of the right of the person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. If the defendant so requests, the clerk of the court must immediately prepare and file a notice of appeal on behalf of the defendant.~~

~~**(d) Judgment.**~~

~~**(1) In General.** A judgment of conviction must set forth the plea, the verdict or findings, the adjudication, and the sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment must be entered accordingly. The judgment must be signed by the judge and entered by the clerk.~~

~~**(2) Criminal Forfeiture.** Forfeiture procedures are governed by Rule 32.1.~~**

~~**(e) Plea Withdrawal.** If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.~~

~~**(f) Definitions.** For purposes of this rule —~~

~~**(1)** "victim" means any individual against whom an offense has been committed for which a sentence is to be imposed, but the right of allocution under subdivision (c)(3)(E) may be exercised instead by —~~

~~**(A)** a parent or legal guardian if the victim is below the age of eighteen years or incompetent; or~~

**The Supreme Court approved amendments in April 2000. The amendments take effect on December 1, 2000, unless Congress takes action otherwise.

~~(B) one or more family members or relatives designated by the court if the victim is deceased or incapacitated;~~

~~if such person or persons are present at the sentencing hearing, regardless of whether the victim is present; and~~

~~(2) "crime of violence or sexual abuse" means a crime that involved the use or attempted or threatened use of physical force against the person or property of another, or a crime under chapter 109A of title 18, United States Code.~~

Rule 32. Sentencing and Judgment

(a) Definitions. The following definitions apply under this rule:

(1) "Victim" means an individual against whom the defendant committed an offense for which the court will impose sentence.

(2) "Crime of violence or sexual abuse" means:

(A) a crime that involves the use, attempted use, or threatened use of physical force against another's person or property; or

(B) a crime under 18 U.S.C. §§ 2241–2248 or §§ 2251-2257.

(b) Time of Sentencing.

(1) ***In General.*** The court must impose sentence without unnecessary delay.

(2) ***Changing Time Limits.*** The court may, for good cause, change any time limits prescribed in Rule 32.

(c) Presentence Investigation.

(1) ***Required Investigation.***

(A) *In General.* The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless:

(i) 18 U.S.C. § 3593(c) or another statute requires otherwise; or

(ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.

(B) *Restitution.* If the law requires restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.

(2) ***Interviewing the Defendant.*** The probation officer who interviews a defendant as part of a presentence investigation must, on request, give the defendant's attorney notice and a reasonable opportunity to attend the interview.

(d) Presentence Report.

(1) ***Contents of the Report.*** The presentence report must contain the following information:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) the kinds of sentences and the sentencing range provided by the Sentencing Commission's guidelines, and the probation officer's explanation of any factors that may suggest a more appropriate sentence within or without an applicable guideline;

(C) a reference to any pertinent Sentencing Commission policy statement;

(D) verified information, stated in a nonargumentative style, that assesses the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;

(E) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;

(F) when the law permits the court to order restitution, information sufficient for such an order;

(G) if the court orders a study under 18 U.S.C. § 3552(b), any resulting report and recommendation; and

(H) any other information that the court requires.

(2) ***Exclusions.*** The presentence report must exclude the following:

(A) any diagnoses that, if disclosed, might seriously disrupt a rehabilitation program;

(B) any sources of information obtained upon a promise of confidentiality; and

(C) any other information that, if disclosed, might result in physical or other harm to the defendant or others.

(e) Disclosing the Report and Recommendation.

(1) ***Time to Disclose.*** Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.

(2) ***Minimum Required Notice.*** The probation officer must give the presentence report to the defendant, the defendant's attorney, and the attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period.

(3) ***Sentence Recommendation.*** By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence.

(f) Objecting to the Report.

(1) ***Time to Object.*** Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report.

(2) ***Serving Objections.*** An objecting party must provide a copy of its objections to every other party and to the probation officer.

(3) ***Action on Objections.*** After receiving objections, the probation officer may meet with the parties to discuss the objections. The probation officer may then investigate further and revise the presentence report as appropriate.

(g) Submitting the Report. At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them.

(h) Sentencing.

(1) ***In General.*** At sentencing, the court:

(A) must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report;

(B) must give the defendant and the defendant's attorney a written summary of—or summarize in camera—any information excluded from the presentence report under Rule 32(d)(2) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information;

(C) must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence; and

(D) may, for good cause, allow a party to make a new objection at any time before sentence is imposed.

(2) ***Introducing Evidence; Producing Statements.*** The court may permit the parties to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)-(d) and (f) applies. If a party does not comply with a Rule 26.2(a) order to produce a witness's statement, the court must not consider that witness's testimony.

(3) ***Court Determinations.*** At sentencing, the court:

(A) may accept any undisputed portion of the presentence report as a finding of fact;

(B) must rule on any—

(i) unresolved objection to a material matter in the presentence report; and

(ii) other controverted matter, unless the court determines that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and

(C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.

(4) *Opportunity to Speak.*

(A) *By a Party.* Before imposing sentence, the court must:

(i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;

(ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and

(iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

(B) *By a Victim.* Before imposing sentence, the court must address any victim of a crime of violence or sexual abuse who is present at sentencing and permit the victim to speak or submit any information concerning the sentence. Whether or not the victim is present, a victim's right to address the court may be exercised by the following persons if present:

(i) a parent or legal guardian, if the victim is younger than 18 years or is incompetent; or

(ii) one or more family members or relatives the court designates, if the victim is deceased or incapacitated.

(C) *In Camera Proceedings.* Upon a party's motion the court may hear in camera any statement made under Rule 32(h)(4).

(5) ***Notice of Possible Departure from Sentencing Guidelines.*** Before the court may depart from the Guidelines calculation on a ground not identified as a ground for departure either in the presentence report or in a prehearing submission by a party, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specifically identify the ground on which the court is contemplating a departure.

(i) **Defendant's Right to Appeal.**

(1) ***Advice of a Right to Appeal.***

(A) *Appealing a Conviction.* If the defendant pleaded not guilty and was convicted, after sentencing the court must advise the defendant of the right to appeal the conviction.

(B) *Appealing a Sentence.* After sentencing — regardless of the defendant's plea — the court must advise the defendant of any right to appeal the sentence.

(C) *Appeal Costs.* The court must advise a defendant who is unable to pay appeal costs of the right to ask for permission to appeal in forma pauperis.

(2) *Clerk's Filing of Notice.* If the defendant so requests, the clerk must immediately prepare and file a notice of appeal on the defendant's behalf.

(j) Judgment.

(1) ***In General.*** In the judgment of conviction, the court must set forth the plea, the jury verdict or the court's findings, the adjudication, and the sentence. If the defendant is found not guilty or is otherwise entitled to be discharged, the court must so enter judgment. The judge must sign the judgment, and the clerk must enter it.

(2) ***Criminal Forfeiture.*** Forfeiture procedures are governed by Rule 32.2.

Rule 32
Substantive Change Package
May 10, 2000

COMMITTEE NOTE

The language of Rule 32 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The rule has been completely reorganized to make it easier to follow and apply. For example, the definitions in the rule have been moved to the first sections and the sequencing of the sections generally follows the procedure for presentencing and sentencing procedures.

Under current Rule 32(c)(1), the court is required to "rule on any unresolved objections in the presentence report." The rule does not specify, however, whether that provision should be read literally to mean every objection that might have been made to the report or only on those objections which might in some way actually affect the sentence. Revised Rule 32(h)(3)(i) now explicitly requires that the court must rule on any "unresolved objection to a material matter" in the presentence report, whether or not the court will consider it in imposing an appropriate sentence. This is a change from the current rule. If, on the other hand, the unresolved objection addresses any other controverted matter, the court must either make a finding on the objection or decide that a finding is not required because the matter will not affect sentencing or that the matter will not be considered at all in sentencing. *See* Rule 32(h)(3)(ii). The new language recognizes that even if an unresolved objection may not have any impact on determining a sentence under the Sentencing Guidelines, it often affects other important post-sentencing decisions. For example, the Bureau of Prisons consults the presentence report in deciding, for example, where a defendant will actually serve his or her sentence of confinement. *See A Judicial Guide to the Federal Bureau of Prisons*, 11 (United States Department of Justice, Federal Bureau of Prisons 1995) (noting that "Bureau relies primarily on the Presentence Investigator Report..."). *See also* 18 U.S.C. § 3621 (Bureau of Prisons decides where prisoner will serve sentence); *United States v. Velasquez*, 748 F.2d 972, 974 (5th Cir. 1984) (rule designed to protect against evil that false allegation that defendant was notorious alien smuggler would affect defendant for years to come); *United States v. Brown*, 715 F.2d 387, 389 n.2 (5th Cir. 1983) (sentencing report affects "place of incarceration, chances for parole, and relationships with social service and correctional agencies after release from prison). Thus, the Committee considers a "material" matter to be one that will likely affect the defendant's subsequent treatment, including decisions made by the Bureau of Prisons. To that end, counsel should be prepared to point out to the court those matters that are typically considered by the Bureau of Prisons in designating the place of confinement. For example, the Bureau considers:

"the type of offense, the length of sentence, the defendant's age, the defendant's release residence, the need for medical or other special treatment, and any placement recommendation made by the court."

A Judicial Guide to the Federal Bureau of Prisons, supra, at 11. Thus, even assuming that a unresolved objection to the report's discussion about the need for medical treatment might not affect the sentence, it would be considered under the revised rule to be a material matter and one to be resolved by the court. Further, a question as to whether or not the defendant has a "drug problem" could have an impact on whether the defendant would be eligible for prison drug abuse treatment programs. 18 U.S.C. § 3621(e) (Substance abuse treatment). Accordingly, the Committee would view that as a material matter to be resolved by the court.

Rule 32(h)(4)(B) includes a change permitting a victim of a crime under 18 U.S.C. §§ 2251-57 (child pornography and related offenses) to address the court at sentencing. The Committee considered those victims to be similar to victims of sexual offenses under 18 U.S.C. §§ 2241-48, who already possess that right.

Rule 32(h)(4)(C) includes a change concerning who may request an in camera proceeding. Under current Rule 32(c)(4), the parties must file a joint motion for an in camera proceeding to hear the statements by the defense counsel, the defendant, the attorney for the government, or any victim. Under the revised rule, any party may move that the court hear in camera any statement—by a party or a victim—made under revised Rule 32(h)(4).

Rule 32(h)(5) is a new provision that reflects *Burns v. United States*, 501 U.S. 129, 138-139 (1991). In *Burns*, the Court held that before a sentencing court could depart upward on a ground in the Sentencing Guidelines, not previously identified in the presentence report as a ground for such departure, Rule 32 requires the court to give the parties reasonable notice that it is contemplating such a ruling and to identify the specific ground for the departure. The Court also indicated that because the procedural entitlements in Rule 32 apply equally to both parties, it was appropriate to address the issue of requiring notice whether the sentencing court departs either upward or downward. *Id.* at 135, n.4.

Finally, current Rule 32(e), which addresses the ability of a defendant to withdraw a guilty plea, has been moved to Rule 11(e).

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 32 is one of those rules. This version of Rule 32 includes an amendment that expands the occasions that the sentencing judge would have to rule on unresolved objections to the presentence report. This version requires the judge

to rule on every unresolved "material" matter in the report. Another version of Rule 32, that does not include this provision, is being published simultaneously in a separate pamphlet.

~~**Rule 35. Correction or Reduction of Sentence**~~

~~**(a) Correction of Sentence on Remand.** The court shall correct a sentence that is determined on appeal under 18 U.S.C. 3742 to have been imposed in violation of law, to have been imposed as a result of an incorrect application of the sentencing guidelines, or to be unreasonable, upon remand of the case to the court—~~

~~(1) for imposition of a sentence in accord with the findings of the court of appeals; or~~

~~(2) for further sentencing proceedings if, after such proceedings, the court determines that the original sentence was incorrect.~~

~~**(b) Reduction of Sentence for Substantial Assistance.** If the Government so moves within one year after the sentence is imposed, the court may reduce a sentence to reflect a defendant's subsequent, substantial assistance in investigating or prosecuting another person in accordance~~

~~with the guidelines and policy statements issued by the Sentencing Commission under 28 U.S.C. § 994. The court may consider a government motion to reduce a sentence made one year or more after the sentence is imposed if the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after sentence is imposed. In evaluating whether substantial assistance has been rendered, the court may consider the defendant's pre-sentence assistance. In applying this subdivision, the court may reduce the sentence to a level below that established by statute as a minimum sentence.~~

~~**(c) Correction of Sentence by Sentencing Court.** The court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as the result of arithmetical, technical, or other clear error.~~

Rule 35. Correcting or Reducing a Sentence

(a) **Correcting Clear Error.** Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

(b) **Reducing a Sentence for Substantial Assistance.**

(1) ***In General.*** Upon the government's motion made within one year of sentencing, the court may reduce a sentence if:

(A) the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person; and

(B) reducing the sentence accords with the Sentencing Commission's guidelines and policy statements.

(2) ***Later Motion.*** The court may consider a government motion to reduce a sentence made one year or more after sentencing if the defendant's substantial assistance involved information not known — or the

usefulness of which could not reasonably have been anticipated — until more than one year after sentencing.

(b) ***Evaluating Substantial Assistance.*** In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's presentence assistance.

(4) ***Below Statutory Minimum.*** When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.

Rule 35
Substantive Change Package
May 10, 2000

COMMITTEE NOTE

The language of Rule 35 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The Committee deleted current Rule 35(a) (Correction on Remand). That rule, which currently addresses the issue of the district court's actions following a remand on the issue of sentencing, was added by Congress in 1984. P.L. 98-473. The rule cross-references 18 U.S.C. § 3742, also enacted in 1984, which provides detailed guidance on the various options available to the appellate courts in addressing sentencing errors. In reviewing both provisions, the Committee concluded that Rule 35(a) was no longer needed. First, the statute clearly covers the subject matter and second, it is not necessary to address an issue that would be very clear to a district court following a decision by a court of appeals. The remaining subdivisions have been re-numbered.

Former Rule 35(c), which addressed the authority of the court to correct certain errors in the sentence, is now located in Rule 35(a).

A substantive change has been made in Rule 35(b). Under the current rule, if the government believes that a sentenced defendant has provided substantial assistance in investigating or prosecuting another person, it may move the court to reduce the original sentence; ordinarily, the motion must be filed within one year of sentencing. In 1991, the rule was amended to permit the government to file such motions after more than one year had elapsed if the government could show that the defendant's substantial assistance involved "information or evidence not known by the defendant" until more than one year had elapsed. The current rule, however, did not address the question of whether a motion to reduce a sentence could be filed and granted in those instances when the defendant's substantial assistance involved information *known* to the defendant within one year after sentencing, but no motion was filed because the significance or usefulness of the information was not apparent until after the one year period had elapsed. The courts were split on the issue. *Compare United States v. Morales*, 52 F.3d 7 (1st Cir. 1995) (permitting filing and granting of motion) *with United States v. Orozco*, 160 F.3d 1309 (11th Cir. 1998) (denying relief and citing cases). Although the court in *Orozco* felt constrained to deny relief under Rule 35(b), the court urged an amendment of the rule to:

> address the apparent unforeseen situation presented in this case where a convicted defendant provides information to the government prior to the expiration of the jurisdictional, one-year period from sentence imposition, but that information does

not become useful to the government until more than one year after sentence imposition. *Id.* at 1316, n. 13.

The Committee has amended the rule to make clear that a sentence reduction motion is permitted in those instances identified by the court in *Orozco*. The rule's one-year restriction generally serves the important interests of finality and of creating an incentive for defendants to provide promptly what useful information they might have. Thus, the proposed amendment would not eliminate the one-year requirement as a generally operative element. But where the usefulness of the information is not reasonably apparent until a year or more after sentencing, no sound purpose is served by the current rule's removal of any incentive to provide that information to the government one year or more after the sentence (or if previously provided, for the government to seek to reward the defendant) when its relevance and substantiality become evident.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 35 is one of those rules. This proposed revision of Rule 35 includes an amendment that would authorize a court to hear a motion to reduce a sentence, more than one year after sentence was imposed, when the defendant's substantial assistance involved information known to the defendant within one year after sentencing, but no motion was filed because the significance or usefulness of the information was not apparent until after the one year period had elapsed. Another version of Rule 35, which does not include this amendment, is being published simultaneously in a separate pamphlet.

~~**Rule 41. Search and Seizure**~~

~~**(a) Authority to Issue Warrant.** Upon the request of a federal law enforcement officer or an attorney for the government, a search warrant authorized by this rule may be issued (1) by a federal magistrate judge, or a state court of record within the federal district, for a search of property or for a person within the district and (2) by a federal magistrate judge for a search of property or for a person either within or outside the district if the property or person is within the district when the warrant is sought but might move outside the district before the warrant is executed.~~

~~**(b) Property or Persons Which May be Seized With a Warrant.** A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of the crime, or things otherwise~~

~~criminally possessed; or (3) property designed or intended for use or which has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.~~

~~**(c) Issuance and Contents.**~~

~~**(1) Warrant Upon Affidavit.** A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the federal magistrate judge or state judge and establishing grounds for issuing the warrant. If the federal magistrate judge or state judge is satisfied that the grounds for the application exist or that there is probable cause to believe that they exist, that magistrate judge or state judge shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be~~

~~searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate judge or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses the affiant may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property or person specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision~~

~~in the warrant, and for reasonable cause shown, authorized its execution at times other than daytime. It shall designate a federal magistrate judge to whom it shall be returned.~~

~~**(2) Warrant Upon Oral Testimony.**~~

~~**(A) General Rule.** If the circumstances make it reasonable to dispense, in whole or in part, with a written affidavit, a Federal magistrate judge may issue a warrant based upon sworn testimony communicated by telephone or other appropriate means, including facsimile transmission.~~

~~**(B) Application.** The person who is requesting the warrant shall prepare a document to be known as a duplicate original warrant and shall read such duplicate original warrant, verbatim, to the Federal magistrate judge. The~~

~~Federal magistrate judge shall enter, verbatim, what is so read to such magistrate judge on a document to be known as the original warrant. The Federal magistrate judge may direct that the warrant be modified.~~

~~(C) **Issuance.** If the Federal magistrate judge is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and that the grounds for the application exist or that there is probable cause to believe that they exist, the Federal magistrate judge shall order the issuance of a warrant by directing the person requesting the warrant to sign the Federal magistrate judge's name on the duplicate original warrant. The Federal magistrate judge shall immediately sign the original warrant and enter on the face~~

~~of the original warrant the exact time when the warrant was ordered to be issued. The finding of probable cause for a warrant upon oral testimony may be based on the same kind of evidence as is sufficient for a warrant upon affidavit.~~

~~**(D) Recording and Certification of Testimony.** When a caller informs the Federal magistrate judge that the purpose of the call is to request a warrant, the Federal magistrate judge shall immediately place under oath each person whose testimony forms a basis of the application and each person applying for that warrant. If a voice recording device is available, the Federal magistrate judge shall record by means of such device all of the call after the caller informs the Federal magistrate~~

~~judge that the purpose of the call is to request a warrant. Otherwise a stenographic or longhand verbatim record shall be made. If a voice recording device is used or a stenographic record made, the Federal magistrate judge shall have the record transcribed, shall certify the accuracy of the transcription, and shall file a copy of the original record and the transcription with the court. If a longhand verbatim record is made, the Federal magistrate judge shall file a signed copy with the court.~~

~~(E) **Contents.** The contents of a warrant upon oral testimony shall be the same as the contents of a warrant upon affidavit.~~

~~(F) **Additional Rule for Execution.** The person who executes the warrant shall enter the exact~~

~~time of execution on the face of the duplicate original warrant.~~

~~**(G) Motion to Suppress Precluded.** Absent a finding of bad faith, evidence obtained pursuant to a warrant issued under this paragraph is not subject to a motion to suppress on the ground that the circumstances were not such as to make it reasonable to dispense with a written affidavit.~~

~~**(d) Execution and Return with Inventory.** The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the~~

~~presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The federal magistrate judge shall upon request deliver a copy of the inventory to the person from or from whose premises the property was taken and to the applicant for the warrant.~~

~~**(c) Motion for Return of Property.** A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property. The court shall receive evidence on any issue of fact necessary to the decision of~~

~~the motion. If the motion is granted, the property shall be returned to the movant, although reasonable conditions may be imposed to protect access and use of the property in subsequent proceedings. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.~~

~~**(f) Motion to Suppress.** A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12.~~

~~**(g) Return of Papers to Clerk.** The federal magistrate judge before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.~~

~~**(h) Scope and Definitions.** This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects. The term "daytime" is used in this rule mean hours from 6:00 a.m. to 10:00 p.m. according to local time. The phrase "federal law enforcement officer" is used in this rule to mean an government agent, other than an attorney for the government as defined in Rule 54(c), who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant.~~

Rule 41. Search and Seizure

(a) Scope and Definitions.

(1) ***Scope.*** This rule does not modify any statute regulating search or seizure, or the issuance and execution of a search warrant in special circumstances.

(2) ***Definitions.*** The following definitions apply under this rule:

(A) "Property" includes documents, books, papers, other tangible objects, and information.

(B) "Daytime" means the hours between 6:00 a.m. and 10:00 p.m. according to local time.

(C) "Federal law enforcement officer" means a government agent (other than an attorney for the government) who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant.

(b) **Authority to Issue a Warrant.** At the request of a federal law enforcement officer or an attorney for the government:

(1) a magistrate judge having authority in the district — or if none is reasonably available, a judge of a state court of record in the district — may issue a warrant to search for and seize, or covertly observe on a noncontinuous basis a person or property located within the district; and

(2) a magistrate judge may issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move outside the district before the warrant is executed.

(c) **Persons or Property Subject to Search or Seizure.** A warrant may be issued for any of the following:

(1) evidence of the commission of a crime;

(2) contraband, fruits of crime, or other items illegally possessed;

(3) property designed for use, intended for use, or used in committing a crime; or

(4) a person to be arrested or a person who is unlawfully restrained.

(d) Obtaining a Warrant.

(1) ***Probable Cause.*** After receiving an affidavit or other information, a magistrate judge or a judge of a state court of record must issue the warrant if there is probable cause to search for and seize, or covertly observe, a person or property under Rule 41(c).

(2) ***Requesting a Warrant in the Presence of a Judge.***

(A) *Warrant on an Affidavit.* When a federal law enforcement officer or an attorney for the government presents an affidavit in support of a warrant, the judge may require the affiant to

appear personally and may examine under oath the affiant and any witness the affiant produces.

(B) *Warrant on Sworn Testimony.* The judge may wholly or partially dispense with a written affidavit and base a warrant on sworn testimony if doing so is reasonable under the circumstances.

(C) *Recording Testimony.* Testimony taken in support of a warrant must be recorded by a court reporter or by a suitable recording device, and the judge must file the transcript or recording with the clerk, along with any affidavit.

(3) *Requesting a Warrant by Telephonic or Other Means.*

(A) *In General.* A magistrate judge may issue a warrant based on information communicated by telephone or other appropriate means, including facsimile transmission.

(B) *Recording Testimony.* Upon learning that an applicant is requesting a warrant, a magistrate judge must:

(i) place under oath the applicant and any person on whose testimony the application is based; and

(ii) make a verbatim record of the conversation with a suitable recording device, if available, or by court reporter, or in writing.

(C) *Certifying Testimony.* The magistrate judge must have any recording or court reporter's notes transcribed, certify the transcription's

accuracy, and file a copy of the record and the transcription with the clerk. Any written verbatim record must be signed by the magistrate judge and filed with the clerk.

(D) *Suppression Limited.* Absent a finding of bad faith, evidence obtained from a warrant issued under Rule 41(d)(3)(A) is not subject to suppression on the ground that issuing the warrant in that manner was unreasonable under the circumstances.

(e) Issuing the Warrant.

(1) ***In General.*** The magistrate judge or a judge of a state court of record must issue the warrant to an officer authorized to execute it and deliver a copy to the district clerk.

(2) ***Contents of the Warrant.*** The warrant must identify the person or property to be searched or covertly

observed, identify any person or property to be seized, and designate the magistrate judge to whom the warrant must be returned. The warrant must command the officer to:

(A) execute the warrant within a specified time no longer than 10 days;

(B) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution of the warrant at another time; and

(C) return the warrant to the magistrate judge designated in the warrant.

(3) ***Warrant by Telephonic or Other Means.*** If a magistrate judge decides to issue a warrant under Rule 41(d)(3)(A), the following additional procedures apply:

(A) *Preparing a Proposed Duplicate Original Warrant.* The applicant must prepare a "proposed duplicate original warrant" and must

read or otherwise transmit the contents of that document verbatim to the magistrate judge.

(B) *Preparing an Original Warrant.* The magistrate judge must enter the contents of the proposed duplicate original warrant into an original warrant.

(C) *Modifications.* The magistrate judge may direct the applicant to modify the proposed duplicate original warrant. In that case, the judge must also modify the original warrant.

(D) *Signing the Original Warrant and the Duplicate Original Warrant.* Upon determining to issue the warrant, the magistrate judge must immediately sign the original warrant, enter on its face the exact time when it is issued, and direct the applicant to sign the judge's name on the duplicate original warrant.

(f) Executing and Returning the Warrant.

(1) ***Notation of Time.*** The officer executing the warrant must enter on the face of the warrant the exact date and time it is executed.

(2) ***Inventory.*** An officer executing the warrant must also prepare and verify an inventory of any property seized and must do so in the presence of:

(A) another officer, and

(B) the person from whom, or from whose premises, the property was taken, if present; or

(C) if either of these persons is not present, at least one other credible person.

(3) ***Receipt.*** The officer executing the warrant must:

(A) give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken; or

(B) leave a copy of the warrant and receipt at the place where the officer took the property.

(4) ***Return.*** The officer executing the warrant must promptly return it— together with a copy of the inventory — to the magistrate judge designated on the warrant. The judge must, on request, give a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(5) ***Covert Observation of a Person or Property.*** If the warrant authorizes a covert observation of a person or property, the government must within 7 days deliver a copy to the person whose property was searched or observed. Upon the government's motion, the court may on one or more occasions for good cause extend the time to deliver the warrant for a reasonable period.

(g) Motion to Return Property. A person aggrieved

by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

(h) Motion to Suppress. A defendant may move to suppress evidence in the court where the trial will occur, as Rule 12 provides.

(i) Forwarding Papers to the Clerk. The magistrate judge to whom the warrant is returned must attach to the warrant a copy of the return, inventory, and all other related papers

and must deliver them to the clerk in the district where the property was seized.

Rule 41
Substantive Change Package
May 10, 2000

COMMITTEE NOTE

The language of Rule 41 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Rule 41 has been completely reorganized to make it easier to read and apply its key provisions. Additionally, several substantive changes have been made.

First, revised Rule 41 now explicitly includes procedural guidance for conducting covert entries and observations. Federal law enforcement officers have obtained warrants, based upon probable cause, to make a covert search—not for the purpose of seizing property but instead to observe and record information. Those observations may assist officers in confirming information already in the possession of law enforcement officials and in turn may assist in deciding whether, and by what means, to pursue further investigation. For example, agents may seek a warrant to enter the office of suspected conspirators to determine the layout of the office for purposes of seeking additional warrants to establish surveillance points or to determine the number and identity of the participants.

Currently, Rule 41(a) recognizes the possibility that a search may occur of property without any subsequent seizure taking place. But the remainder of the rule addresses only traditional searches where the objective is the seizure of tangible property. Nonetheless, the courts have approved the authority of law enforcement agencies to search for and seize intangible evidence or information. *See, e.g.*, *Silverman v. United States*, 365 U.S. 505 (1961) (conversations overheard by microphone touching heating duct); *Berger v. New York*, 388 U.S. 41 (1967) (wiretap of conversations); *United States v. Knotts*, 460 U.S. 276 (1983) (beeper); *United States v. Karo*, 468 U.S. 705 (1984) (beeper); *United States v. Biasucci*, 786 F.2d 504 (2d Cir.), *cert. denied*, 479 U.S. 827 (1986) (visual information gathered by video camera); *United States v. Torres*, 751 F.2d 875 (7th Cir. 1984) (television surveillance of safe house); *United States v. Taborda*, 635 F.2d 131 (2d Cir. 1980) (warrant required to view private area through telescope).

Although the foregoing cases involved Fourth Amendment intrusions because they involved monitoring activities within the defendant's zone of reasonable expectation of privacy, they did not explicitly address the authority of agents to make covert entries. There is authority for the view, however, that both the Constitution and Rule 41 are broad enough to authorize a "surreptitious entry" warrant—for the purpose of observing tangible and intangible evidence. *United States v. Villegas*, 899 F.2d 1334, 1336 (2d Cir. 1990), *citing*

Dalia v. United States, 441 U.S. 238 (1979) and *Katz v. United States*, 389 U.S. 347 (1967); *United States v. Freitas*, 800 F.2d 1451 (9th Cir. 1986), *citing United States v. New York Telephone Co.*, 434 U.S. 159, 169 (1977) (Rule 41 is not limited to tangible items). *See also United States v. Freitas*, 856 F.2d 1425 (9th Cir. 1988) (on remand, court held that good faith exception to exclusionary rule applied; officers had reasonably relied on search warrant, based on probable cause, to surreptitiously search for information; failure to provide notice under Rule 41(d) was technical error). *See also United States v. Villegas*, *supra*, 899 F.2d at 1334-35 (2d Cir. 1990) (approving search warrant for "sneak and peek" entry of defendant's buildings; court noted that Rule 41 does not define the extent of court's power to issue search warrant). In some respects, the covert entry search for a noncontinous observation is less intrusive than other types of conventional intrusions. As the court in *United States v. Villegas* observed:

> [A covert entry search] is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. It is less intrusive than a wiretap or video camera surveillance because the [covert entry] physical search is of relatively short duration,...and produces information as of a given moment, whereas the electronic surveillance is ongoing and indiscriminate, gathering in any activities within its mechanical focus. Thus, several of the limitations on wiretap or electronic surveillance, such as duration and minimization, would be superfluous in the context [of a covert entry search].

The Committee agrees that Rule 41 does not define the limits of the Fourth Amendment, and is cognizant that the Supreme Court has upheld the validity of covert entries with delayed notification, *see, e.g., Dalia v. United States*, 441 U.S. 238, 247-248 (1979) ("The Fourth Amendment does not prohibit per se covert entry performed for the purposes of installing otherwise legal electronic bugging equipment"); *United States v. Donovan*, 429 U.S. 428, 429 n. 19 (1977). The Committee also considered the argument that it would be premature to amend Rule 41 in order to codify the views of only two circuits that have expressly addressed the type of covert search addressed in the amendment, and that it would be better to await further caselaw developments. Nonetheless, the Committee believed that on balance, it would be beneficial to address the procedures (in particular the notice provisions) for covert entry searches in the Rule itself. Accordingly, revised Rule 41(b) recognizes the authority of officers to seek a warrant for the purpose of covertly observing—on a noncontinous basis—a person or property. These types of intrusions are to be distinguished from other continuous monitoring or observations that would be governed by statutory provisions or caselaw. *See* Title III, Omnibus Crime Control and Safe Streets Act of 1968, *as amended* by Title I of the 1968 Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2520; *United States v. Biasucci*, *supra* (use of video camera); *United States v. Torres*, *supra* (television surveillance).

Under revised Rule 41(e)(2), the warrant must describe the person or property to be covertly observed.

Revised Rule 41(f)(5) explicitly requires that if a covert entry search warrant has been issued, the government must provide notice to the person whose property was searched within 7 days of the execution. The time for providing notice may be extended for good cause for a reasonable time, on one or more occasions. This notice requirement parallels the notice requirement for the traditional search but makes allowance for the fact that the functions of covert entry searches would be frustrated by prior or contemporaneous notice of the entry. *See, e.g., United States Villegas, supra; United States v. Freitas, supra.*.

The second substantive change is in revised Rule 41(b)(1). That provision requires law enforcement personnel to first attempt to obtain a warrant from a federal judicial officer. If none is reasonably available, they may seek a warrant from a state judge. This preference parallels similar requirements in Rules 3, 4, and Rule 5. The Committee understands that this change may have a dramatic impact in some districts, which experience a heavy criminal caseload and rely routinely on state judges for assistance. That practice seems to be the exception rather than the general rule, however. On balance, it is important to state a clear preference that in the normal situation federal judicial authorities should be involved in pretrial processing of federal prosecutions. The amendment is not intended to create any new ground for contesting the validity of a search warrant or seeking to suppress evidence on the ground that it was issued by the "wrong" judge.

Finally, two minor changes have been made to Rule 41(e), which governs the procedures for issuing warrants under the rule. First, Rule 41(e)(1) requires that after issuing a warrant, the magistrate judge or state judicial officer must deliver a copy of the warrant to the district clerk. Further, under Rule 41(e)(3), the warrant must designate the magistrate judge to whom the warrant must be returned. The Committee believed that these changes would provide for more efficient processing of warrants, particularly in those instances where a state court judge has issued the warrant.

REPORTERS' NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 41 is one of those rules. This version of Rule 41 includes a significant amendment concerning the authority of a court to approve search warrants for covert entries for the purpose of making observations. Another version of Rule 41, which does not include this provision, is being published simultaneously in a separate pamphlet.

~~**Rule 43. Presence of the Defendant**~~

~~**(a) Presence Required.** The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.~~

~~**(b) Continued Presence Not Required.** The further progress of the trial to and including the return of the verdict, and the imposition of sentence, will not be prevented and the defendant will be considered to have waived the right to be present whenever a defendant, initially present at trial, or having pleaded guilty or nolo contendere,~~

~~(1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial),~~

~~(2) in a noncapital case, is voluntarily absent at the imposition of sentence, or~~

~~(3) after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.~~

~~**(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(b) or (c) or 18 U.S.C. § 3582(c).~~

Rule 43. Defendant's Presence

(a) **When Required.** Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:

(1) the initial appearance, arraignment, and plea;

(2) every trial stage, including jury impanelment and the return of the verdict; and

(3) sentencing.

(b) **When Not Required.** A defendant need not be present under any of the following circumstances:

(1) ***Organizational Defendant.*** The defendant is an organization represented by counsel who is present.

(2) ***Misdemeanor Offense.*** The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur in the defendant's absence.

(3) ***Conference or Hearing on a Legal Question.*** The proceeding involves only a conference or hearing on a question of law.

(4) ***Sentence Correction.*** The proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c).

(c) Waiving Continued Presence.

(1) ***In General.*** A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:

(A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial;

(B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or

(C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.

(2) ***Waiver's Effect.*** If the defendant waives the right to be present under this rule, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.

Committee Notes
Rule 43
May 10, 2000

COMMITTEE NOTE

The language of Rule 43 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The first substantive change is reflected in Rule 43(a), which recognizes several exceptions to the requirement that a defendant must be present in court for all proceedings. In addition to referring to exceptions that might exist in Rule 43 itself, the amendment recognizes that a defendant need not be present when the court has permitted video teleconferencing procedures under Rules 5 and 10 or when the defendant has waived the right to be present for the arraignment under Rule 10. Second, by inserting the word "initial" before "arraignment, " revised Rule 43(a)(1) reflects the view that a defendant need not be present for subsequent arraignments based upon a superseding indictment.

The Rule has been reorganized to make it easier to read and apply; revised Rule 43(b) is former Rule 43(c).

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 43 is one of those rules. This version of Rule 43 recognizes substantive amendments to Rules 5, 5.1. and 10, which in turn permit video teleconferencing of proceedings, where the defendant would not be personally present in the courtroom. Another version of Rule 43, which includes only style changes is being published simultaneously in a separate pamphlet.

Item 8C

APPENDIX C

HABEAS CORPUS RULES

Rule 1. Scope of Rules

(a) Applicable to cases involving custody pursuant to a judgment of a state court. These rules govern the procedure in the United States district courts on applications under 28 U.S.C. § 2254 or § 2241:

(1) by a person in custody pursuant to a judgment of a state court, for a determination that such custody is in violation of the Constitution, laws, or treaties of the United States; and

(2) by a person in custody pursuant to a judgment of either a state or a federal court, who makes application for a determination that custody to which he may be subject in the future under a judgment of a state court will be in violation of the Constitution, laws, or treaties of the United States.

COMMITTEE NOTE

Rule 1(a) has been amended to make it clear that if a request for habeas corpus relief is filed under 28 U.S.C. § 2241, these rules are applicable. The Committee believes that applying these rules to those proceedings will promote uniformity and consistency in processing applications for habeas corpus review, whether the application is filed under § 2254 or § 2241.

Rule 2. Petition

* * * * *

(e) Return of insufficient petition. If a petition ~~received by~~ filed with the clerk of a district court does not substantially comply with the requirements of rule 2 or rule 3, it may be returned to the petitioner, if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the petition.

COMMITTEE NOTE

Rule 2(e) has been amended to conform it to language in Federal Rule of Civil Procedure 5(e). No change in practice is intended by the amendment.

Rule 3. Filing Petition

* * * * *

(b) Filing and service. ~~Upon receipt of the petition and the filing fee, or an order granting leave to the petitioner to proceed in forma pauperis, and having ascertained that the petition appears on its face to comply with rules 2 and 3, the~~ The clerk of the district court shall file the petition and enter it on the docket in his office. The filing of the petition shall not require the respondent to answer the petition or otherwise move with respect to it unless so ordered by the court.

COMMITTEE NOTE

The first portion of Rule 3(b) has been deleted because it conflicts with the requirement in Federal Rule of Civil Procedure 5(e) that the clerk file the papers. The amendment also conforms to current practice; the clerk files the petition and refers it to the court for its consideration of any defects in the petition.

Rule 6. Discovery

(a) Leave of court required. A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for a petitioner who qualifies for the appointment of

counsel under 18 U.S.C. ~~§ 3006A(g)~~ § 3006A.

* * * * *

COMMITTEE NOTE

The amendment to Rule 6(a) reflects amendments to 18 U.S.C. § 3006A.

Rule 8. Evidentiary Hearing

* * * * *

(b) Function of the magistrate judge.

(1) When designated to do so in accordance with 28 U.S.C. § 636(b), a magistrate judge may conduct hearings, including evidentiary hearings, on the petition, and submit to a judge of the court proposed findings of fact and recommendations for disposition.

(2) The magistrate judge shall file proposed findings and recommendations with the court and a copy shall forthwith be mailed to all parties.

(3) Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court.

(4) A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate judge.

COMMITTEE NOTE

The amendment reflects the change in name of magistrates to United States Magistrate Judges.

Rule 9. Delayed or Successive Petitions

* * * * *

(b) Successive petitions. ~~A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.~~ Before a second or successive petition is presented to the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the petition.

COMMITTEE NOTE

Rule 9(b) has been amended to reflect the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 which amended 28 U.S.C. § 2244. That new provision places limitations on the ability of a petitioner to file successive applications for habeas corpus relief. Section 2244(b) explicitly states that a second or successive petition must be first presented to the appropriate court of appeals for an order that authorizes the district court to consider the application.dismissed if it was presented in an earlier petition. The amendment to Rule 9(b) is intended to reflect that statutory provision.

Rule 10. Powers of ~~Magistrates~~ Magistrate Judges

The duties imposed upon the judge of the district court by these rules may be performed by a United States magistrate judge pursuant to 28 U.S.C. § 636.

COMMITTEE NOTE

Rule 10 has been amended to reflect the change in the title of United States Magistrates to United States Magistrate Judges.

Advisory Committee on Criminal Rules
Rules Governing § 2255 Proceedings
May 1, 2000

Rule 1. Scope of Rules

These rules govern the procedure in the district court on a motion under 28 U.S.C. § 2255 or § 2241:

(1) by a person in custody pursuant to a judgment of that court for a determination that the judgment was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such judgment, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack; and

(2) by a person in custody pursuant to a judgment of a state or other federal court and subject to future custody under a judgment of the district court for a determination that such future custody will be in violation of the Constitution or laws of the United States, or that the district court was without jurisdiction to impose such judgment, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.

COMMITTEE NOTE

Rule 1 has been amended to make it clear that if a request for habeas corpus relief is filed under 28 U.S.C. § 2241, these rules are applicable. The Committee believes that applying these rules to those proceedings will promote uniformity and consistency in processing applications for habeas corpus review, whether the application is filed under § 2255 or § 2241. For a discussion on the possible relationship between those two provisions, *see Wofford v. Scott*, 177 F.3d 1236 (11th Cir. 1999).

Rule 2. Motion

* * * * *

(b) Form of Motion. The motion shall be in substantially the form annexed to these rules, except that any district court may by local rule require that motions filed with it shall be in a form prescribed by the local rule. Blank motions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the movant and of which he has or, by the exercise of reasonable diligence, should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The motion shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the ~~petitioner~~ movant.

(d) Return of insufficient motion. If a motion ~~received by~~ filed with the clerk of a district court does not substantially comply with the requirements of rule 2 or rule 3, it may be returned to the movant, if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the motion.

COMMITTEE NOTE

The amendment to Rule 2(b)—changing the word "petitioner" to "movant"—is intended to make the terminology internally consistent throughout the rule.

Rule 2(d) has been amended to conform it to language in Federal Rule of Civil Procedure 5(e). No change in practice is intended by the amendment.

Rule 3. Filing Motion

* * * * *

(b) Filing and service. ~~Upon receipt of the motion and having ascertained~~

~~that it appears on its face to comply with rules 2 and 3, the~~ The clerk of the district court shall file the motion and enter it on the docket in his office in the criminal action in which was entered the judgment to which it is directed. He shall thereupon deliver or serve a copy of the motion together with a notice of its filing on the United States Attorney of the district in which the judgment under attack was entered. The filing of the motion shall not require said United States Attorney to answer the motion or otherwise move with respect to it unless so ordered by the court.

COMMITTEE NOTE

The first portion of Rule 3(b) has been deleted because it conflicts with the requirement in Federal Rule of Civil Procedure 5(e) that the clerk file the papers. The amendment also conforms to current practice; the clerk files the petition and refers it to the court for its consideration of any defects in the petition.

Rule 8. Evidentiary Hearing

* * * * *

(b) Function of the magistrate judge.

(1) When designated to do so in accordance with 28 U.S.C. § 636(b), a magistrate judge may conduct hearings, including evidentiary hearings, on the motion, and submit to a judge of the court proposed findings and recommendations for disposition.

(2) The magistrate judge shall file proposed findings and recommendations with the court and a copy shall forthwith be mailed to all parties.

(3) Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court.

(4) A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate judge.

(c) Appointment of counsel; time for hearing. If an evidentiary hearing is required, the judge shall appoint counsel for a movant who qualifies for the appointment of counsel under 18 U.S.C. ~~§ 3006A(g)~~ § 3006A and the hearing shall be conducted as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation. These rules do not limit the appointment of counsel under 18 U.S.C. § 3006A at any stage of the proceeding if the interest of justice so requires.

* * * * *

COMMITTEE NOTE

The amendments to Rule 8 address two issues. First the term "magistrate" has been changed to "magistrate judge" to reflect the change in name of magistrates to United States Magistrate Judges. Second, the amendment to Rule 8(c) reflects amendments to 18 U.S.C. § 3006A.

Rule 9. Delayed or Successive Motions

* * * * *

(b) Successive motions. ~~A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.~~ Before a second or successive motion is presented to the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the motion.

* * * * *

COMMITTEE NOTE

Rule 9(b) has been amended to reflect the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 which amended 28 U.S.C. 2244. That new provision places limitations on the ability of a petitioner or movant to file successive applications for habeas corpus relief. Section 2244(b) explicitly states that a second or successive petition must be first presented to the appropriate court of appeals for an order that authorizes the district court to consider the application.dismissed if it was presented in an earlier petition. The amendment to Rule 9(b) is intended to reflect that statutory provision.

Rule 10. Powers of ~~Magistrates~~ Magistrate Judges

The duties imposed upon the judge of the district court by these rules may be performed by a United States magistrate judge pursuant to 28 U.S.C. § 636.

COMMITTEE NOTE

Rule 10 has been amended to reflect the change in the title of United States Magistrates to United States Magistrate Judges.

Item 8D

APPENDIX D

PROPOSED RULE 12.4

Rule 12.4. Disclosure Statement

(a) Who Must File.

(1) Nongovernmental corporate party. Any nongovernmental corporate party to a proceeding in a district court must file a statement that:

(A) identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation, and

(B) discloses any additional information that may be required by the Judicial Conference of the United States.

(2) Organizational Victim. If an organization is a victim of the alleged criminal activity, the government must file a statement identifying the victim. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 12.4(a)(1).

(b) Time for Filing; Supplemental Filing. A party must:

(1) file the Rule 12.4(a) statement upon its first appearance, pleading, petition, motion, response, or other request addressed to the court, and

(2) promptly file a supplemental statement upon any change in the information that the statement requires.

COMMITTEE NOTE

Rule 12.4 is a new rule modeled after Federal Rule of Appellate Procedure 26.1 and parallels similar provisions being proposed in new Federal Rule of Civil Procedure 7.1. The purpose of the rule is to assist judges in determining whether they must recuse themselves because of a "financial interest in the subject matter in controversy." Code of Judicial Conduct, Canon 3C(1)(c)(1972). It does not, however, deal with other circumstances that might lead to disqualification for other reasons.

Under Rule 12.4(a)(1), any nongovernmental corporate party must file a statement that indicates whether it has any parent corporation that owns 10% or more of its stock or indicates that there is no such corporation. In addition, the rule requires that party to disclose any other information that may be required by the Judicial Conference. Although the term "nongovernmental corporate party" will almost always involve organizational defendants, it might also cover any third party that asserts an interest in property to be forfeited under new Rule 32.2.

Rule 12.4(a)(2) requires an attorney for the government to file a statement that lists any organizational victims to the alleged criminal activity; the pupose of this disclosure is to alert the court to the fact that a possible ground for disqualification might exist. Further, if the organizational victim is a corporation, the statement must include the same information required of any nongovernmental corporate party.

Although the disclosures required by Rule 12.4 may seem limited, they are calculated to reach the majority of circumstances that are likely to call for disqualification on the basis of information that a judge may not know or recollect. Framing a rule that calls for

more detailed disclosure is problematic and will inevitably require more information than is necessary for purposes of automatic recusal. Unnecessary disclosure of volumes of information may create the risk that a judge will overlook the one bit of information that might require disqualification, and may also create the risk that courts will experience unnecessary disqualifications rather than attempt to unravel a potentially difficult question.

The same concerns about overbreadth are potentially present by in any local rules that might address this topic. Rule 12.4 does not address the promulgation of any local rules that might address the same issue, or supplement the requirements of the rule. However, the authority granted to the Judicial Conference to require additional disclosures provides authority to preempt any local rules on the same topic.

The rule does not cover disclosure of all financial information that could be relevant to a judge's decision whether to recuse himself or herself from a case. The Committee believes that with the various disclosure practices in the federal courts and with the development of technology, more comprehensive disclosure may be desirable and feasible. The Committee further believes that the Judicial Conference is in the best position to develop any additional requirements and to adjust those requirements as technological and other developments warrant. Accordingly, Rule 12.4(a)(1)(B) authorizes the Judicial Conference to promulgate more detailed financial disclosure requirements for criminal cases.

Rule 12.4(b)(1) indicates that the time for filing a financial disclosure statement is at the point when the parties first have formal contact with the court on criminal proceeding. In some instances, that might be as early as the initial appearance.

Finally, Rule 12.4(b)(2) requires the parties to file supplemental statements with the court if there are any changes in the information required in the statement.

APPENDIX E

MINUTES OF COMMITTEE MEETINGS
JANUARY 2000 & APRIL 2000

MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

January 10-11, 2000
Orlando, Florida

The Advisory Committee on the Federal Rules of Criminal Procedure met at Orlando, Florida on January 10 and 11, 2000. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Davis, Chair of the Committee, called the meeting to order at 8:30 a.m. on Monday, January 10, 2000. The following persons were present for all or a part of the Committee's meeting:

Hon. W. Eugene Davis, Chair
Hon. David D. Dowd, Jr.
Hon. John M. Roll
Hon. Susan C. Bucklew
Hon. Tommy E. Miller
Hon. Daniel E. Wathen
Prof. Kate Stith
Robert C. Josefsberg, Esq.
Darryl W. Jackson, Esq.
Lucien B. Campbell, Esq.
Mr. Laird Kirkpatrick, designate of the Asst. Attorney General for the Criminal Division, Department of Justice
Professor David A. Schlueter, Reporter

Also present at the meeting were: Mr. Roger Pauley of the Department of Justice; Mr. Peter McCabe of the Administrative Office of the United States Courts, Mr. John Rabiej and Mr. Mark Shapiro from the Rules Committee Support Office of the Administrative Office of the United States Courts; and Mr. Joseph Spaniol, consultant to the Standing Committee.

Judge Davis, the Chair, welcomed the attendees and reported on the Standing Committee's actions on the proposed amendments to Rules 1 to 31. He noted that the Committee's reaction had generally been positive and that it had approved the rules for publication and comment, subject to some minor editing issues. He added that some members had recommended careful consideration of whether to include any controversial

issues, such as the proposal to change the number of peremptory challenges, in the package to be published.

II. PROPOSED AMENDMENTS TO RULES 1 TO 31

Judge Davis indicated that the primary purpose of the meeting would be to review the proposed style changes to Rules 32 to 60. Any additional changes to Rules 1 to 31 would be referred initially to the respective subcommittees for their consideration. The proposed schedule, he said, would be to hold subcommittee meetings before the scheduled April meeting of the full committee, and then use that meeting to finalize the proposed changes to all of the Rules.

The Committee discussed briefly the question of whether to pursue any substantive amendments to Rule 24(b) concerning the number of peremptory challenges. Judge Miller moved that the current number of peremptory challenges in felony cases (6 for the defense and 10 for the prosecution) be retained and that any discussion regarding equalization of the number be deferred until the October meeting. Mr. Campbell seconded the motion, which carried by a unanimous vote.

III. PROPOSED AMENDMENTS TO RULES 32-40

Judge Dowd, the chair of Subcommittee B, informed the Committee that the Subcommittee had reviewed the proposed style changes to Rules 32 through 40.

A. Rule 32. Sentencing and Judgment.

Judge Dowd explained that Mr. Campbell had proposed a re-organization to the Rule to make it easier to follow and apply. Mr. Campbell added that although there were no major substantive changes in his draft proposal, the sequencing of the provisions had changed and noted, for example, that the definitions in the rule had been moved to the first sections.

The Committee turned first to Rule 32(e)(1), which addresses the issue of disclosure of the Presentence Report and Recommendation. Following discussion, the Committee voted unanimously to approve the proposed language. The Committee discussed the time requirements set out in Rule 32 for completing the various stages of presentencing and sentencing and ultimately decided to retain the language in Rule 32(b) that requires the court to impose a sentence "without unnecessary delay."

Mr. Pauley raised the question of whether any reference should be made in Rule 32 to sentences imposed by the court under Rule 42 for a contempt. He noted that currently both of those rules are silent, for example, on the issue of whether a presentence report would have to be prepared, or whether the person found in contempt would be entitled to any of the

other provisions in Rule 32. Following discussion, there was no consensus that the issue should be explicitly addressed in the Rule.

Mr. Pauley and other members of the Committee raised the question whether Rule 32(h)(3)(A) should be retained. Some members believed that the provision, which requires the court to rule on all unresolved objections to the presentence report, placed an unnecessary burden on the court. Although the Committee ultimately voted 8-1 to delete the provision, it also concluded that additional research would be appropriate. Mr. Campbell and Professor Stith will examine this issue further, in particular the question of whether the Rule should attempt to distinguish between ruling on an objection and making a finding.

In discussing Rule 32(h)(4)(ii) (addressing the defendant), the Committee again discussed the issue of whether the Rule should explicitly exempt contempt proceedings from its coverage. The Committee decided not to address Rule 42 contempt proceedings in this particular provision. The Committee also discussed the topic of in camera hearings addressed in Rule 32(h)(4)(C) and determined that it would be appropriate to research further the issue of whether such hearings should be on a joint motion by the parties or perhaps even by a victim.

B. Rule 32.1. Revoking or Modifying Probation or Supervised Release.

Judge Dowd introduced the proposed revisions to Rule 32.1, noting that the Subcommittee had discussed the issue of whether a proceeding under this Rule should be conducted by a magistrate judge or a district judge. He also noted that the revised rule contained new language in (a)(1)(D) to the effect that the defendant bears the burden of showing that he or she will not flee or pose a danger; that language, however, is not a substantive change and will make no change in practice. The Committee also focused on Rule 32.1(b)(1) (dealing with modification of conditions) and concluded that that provision did not make any change in practice or substance. Following additional discussion, the chair asked Judge Miller, Professor Stith and Mr. Campbell to review Rule 32.1 and determine, inter alia, whether any cross-reference should be made to Rule 40.

C. Rule 32.2. Criminal Forfeiture.

In light of the fact that Rule 32.2 had not yet been approved by the Supreme Court, it would be advisable to wait with any additional changes to the Rule. Mr. Spaniol indicated that he would pass along some additional minor style suggestions to Mr. Rabiej for possible inclusion in the next draft of the rule.

D. Rule 33. New Trial.

Judge Dowd noted that only minor style changes had been made to Rule 33. The Committee agreed with the changes.

E. Rule 34. Arrest of Judgment.

The Committee first addressed the issue of whether to change the title of this rule, noting that the term "arrest in judgment" should be replaced with the style subcommittee's suggested language, "Vacating a Verdict or Finding of Guilty on Jurisdictional Grounds." That point, the Committee concluded, should be addressed in the Committee Note. There was some question on whether the rule should address findings following a nolo contendere plea and whether the rule was intended to focus on vacating a conviction or arresting a judgment and whether they are one in the same. Following additional discussion, the Committee concluded that additional work was required on this rule.

F. Rule 35. Correcting or Reducing a Sentence.

The Committee's discussion focused on two primary areas. First, the Committee engaged in a lengthy discussion regarding the need or utility of Rule 35(a), which currently addresses the issue of the district court's responsibilities following a remand on the issue of sentencing. Initially the discussion focused on Rule 35(a)(1); ultimately the Committee voted 8 to 2 to delete that specific provision. The prevailing view was that that provision was unnecessary. Additional discussion focused on the remainder of Rule 35(a). The discussion focused on the issue of whether it was necessary to even address an issue that should be very clear to a district court following a decision by a Court of Appeals on the issue of whether the sentence was correct. The Committee voted 6-4 to delete Rule 32(a) in its entirety and to re-number the remaining subdivisions.

The second issue for discussion focused on new language in Rule 32(b) to the effect that the government may file a late motion to reduce a sentence if it demonstrates that the defendant had presented information, the usefulness of which could not reasonably be known until more than one year following sentencing. This point, which is a substantive change, reflects the decision of *United States v. Orozco*, ___ F.3d ____ will be reflected in the Committee Note.

G. Rule 36 Stay of Execution.

The Committee agreed with the Style Subcommittee's recommended style changes to Rule 36. No substantive changes are intended.

H. Rule 38. Stay of Execution.

Following discussion of the proposed draft of Rule 38, the Committee decided to remove the reference to Appellate Rule 9(b). The Committee believed that the reference was unnecessary and its deletion was not intended to be substantive in nature. A question was raised about Rule 38(e)(2)(D) and whether the term "surety bond" could be substituted for the term "performance bond." Following additional discussion, the Committee decided to research the issue further.

I. Rule 40. Transfer to Another District.

Mr. Pauley recommended that the Committee consider the issue of explicitly addressing in Rule 40, and in other rules, the issue of whether authorities should be permitted to cross district lines in taking a defendant before a magistrate. He noted that the language in Rules 5 and 5.1 did not address the point. He believed that it would be advisable to consider the point with a view toward including something in the rules. He also raised the question of whether Rule 40 should be incorporated into Rules 5 and 5.1

The Committee discussed the issue and a consensus emerged that Rule 40 should be so incorporated into Rules 5, 5.1, and possibly Rule 32.1. Judge Davis asked Judge Miller and Mr. Pauley to confer on proposing changes to those rules.

IV. PROPOSED AMENDMENTS TO RULES 41 TO 60

A. Rule 41. Search and Seizure.

Mr. Pauley and the Reporter explained the changes to Rule 41, noting that the rule had been completely reorganized to more clearly reflect its key provisions. Mr. Pauley pointed out that the redrafted rule was the result of a subcommittee's work and that it includes a reference to "covert" searches, e.g., where officers seek a warrant to examine or monitor activities in a covert manner.

The Committee engaged in an extensive discussion regarding a proposed change in Rule 41(b) that states a clear preference for seeking a warrant from a magistrate judge. This would be a change in practice from the current rule that states no preference. Judge Roll noted that in his district, where there is an extremely heavy caseload, law enforcement officials often request warrants from state judicial officers and urged the Committee to carefully consider the change and the possibility that it might lead to unintended consequences of creating an unnecessary appellate issue. Following additional discussion, the Committee decided to retain the preference and asked the Reporter to include language in the Committee Note that would make it clear the change was not intended to create any new ground for contesting the validity of a search warrant.

B. Rule 42. Criminal Contempt.

The Committee discussed the issue of whether to include a specific provision in Rule 42 for the appointment of a prosecutor where a person has been charged with contempt. Mr. Pauley pointed out that the proposed language in Rule 42(a)(2) mirrored language in *Klayminic v. United States ex rel Vuitton*, 481 U.S. 787 (1987). In that case, he pointed out, the Court had indicated that ordinarily the court should request that an attorney for the government prosecute the contempt; only if that request is denied, should the court appoint a private prosecutor. Following additional discussion the Committee agreed with the general concept but suggested that the language be reworked.

Some members suggested that there might be an ambiguity in Rule 42(b) in using the word "court" and "judge" in the same sentence. However, a consensus emerged that in the context of the provision, no ambiguity existed.

Mr. Pauley raised the issue of whether there should be a specific reference in Rule 42 to the fact that the formal sentencing proceedings in Rule 32 do not apply to contempt procedures. The Committee agreed tentatively to include a reference in Rule 42(b) to the effect that notwithstanding Rule 32, the court may summarily punish a person found in contempt in the presence of the judge.

Several members questioned the meaning of the provision at the end of Rule 42(b) that the contempt order must be "entered on the record." The Committee agreed that the better phrase might be "filed with the clerk."

C. Rule 43. Presence of the Defendant.

In discussing the proposed style changes to Rule 43, several committee members raised the question of whether some mention should be made in the Rule of the defendant's presence at an arraignment following a superceding indictment. The Committee ultimately decided to change the language in Rule 43(a) to make it clear that the rule applies to "initial" arraignments and to include some discussion of the issue in the Committee Note. The Committee also indicated that the Note should make it clear that the language in Rule 43(b) referring to the fact that the defendant "need not be present..." is designed to reflect the view that the defendant does not have a right to be present under the specified instances.

D. Rule 44. Right to and Assignment of Counsel.

The Committee briefly discussed the proposed style changes to Rule 44 and made several minor modifications, including changing several reference to the assignment of counsel; the Committee believed that the word "appointment" was more appropriate. The Committee also agreed with deletion of the word "promptly" from current Rule 44(c)

regarding the timing of the judge's inquiry into the issue of joint representation. Now, the Rule simply requires that the inquiry be made; the Committee anticipates no change in practice.

E. Rule 45. Computing and Extending Time.

The Committee generally agreed with the proposed style changes but some members questioned whether the reference in Rule 45(a)(4)(C) to "Presidents' Day" was still appropriate. Other members noted that that term had been used in the recent restyling of the appellate rules, although the statute uses the term "Washington's Birthday." It was also pointed out to the Committee that current Rule 45(d), which governs the timing of written motions and affidavits, has been moved to Rule 47.

F. Rule 46. Release from Custody.

During the discussion of the changes to Rule 46, several members raised the question of whether the district court may grant release of a defendant once notice of an appeal has been filed and whether any more specific guidance should be provided in the Rule itself. Currently, Rule 46(c) simply cross-references 18 U.S.C. § 3143(a). Following additional discussion regarding the exoneration of obligors and sureties in Rule 46(g), the Committee decided that more research was required into the question of whether a court must exonerate a surety who deposits cash in the amount of the bond or produces the defendant. The Committee also suggested that more research was required into the question of whether there is any further need for the government to provide bi-weekly reports on defendants who are in pretrial detention. The Committee discussed whether Rule 46(h) should be changed to reflect that the attorney for the government is not required to list each defendant, and the reason for that defendant's continued confinement. Mr. Pauley and Judge Miller had indicated that in their view that provision was not needed; however, the Committee was of the view that more research was required. Finally, the Committee agreed that the Subcommittee should attempt to clarify the language in Rule 46(i).

G. Rule 47. Motions and Supporting Affidavits.

The Committee agreed that the word "orally" should be deleted from the rule. First, that term should not act as a limitation of those who are not able to speak orally and second, a court may wish to entertain motions through electronic means. Deletion of the term also comports with a similar change in Rule 26, regarding the taking of testimony during trial. In place of that word, the Committee decided to substitute the broader phrase "by other means."

Several members raised the question of whether Rule 47(b), regarding affidavits, might be better placed in Rule 12. Another option mentioned was the possibility of cross-referencing Rule 47 in Rule 12. This matter will be studied further.

H. Rule 48. Dismissal.

During the discussion of the proposed changes to Rule 48, it was pointed out to the Committee that the phrase, "leave of the court," in Rule 48(a) was apparently inserted by the Supreme Court when it reviewed the rule during an earlier process, although it might not be apparent from the face of the rule why that language was necessary. Mr. Pauley indicated that it would be appropriate to change the word "government" in that same subdivision, to "attorney for the government." He also noted that there might be a question of whether Rule 48(b) was still necessary. That provision, he stated, preceded the Speedy Trial Act, and to his knowledge, there has been no case where the court dismissed the case under Rule 48(b), which otherwise met the requirements of the Act. Some members pointed out the Act would not necessarily cover pre-arrest delays, and thus Rule 48(b) had some utility. After further discussion, the Committee decided to conduct further research on the issue. Judge Davis asked Mr. Campbell and Mr. Josefsberg to consider whether to retain Rule 48(b).

I. Rule 49. Serving and Filing of Papers.

The Committee briefly discussed the proposed style changes to Rule 49 and agreed with those changes.

J. Rule 50. Calendars; Prompt Disposition.

The Committee discussed the need for the first sentence in Rule 50(a) and agreed that that sentence simply states a truism and was no longer necessary.

Mr. Rabiej and Mr. Shapiro had pointed out to the Committee that Rule 50(b) simply mirrored 18 U.S.C. § 3165. They noted that the provision had been added in 1971 under an accelerated amendment procedure to meet congressional concerns about deadlines in criminal cases. Although there was apparently some discussion in 1975 regarding deletion of the rule (after enactment of the Speedy Trial Act), no action was taken. The Committee agreed that the provision seemed out of place and served no purpose. With the deletion of this provision, the Committee agreed that the Rule should be retitled, "Prompt Disposition" and that some additional thought should be given to deleting Rule 50 entirely.

K. Rule 51. Preserving Claimed Error.

The Committee provided additional style changes to those recommended by the Style Subcommittee and added a sentence at the end of the Rule, clarifying that any rulings regarding evidence would be governed by Federal Rule of Evidence 103. That sentence was added because of concerns about the Supercession Clause and the belief that an argument might have been made that Congressional approval of this rule would supercede that Rule of Evidence.

L. Rule 52. Harmless and Plain Error.

During its discussion of the proposed style changes to Rule 52, the Committee agreed that use of the word "noticed" in the current rule was an anachronism. In its place, the Committee inserted the word "considered."

M. Rule 53. Courtroom Photographing and Broadcasting Prohibited.

The Committee briefly discussed the proposed changes to Rule 53 and agreed that the word "radio" could be deleted without changing the scope of the rule. The Committee also noted that the Note should discuss the narrow exceptions to this rule, i.e. Rules 5 and 10 regarding video teleconferencing of certain proceedings.

N. Rule 54. Application and Exception.

The Reporter indicated that the provisions of Rule 54 had been moved to Rule 1 or deleted from the Rules altogether.

O. Rule 55. Records.

The Committee made only minor changes to the recommended version of Rule 55.

P. Rule 56. When Court Is Open.

The Committee briefly discussed the proposed style changes to the Rule and concluded that no additional changes were necessary. Based upon the earlier discussion at Rule 45(a) (regarding use of the term "Presidents' Day) the Committee agreed to use that term in Rule 56 as well.

Q. Rule 57. District Court Rules.

The Committee reviewed the proposed style changes and in Rule 57(a)(1) substituted the words "federal statute" for the words, "Acts of Congress."

R. Rule 58. Misdemeanors and Petty Offenses.

The Committee changed the title of the rule to "Petty Offenses and Other Misdemeanors." In Rule 58(c)(2)(B) (regarding waiver of venue), the Committee changed to rule to require that the "district clerk," instead of the magistrate judge, to inform the original district clerk of the defendant's waiver of venue. During the discussion of that change the Committee voted 8 to 0 to use the term "district clerk" throughout the rules, rather than "clerk of the district court."

And in Rule 58(g)(1) and (g)(2)(A), the Committee deleted the word "decision." In the Committee's view deletion of that term does not amount to a substantive change.

In addition to several other minor style changes, the Committee discussed whether initial appearances and detention hearings should be addressed in this rule, or cross-referenced in other rules. The Committee referred those issues back to the Subcommittee.

S. Rule 59. Effective Date.

No changes were made to the proposed style changes in Rule 59.

T. Rule 60. Title.

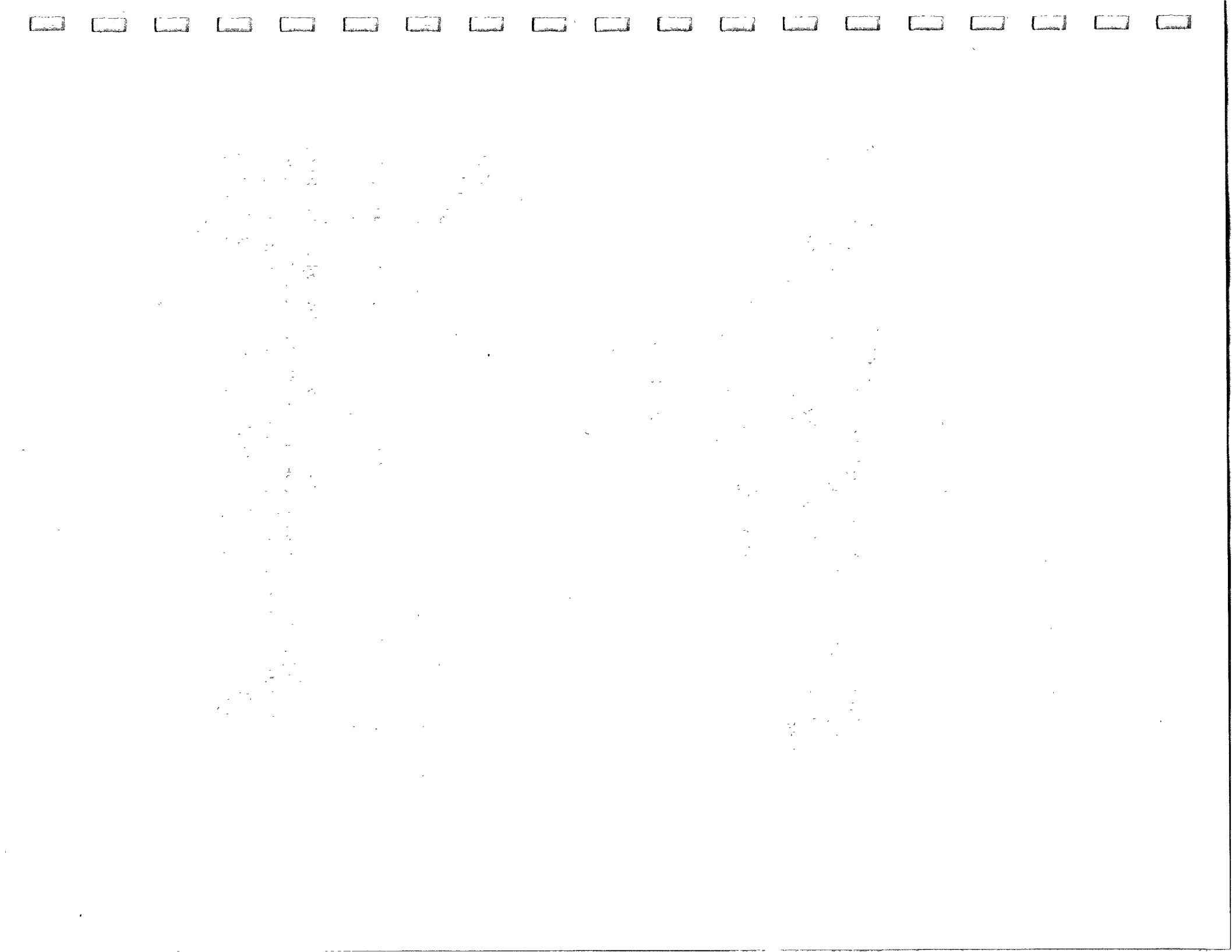
The Reporter noted that Rule 60 has been deleted from the rules.

V. DESIGNATION OF TIME AND LOCATION OF NEXT MEETINGS

Judge Davis reminded the Committee that its next regularly scheduled meeting would be held in New York City on April 25 and 26, 2000. Mr. Rabiej announced that after consulting with the chairs of the subcommittees, that Subcommittee A will meet in Washington, D.C. on Tuesday, February 29, 2000. Subcommittee B will meet in Washington , D.C. on March 9, 2000.

Respectfully submitted,

David A. Schlueter
Reporter, Criminal Rules Committee



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

April 25-26, 2000
New York City, New York

The Advisory Committee on the Federal Rules of Criminal Procedure met at New York City, New York on April 25 and 26, 2000. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Davis, Chair of the Committee, called the meeting to order at 8:30 a.m. on Tuesday April 25, 2000. The following persons were present for all or a part of the Committee's meeting:

Hon. W. Eugene Davis, Chair
Hon. Edward E. Carnes
Hon. David D. Dowd, Jr.
Hon. John M. Roll
Hon. Susan C. Bucklew
Hon. Paul L. Friedman
Hon. Tommy E. Miller
Hon. Daniel E. Wathen
Prof. Kate Stith
Robert C. Josefsberg, Esq.
Darryl W. Jackson, Esq.
Lucien B. Campbell, Esq.
Mr. Laird Kirkpatrick, designate of the Asst. Attorney General for the Criminal Division, Department of Justice
Prof. David A. Schlueter, Reporter

Also present at the meeting were: Hon. Anthony J. Scirica, Chair of the Standing Committee, Hon. A. Wallace Tashima, member of the Standing Committee and liaison to the Criminal Rules Committee; Mr. Roger Pauley of the Department of Justice; Mr. Peter McCabe of the Administrative Office of the United States Courts, Mr. John Rabiej and Mr. Mark Shapiro from the Rules Committee Support Office of the Administrative Office of the United States Courts; Professor Joseph Kimble and Mr. Joseph Spaniol, consultants to the Standing Committee, Hon. James Parker, former member of the Standing Committee and past-chair of that Committee's Subcommittee on Style, Ms. Lynn Rzonca, briefing attorney for Judge Scirica, and Ms. Laurel Hooper, of the Federal Judicial Center.

Judge Davis, the Chair, welcomed the attendees and noted the presence and assistance of Judges Parker and Tashima, and the new consultant on style to the Standing Committee, Professor Joe Kimble.

II. APPROVAL OF MINUTES

Mr. Jackson moved that the minutes of the Committee's special style meeting in Orlando, Florida in January 2000, be approved. The motion was seconded by Justice Wathen and carried by a unanimous vote.

III. STATUS OF PENDING AMENDMENTS BEFORE THE SUPREME COURT

Mr. Rabiej informed the Committee that the Supreme Court had approved the amendments to Rules 6, 7, 11, 24(c), 32.2, and 54 on April 17, 2000 and had forwarded them to Congress. Barring any additional action by Congress, those changes will go into effect on December 1, 2000.

IV. REPORT ON STATUS OF RESTYING PROJECT: PROPOSED PUBLICATION OF TWO PACKAGES OF RULES

Judge Scirica informed the Committee that he and Professor Cocquillette had met with the Chief Justice and provided a status report on the criminal rules restyling project. Judge Davis added that as a result of discussions between Judge Scirica, Professor Coquillette, Mr. Rabiej, and the Reporter, that it was decided that it would be best to publish the proposed rules changes in two packages. That process was further explained by the Reporter who informed the Committee that the first package would be referred to as the "Style" package and would consist of all of the criminal rules. That package would include changes in style and any other changes resulting from conforming the rules to practice or clarifying ambiguous provisions in the existing rules. He added that a "Reporter's Note" would accompany a number of the rules that would be published separately in a second package. The second package for publication, he continued, would be referred to as the "Substantive" package. He noted that that package would consist of approximately 10 rules that included substantive amendments that had been under consideration by the Committee apart from the restyling project. It could also include, he stated, any rules that involved major or controversial changes. The secondary purpose of this package would be to draw the public's attention to those rules containing significant changes in current practice.

Mr. Pauley questioned whether certain rules, such as the proposed amendment to Rule 35 would have to be included in the substantive package. The Reporter responded that that particular rule had been included because the amendment to that rule had been under consideration for some time, before the restyling project began. Again, each of the rules in the substantive package would be a restyled version of the rule and would be accompanied

by a Committee Note and Reporter's Note that would explain that two versions of the rule were being published separately but simultaneously.

Mr. Rabiej added that a letter of explanation would be included in the publication packages to set out the purposes for duplicate sets of rules.

Judge Dowd moved that the Committee approve the format of using two separate packages for publication, with the understanding that a rule might be added, or removed, from the substantive package. The motion was seconded by Judge Miller and carried by a unanimous vote.

V. UNRESOLVED OR NEW ISSUES IN RULES 1-60*

Judge Davis indicated that the priority for the meeting would be to review any unresolved, or new, issues that remained in Rules 1 to 60, following the subcommittee meetings in February and March.

A. Rule 5. Initial Appearance.

Mr. Pauley pointed out that the restyled Rule 5 included a gap for extraterritorial jurisdiction. The revised rule sets out where officers are to take defendants who have been arrested within a district and outside a district. But the rule does not address what is to happen if a defendant is arrested outside the United States. Judge Miller added that in his district the courts handle a number of initial appearances involving arrests occurring outside the United States. Following additional discussion, Mr. Pauley moved that Rule 5(a)(1)(B) be amended. Judge Miller seconded the motion, which carried by a unanimous vote.

B. Rule 5.1. Preliminary Hearing in a Felony Case.

Mr. Pauley also pointed out that two sentences in Rule 5.1(e) were out of place. Following some discussion, Mr. Campbell moved that the rule be amended. Judge Carnes seconded the motion which carried by a unanimous vote.

C. Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition.

Several committee members noted that in restyling Rule 12.2 a reference to mental examinations had been inadvertently omitted from the revised rule. The Reporter later informed the Committee that Mr. Pauley, Mr. Campbell and the Reporter had drafted some

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* The discussion concerning the rules follows their numerical order rather than the order they were discussed at the meeting.

appropriate language--for both the restyled version of Rule 12.2 and the "substantive" version of Rule 12.2.

D. Rule 26.

Judge Carnes reported that in reviewing the proposed changes to new Rule 26(b)(3), which provides for remote transmission of live testimony, the Subcommittee had initially referred to unavailability provisions in Federal Rule of Evidence 804(a)(1) to (4) in an attempt to avoid a possible conflict with Rule 804(a)(5)'s requirement that a proponent must first show a reasonable attempt to obtain a witness's actual presence in court before offering prior testimony under Rule 804(b)(1). He noted however that for purposes of Rule 26, the only reasonable grounds for unavailability are those listed in Rule 804(a)(4) and (5). The Committee discussed the matter and ultimately agreed to the change, with the recognition that the Evidence Committee might wish to visit the issue.

E. Rule 32. Sentencing and Judgment.

Judge Dowd, the chair of Subcommittee B, informed the Committee that the Subcommittee had addressed the provision in Rule 32(h)(3) concerning whether the sentencing judge must decide all unresolved objections to the presentence report. He noted that on one hand, the Subcommittee recognized that the accuracy of the presentence report was often of assistance to the Bureau of Prisons in deciding administrative disposition of a defendant in the prison system. On the other hand, he noted, the Subcommittee was concerned that requiring a judge to rule on every unresolved objection could be time consuming and inefficient if in fact the factor in question was not material to a sentencing decision. Finally, he stated that Mr. Pauley had suggested an amendment to the rule that would address the problem.

Mr. Campbell added that his research indicated that the Bureau of Prisons depends on the presentence reports in making certain administrative decisions. He noted that the report might actually affect the length of the sentence to be served. Judge Friedman stated that the rule may not go far enough and that perhaps the rule should set out what constitutes "material" information in the report. Judge Carnes observed that trial judges should not be called upon to do the work of the Bureau of Prisons; the role of the trial judge is to determine the sentence. Mr. Pauley stated that the rule, which seemingly requires the judge to resolve all objections, even if they will not affect the sentence, does not reflect current practice in all courts. He explained that in his view, a material matter in a presentence report would be where the defendant has admitted drug addiction in hopes that he or she would be eligible for certain rehabilitation programs while in prison. In that instance, it would be important for the judge to resolve any disputes about whether the defendant in fact was addicted to drugs.

Following additional discussion, Judge Dowd ultimately moved that the Committee adopt Mr. Pauley's suggested change to Rule 32(h)(3), which would require the sentencing judge to decide unresolved objections to material matters. Judge Roll seconded the motion, which carried by a vote of 6 to 4. Members of the Committee suggested that the Note indicate the purpose of the change and that counsel should be prepared to take a greater role in insuring that the Bureau of Prisons was presented with accurate information.

Several members suggested that in light of the substantive change to Rule 32, it should be included in the "substantive" package of amendments. The Committee ultimately voted to do so.

F. Rule 32.1. Revoking or Modifying Probation or Supervised Release.

Judge Dowd noted that he had identified a potential problem in the wording of Rule 32.1 and the accompanying note, that might be read to preclude magistrate judges from preparing reports and recommendations on whether to revoke or modify probation or supervised release. Mr. Campbell responded that he had done some additional research on the issue and proposed language for both the rule and the note to address the issued raised by Judge Dowd. The Committee agreed to the changes suggested by Mr. Campbell.

Mr. Pauley expressed concern about language in Rule 32.1(b)(2)(C) that might be interpreted to provide an absolute right to a person to examine adverse witnesses in connection with a revocation hearing. Following additional discussion, Mr. Pauley moved, and Judge Miller seconded, a motion to make minor changes in the language of the rule that reflects that the right to cross-examination exists unless the court determines that the interests of justice do not require the witness to appear at the hearing. The Committee approved the amendment by a vote of 9 to 0 with 1 abstention.

G. Rule 38. Stay of Execution.

Judge Dowd noted that at the Committee's meeting in Orlando, a question was raised about Rule 38(e)(2)(D) and whether the term "surety bond" could be substituted for the term "performance bond." He indicated that after further consideration he recommended that the reference to "bond" in the restyled version be retained, and so moved. His motion was seconded by Judge Roll. The motion carried by a unanimous vote.

I. Rule 41. Search and Seizure.

Professor Stith informed the Committee of Subcommittee A's proposed revision of Rule 41, in particular the reference in the definitions section, Rule 41(a)(2) to "intangibles." The Committee discussed the issue and concluded that the term was difficult to define; in its place the Committee agreed to substitute the word "information." She also noted that there had been a great deal of discussion about Rule 41(b)(1), which would provide for issuing

warrants for covert entries. Mr. Pauley indicated that the courts have already approved such entries and that the rule could be amended to indicate that such entries are non-continuous, as opposed to entries approved under Title III, which may involve continuous monitoring. Following some additional discussion, Professor Stith moved that the section be amended to note explicitly that these types of intrusions are non-continuous. Judge Friedman seconded the motion, which carried by a vote of 9 to 2 with 1 abstention.

Professor Stith also noted that the subcommittee had discussed the question of whether to include the covert entry provision in the published amendments. Mr. Pauley reiterated that the courts have already approved these intrusions so that the rule is not really creating a new type of fourth amendment intrusion. He added that it would be important that the rule address this investigative technique and establish procedural mechanisms for its implementation.

Judge Friedman responded that this issue was one for Congress to address and that only two circuits have addressed the question of covert searches. In particular he was concerned about the open-ended nature of these intrusions, noting that under proposed Rule 41(f)(5), the government could obtain multiple 30-day extensions of time in which to inform the property owner that a covert entry has occurred. Following additional discussion, the Committee agreed by a vote of 11 to 1 to modify that language to reflect that the court could grant a "reasonable" extension of time to deliver the warrant. By the same margin of approval, additional amendments were made to the rule.

Judge Wathen raised the question of whether even the amended version of Rule 41 should be published for comment. Several members indicated a concern that the amendment was not really procedural in nature and that until there was more caselaw on the subject, the issue of covert searches should not be included in the rule. Judge Wathen moved that the substantive amendments regarding covert searches be removed from the rule. The motion was seconded by Judge Dowd; it failed by a vote of 6 to 7, with Judge Davis casting the tie-breaking vote.

J. Rule 46. Release from Custody; Supervising Detention.

Judge Carnes informed the Committee that Subcommittee A had discussed the language in Rule 46(i), dealing with forfeiture of property if a defendant fails to appear. He noted that the subcommittee had concluded that the language in that provision had been included by Congress and the subcommittee was initially reluctant to change the language. However, he recommended "restyled" language that would retain the essence of the provision and make it clearer that a court may dispose of a charged offense by ordering forfeiture under 18 U.S.C. § 3146(b), if a fine in the amount of the property's value would be an appropriate sentence. Judge Dowd moved that the suggested language be adopted and Judge Bucklew seconded the motion. The motion carried by a unanimous vote.

K. Rule 48. Dismissal.

Judge Dowd indicated that at the Committee's Orlando meeting, a question had been raised about whether to retain Rule 48(b), which permits a court to dismiss an indictment for delays. It had been pointed out at that meeting that the rule had preceded enactment of the Speedy Trial Act and that there was a risk that re-promulgating the rule might be viewed as an attempt to supersede that Act. The Subcommittee had considered an amendment offered by Mr. Pauley but had ultimately decided not to change the rule because it believed that Rule 48(b) still had utility apart from the Speedy Trial Act. Following some additional discussion the Committee decided to retain Rule 48(b) and suggested some modifications to the accompanying Note that would simply reflect that the Committee had considered the relationship between the Speedy Trial Act and Rule 48 and that it intended to make no change in that relationship.

L. Rule 49. Serving and Filing of Papers.

The Reporter informed the Committee that the Civil Rules Committee had published for comment an amendment to Civil Rule 77 concerning electronic service of a court's orders or judgments. He noted that Criminal Rule 49 currently cross-references the civil rules regarding service of papers and recommended that similar language be adopted regarding notice of a court order in Rule 49(c). Following discussion Judge Miller moved that Rule 49(c) be so amended. Mr. Campbell seconded the motion, which carried by a unanimous vote.

VI. VIDEO TELECONFERENCING—RULES 5 & 10

Judge Roll reported that in his circuit there was a great deal of interest in being able to use teleconferencing for initial appearances and arraignments. He also noted, however, that there was also a feeling that if those procedures were dependent upon obtaining the defendant's consent that they would not be used. Following additional discussion, the Committee voted by a margin of 10 to 2 to publish alternate versions of Rule 5—one that would require the defendant to consent to video teleconferencing and one that would not. The Committee also voted by a margin of 11 to 1 to publish similar alternate versions of Rule 10.

VII. ADDITIONAL STYLE CHANGES TO RULES 1 - 60

Judge Davis indicated that additional suggested style changes had been submitted by several parties and that they would be submitted to the Standing Committee's Style Subcommittee, which would be conducting a review of the rules during the public comment period. Any minor, purely mechanical, corrections or changes could be incorporated into the two packages to be sent to the Standing Committee. The Reporter added that if time

permitted, any changes or corrections could be considered at the Committee's Fall 2000 meeting, while the rules were still out for public comment.

VIII. FINANCIAL DISCLOSURE RULES

Judge Scirica provided some background information on proposed financial disclosure rules. He indicated that the Judicial Conference was very interested in the topic and that each of the rules committees would hopefully agree on some standard language for their particular rules to be published in August 2000. He noted that there had been considerable discussion about whether these proposed rules were even procedural in nature; some were of the view that this is really a matter of professional ethics and not the rules process. In response, others had noted that the Appellate Rules already included a disclosure provision, that Congress apparently expected the Judicial Conference to address the issue, and finally, the Code of Conduct Committee had requested assistance from the rules committees. Judge Scirica also stated that there had been a good deal of debate over just what should be disclosed. A review of the district and appellate courts had indicated a wide variety of approaches to the problem. For now, he said, there appeared to be a consensus to address the topic in a more limited fashion in the rules themselves but to include a cross-reference to the fact that the Judicial Conference might develop a standard form that could be used; that form in turn might require information beyond the basic financial disclosure envisioned at this time.

Judge Davis indicated that he and the Reporter had discussed the issue and that the Reporter, using Appellate Rule 26.1, had drafted a new Rule 12.4 that would parallel that Rule. The Reporter added that eventually the Reporters of the various rules committees would probably work further to standardize the language.

Following additional discussion regarding disclosure of information concerning organizational victims, the Committee approved the draft.

IX. APPROVAL OF HABEAS RULES FOR PUBLICATION

The Reporter presented copies of proposed amendments and committee notes to the Habeas Corpus Rules (Rules Governing § 2254 and § 2255 Proceedings) to the Committee for its consideration. He noted that the Committee had already approved the substance of the changes at the Fall 1998 and Fall 1999 meetings. Judge Carnes and Judge Miller briefly addressed the purpose of the amendments. Judge Friedman questioned the proposed language in Rules 2 and 3 that would change the current practice of receiving and reviewing habeas actions. In his experience, one judge reviews all of the habeas actions that are received and then decides whether they should actually be filed. Other judges noted that the amendment conforms to Civil Rule 5(e) that indicates that the clerk is to file the papers and then refers them to the court for a determination of whether there are any defects in the papers.

Judge Miller moved that the rules be approved and forwarded with a recommendation that they be published for comment. Mr. Pauley seconded the motion, which carried by a unanimous vote.

X. APPROVAL OF PUBLICATION OF LOCAL RULES ON INTERNET

Mr. Rabiej asked the Committee to consider a proposal to publish all of the local rules on the internet. He noted that some concerns had been raised that publication might lead to unnecessary cross-analysis of some of the rules. Following brief discussion, Judge Dowd moved that the Committee approve publication of the local rules on the internet. Judge Miller seconded the motion, which carried unanimously.

XI. APPROVAL OF RULES 1 – 60 FOR SUBMISSION TO STANDING COMMITTEE FOR PUBLICATION

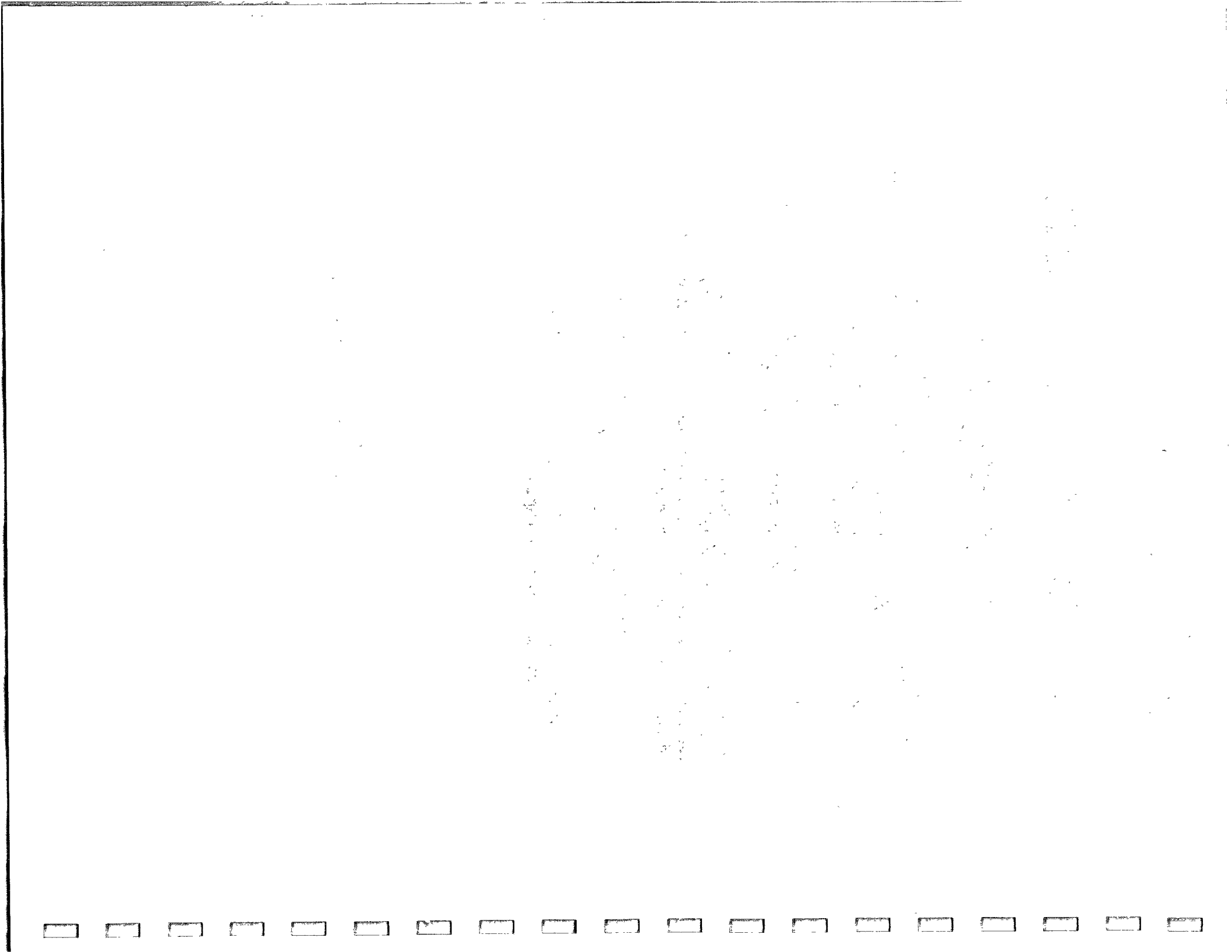
Judge Miller moved that the Committee forward restyled Rules 1 through 60 the Standing Committee for publication and comment. Judge Wathen seconded the motion which carried by a unanimous vote. Judge Davis thanked the Committee members for all of their dedicated efforts in the restyling project.

XII. DESIGNATION OF TIME AND LOCATION OF NEXT MEETINGS

Judge Davis recommended that the Committee hold its Fall 2000 meeting in San Diego. The tentative dates for that meeting are October 23 to 24.

Respectfully submitted,

David A. Schlueter
Reporter, Criminal Rules Committee



COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

File Copy

Washington, D.C.
June 7-8, 2000
Volume III

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JUNE 7-8, 2000

1. Opening Remarks of the Chair

   A. Report on the Judicial Conference session

   B. Supreme Court approval of proposed rule amendments

2. **ACTION** — Approval of Minutes

3. Report of the Administrative Office

   - **ACTION** — Proposal linking courts' Internet web sites containing local rules with "Federal Rulemaking" web site and encouraging courts that do not have an existing web site to post their local rules on one

4. Report of the Federal Judicial Center

5. Report of the Advisory Committee on Appellate Rules

   A. **ACTION** — Proposed amendments to Rules 4, 5(c), 21, 25, 26(c), 26.1, 36, and 45 for approval to be published for comment (publication of proposed amendments to Rules 1, 5, 15, 24, 26, 27, 28, 31, 32, 41, and 44 and revision of Form 6 approved at January 2000 meeting)

   B. Minutes and other informational items

6. Report of the Advisory Committee on Bankruptcy Rules

   A. **ACTION** — Proposed amendments to Rules 1007, 2002, 3016, 3017, 3020, 9006, 9020, and 9022 and Official Form 7 for approval and transmission to the Judicial Conference

   B. **ACTION** — Proposed amendments to Rules 1004, 1004.1, 2014, 2015, 4004, 9014, and 9027 and Official Form 1 for approval to be published for comment

   C. Minutes and other informational items

7. Report of the Advisory Committee on Civil Rules

   A. **ACTION** — Proposed amendments to Rules 5, 6, 65, 77, 81, and 82, and abrogation of Copyright Rules for approval and transmission to the Judicial Conference

B. **ACTION** — Proposed amendments to Rules 54, 58, and 81(a)(2) and new Rule 7.1 for approval to be published for comment

C. Minutes and informational items

8. Report of the Advisory Committee on Criminal Rules

A. **ACTION** — Comprehensive "style" revision of Rules 32 through 60 for approval to be published for comment in August (publication of revised Rules 1 through 31 approved at January 2000 meeting)

B. **ACTION** — Proposed "substantive" amendments to Rules 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41, and 43, which deal with revisions that were considered before the "style" project started, and new Rule 12.4 for approval to be published for comment

C. **ACTION** — Proposed amendments to Rules 1, 2, 3, 6, 8, 9, and 10 Governing Section 2254 Proceedings and Rules 2, 3, 8, 9, and 10 Governing Section 2255 Proceedings

D. Minutes and other informational items

9. Report of the Advisory Committee on Evidence Rules

10. Status Report of Subcommittee on Attorney Conduct Rules

11. Disclosure of Financial Interests

A. **ACTION** — Proposed new Civil Rule 7.1 and Criminal Rule 12.4 and amendments to Appellate Rule 26.1 for approval to be published for comment

B. Alternative language recommended by Committee of Codes of Conduct and FJC report on local rules governing financial disclosure

12. Report of Technology Subcommittee

13. Status Report of Local Rules Project

14. Comments on Proposed New Statistical System

15. Long Range Planning

16. Next Meeting: January 4-5, 2001, in Tucson, Arizona; June 14-15, 2001 (tentative dates)

Item 9

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

ANTHONY J. SCIRICA
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

WILL L. GARWOOD
APPELLATE RULES

ADRIAN G. DUPLANTIER
BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

W. EUGENE DAVIS
CRIMINAL RULES

MILTON I. SHADUR
EVIDENCE RULES

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

FROM: Honorable Milton I. Shadur, Chair
Advisory Committee on Evidence Rules

DATE: May 1, 2000

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules met on April 17th in Chicago, Illinois. At that meeting the Committee reviewed a number of long-term projects, which are summarized in Part III of this Report. At this time, the Evidence Rules Committee is not proposing any amendments to the Federal Rules of Evidence at this time. There is a more extended discussion of matters considered by the Evidence Rules Committee in the draft minutes of the April meeting, attached to this Report.

II. Action Items

No Action Items

III. Information Items

A. Consideration of Evidence Rules

At its April meeting the Committee focused on proposals to amend four Evidence Rules. It determined that one of those Rules (Rule 803(18)) should not be amended . With respect to another Rule (Rule 902) the Committee decided not to proceed with an amendment proposed by the Justice Department unless a showing is made that the current Rule is creating a substantial problem in practice. Finally, the Committee agreed in principle to propose amendments to two rules (Rules 608(b) and 804(b)(3)) at a future date. The Rules considered were:

1. Rule 608(b) — The problem addressed by the Committee is that as written, Evidence Rule 608(b) prohibits the admission of extrinsic evidence when used to impeach a witness' "credibility". Read literally, this would mean that extrinsic evidence could never be offered to prove any aspect of a witness' credibility. But the Supreme Court made clear in *United States v. Abel* that the term "credibility" really means "character for truthfulness" and that impeachment on non-character grounds, such as for bias, is not covered by the extrinsic evidence limitation of Rule 608(b). *Abel* basically distinguishes a character attack (as to which extrinsic evidence is absolutely inadmissible) from all other forms of impeachment (as to which extrinsic evidence can be admitted subject to Rule 403).

The Committee considered whether an amendment is necessary to clarify that extrinsic evidence is absolutely precluded only if the impeaching evidence is offered to attack the witness' character for truthfulness, and that the admissibility of extrinsic evidence for other forms of impeachment is governed by Rule 403. After an extensive review of the case law, the Committee determined that a fair number of cases can be found that misapply the current Rule by invoking it to preclude extrinsic evidence offered for non-character forms of impeachment. There is also a concern that litigants are misapplying the Rule at the trial level, and that many litigants do not proffer extrinsic evidence for non-character impeachment because they believe that the Rule on its face prohibits it. A motion was made to recommend some kind of an amendment to Rule 608(b) to carry out the original purpose of the Rule, as stated at the beginning of this paragraph. That motion passed unanimously.

After substantial discussion the Reporter was directed to draft a proposed amendment and Committee Note to Rule 608(b). That proposed amendment would: 1) substitute the term "character for truthfulness" for the word "credibility" in Rule 608(b); 2) add language to the Rule that would provide that where extrinsic evidence is prohibited, it cannot be referred to directly or indirectly (in order to prevent an abusive practice by which parties seek to smuggle in extrinsic evidence by referring to consequences suffered by the witness for his alleged misconduct); and 3) include language in the Committee Note specifying that the admissibility of extrinsic evidence offered to impeach the witness on grounds of contradiction, prior inconsistent statement, bias, or lack of capacity is governed by Rules 402 and 403, not by Rule 608(b). The proposed amendment will be considered at the October, 2000 meeting of the Evidence Rules Committee, with a view to proposing to the Standing Committee its release for public comment in 2001.

2. Rule 803(18) — At the request of District Judge John Grady of the Northern District of Illinois, the Committee considered whether to propose an amendment to Rule 803(18), the Rule providing a hearsay exception for learned treatises. Judge Grady's proposal was to delete or amend the last sentence of Evidence Rule 803(18), which currently prohibits learned treatises from being introduced as exhibits (and consequently taken into the jury room). The Committee determined, however, that the rationale of the last sentence of Rule 803(18) was sound. There is a legitimate concern that learned treatises might be given undue weight if they are admitted as trial exhibits. The Committee noted that the jury is not ordinarily permitted to bring the transcript of an expert's testimony (or other excerpts from the trial testimony) into the jury room. Because learned treatises essentially operate as expert testimony, it would be inappropriate for the jury to

be allowed to bring a treatise into the jury room, because the treatise might receive more weight than the equivalent expert witness testimony. Indeed, an even greater danger might be posed by allowing such often complex and technical treatises into the jury room without the benefit of contemporaneous explanation. The Committee therefore resolved not to propose an amendment to Rule 803(18) at this time.

3. Rule 804(b)(3) — Rule 804(b)(3) provides a hearsay exception for declarations against penal interest. The Rule as written states that in criminal cases an accused must provide corroborating circumstances clearly indicating the trustworthiness of the statement before it can be admitted as a declaration against penal interest. This corroborating circumstances requirement does not, by the terms of the Rule, apply to government-proffered declarations against penal interest. Nor does the corroborating circumstances requirement apply on its face to civil cases. At the April meeting the Committee considered whether Rule 804(b)(3) should be amended to extend the corroborating circumstances requirement to government-proffered hearsay and to civil cases. The Committee noted that the current one-way corroboration requirement has never been justified and has been criticized and rejected by many courts. The Committee unanimously agreed that a unitary approach to the admissibility of declarations against penal interest would result in both fairness and efficiency in the administration of the Rule.

The Committee also noted that there is some dispute in the courts over the meaning of "corroborating circumstances"; that the Rule leaves the term undefined; and that the term is not used anywhere else in the Evidence Rules. The Committee therefore unanimously agreed that it would be useful to provide some guidance on the meaning of "corroborating circumstances" in a Committee Note. After substantial discussion the Reporter was directed to draft a proposed amendment and Committee Note to Rule 804(b)(3). That proposed amendment would: 1) apply the corroborating circumstances requirement to all proffered declarations against penal interest, and 2) include in the Committee Note a non-exclusive list of factors that courts should take into account in determining whether the corroborating circumstances requirement is met. The proposed amendment will be considered at the October, 2000 meeting of the Evidence Rules Committee, with a view to proposing to the Standing Committee its release for public comment in 2001.

4. Rule 902 — The Committee considered a Justice Department proposal to amend Rule 902 to provide for self-authentication of public documents by way of certification, (to provide an alternative to the requirement of a seal). The Committee resolved that the costs of an amendment would not be justified unless the Justice Department could show that the requirement of a seal imposes a substantial problem in practice. Any hardship imposed by a sealing requirement is minimized by the current Rule 902(2), which provides for self-authentication of unsealed documents if an official affixes a seal to a certification that the document is genuine. The Rule 902(2) certification sealing requirement does not mandate a government seal; a certification would be sufficient if it bore a notary seal or the like. Therefore the Committee did not find a substantial need to proceed with an amendment to Rule 902 at this time. The Committee agreed to reconsider the proposed amendment if a survey by the Department of Justice indicates that

DOJ attorneys are having substantial problems in authenticating public records due to the sealing requirements of Rule 902.

The Committee also responded to a request to consider whether Rule 902(6) should be amended to provide for self-authentication of online reports and news services. The Committee determined that the risk of forgery of such materials was too great to justify a rule providing for self-authentication.

B. Committee Report on Case Law Divergence From Rules or Notes

At an earlier meeting the Committee had directed the Reporter to prepare a report that would highlight for lawyers and judges the existence of case law under the Evidence Rules that diverges materially from the text of a particular Rule, or from the accompanying Committee Note, or both. At the April meeting the Committee reviewed the Reporter's draft of the report on case law divergence. The Committee believes that divergent case law presents a trap for the unwary, not because the case law is wrongly decided but simply because the text of the Rule or the Note would not necessarily lead to an investigation of the case law. The report on case law divergence is to be published as a work of the Reporter at the direction of the Committee. It is not an official Committee report. In this sense the case law divergence report is similar to the Reporter's report on outmoded Advisory Committee Notes that was published by the Federal Judicial Center in 1998.

The case law divergence report makes clear that it is reportorial only. It states that no inference is to be drawn as to the merits of any of the case law that is discussed. Nor is there any implication that any of the Rules discussed are in need of amendment. The goal of the report is simply to highlight for lawyers and judges the fact that some case law diverges from the text of some of the Rules, and to encourage further research where such divergence exists. The report does not purport to be a complete compendium of all the case law, equivalent to a treatise, on every rule in which some case has diverged from the text. The Committee agreed that the report should emphasize that it is operating only as a triggering mechanism--alerting lawyers and judges to the fact that some case law diverges from certain specific rules, and emphasizing that the report does not purport to provide a thorough description of all of the reported cases discussing a particular Evidence Rule.

The case law divergence report has been sent to the Federal Judicial Center for possible publication. A copy of the report is attached.

C. Privileges

The Evidence Rules Committee continues to work on a long-term project to prepare provisions that would state, in rule form, the federal common law of privileges. This project will not necessarily result in proposed amendments, however. The Subcommittee on Privileges prepared three draft rules for consideration by the Committee at the April meeting. Those rules

would codify: 1) the lawyer-client privilege; 2) rules on waiver; and 3) a catch-all provision similar to current Rule 501, that would permit further development of privileges. At the April meeting the Committee provided extensive guidance and commentary on the Subcommittee's drafts. The Subcommittee will conduct further research and will revise the drafts for further consideration at the October, 2000 meeting of the Evidence Rules Committee.

IV. Minutes of the April, 2000 Meeting

The Reporter's draft of the minutes of the Evidence Rules Committee's April, 2000 meeting are attached to this report. These minutes have not yet been approved by the Committee.

Attachments:

Draft Minutes
Case Law Divergence Report

Advisory Committee on Evidence Rules

Draft Minutes of the Meeting of April 17th, 2000

Chicago, Illinois.

The Advisory Committee on the Federal Rules of Evidence met on April 17th in Room 2544 of the Federal Courthouse in Chicago, Illinois.

The following members of the Committee were present:

Hon. Milton I. Shadur, Chair
Hon. Jerry E. Smith
Hon. David C. Norton
Hon. Jeffrey Amestoy
Laird Kirkpatrick, Esq.
Frederic F. Kay, Esq.
John M. Kobayashi, Esq.
David S. Maring, Esq.
Professor Daniel J. Capra, Reporter

Also present were:

Hon. Frank W. Bullock, Jr., Liaison to the Standing Committee on Rules of Practice and Procedure
Hon. Richard Kyle, Liaison to the Civil Rules Committee
Professor Kenneth Broun, Consultant to the Subcommittee on Privileges
Roger Pauley, Esq., Justice Department
Peter G. McCabe, Esq., Secretary, Standing Committee on Rules of Practice and Procedure
John K. Rabiej, Esq., Chief, Rules Committee Support Office
Jennifer Evans Marsh, Esq., Federal Judicial Center
Professor Leo Whinery, Reporter, Uniform Rules of Evidence Drafting Committee

Opening Business

Judge Shadur opened the meeting by asking for approval of the minutes of the October, 1999 Evidence Rules Committee meeting. The minutes were unanimously approved. Judge Shadur informed the Committee that the Supreme Court has approved all of the Committee's proposed amendments to the Evidence Rules--Rules 103, 404(a), 701, 702, 703, 803(6) and 902.

Judge Shadur then asked John Rabiej to report on a proposal to encourage all courts to

place local rules on the internet. Mr. Rabiej noted that concern has been expressed by some courts that if local rules are placed on one internet web site, it will make it easy to compare the rules, to the embarrassment of some of the courts. He noted that the current proposal simply encourages that the district courts place local rules on the internet--the proposal does not purport to mandate anything. The Evidence Rules Committee approved the proposal in principle. Committee members expressed concern, however, that a listing of a particular rule as "effective" on a certain date might be misleading if the date was simply the date on which the rule was last reviewed for publication on the web site. The Committee suggested that the web site specify an "as of" date, indicating when the rules were last reviewed, together with an effective date indicating when the rule first became effective. A Committee member expressed his opinion that standing orders should be placed on the internet as well. Mr. Rabiej informed the Committee that such a proposal is currently under consideration.

Judge Shadur then reported on the Standing Committee's January meeting. The Evidence Rules Committee did not propose any action items at that meeting. Judge Shadur noted, however, that the Evidence Rules Committee does have input into two ongoing Standing Committee projects. One is the proposal of a Civil Rule concerning financial disclosure. Materials on this matter were included in the agenda book. The proposal currently before the Standing Committee is patterned on Appellate Rule 26.1. Judge Shadur noted that the Evidence Rules Committee does not have primary responsibility for rulemaking on financial disclosure, but that the Evidence Rules Committee will be kept apprised of developments. A second Standing Committee project involves the ongoing study of possible Federal Rules of Attorney Conduct. The Standing Committee's subcommittee on attorney conduct held an invitational conference, including members from bar associations, academia, and disciplinary counsel. The current draft model, requiring dynamic conformity with state rules of professional responsibility, has been revised in light of comments made at the February meeting. The Standing Committee plans to hold another invitational conference this Summer, in an effort to determine whether there is really a problem that is worth addressing through a federal rule of attorney conduct. Judge Shadur noted that no action is required from the Evidence Rules Committee at this point.

Consideration of Evidence Rules

Judge Shadur noted that the Evidence Rules Committee is not contemplating formal recommendation of any rule changes to the Standing Committee at this time. At the October, 1999 meeting, several issues were raised concerning possible rule changes, and the Reporter was directed to prepare a memorandum on each of these issues. The Reporter also prepared a memorandum in response to a request by Judge Grady to consider a proposed amendment to Evidence Rule 803(18). The issue for the Committee was whether any of the proposed rule changes are worth considering for further investigation, with a view to a possible proposal to the Standing Committee at its January, 2001 meeting.

commonly after the proceeding has concluded, and almost always after the challenged conduct has been completed. There would be few opportunities for review of the state determination by any federal court.

Together, these difficulties justify the burdensome requirement that an exemption order be sought by an attorney who recognizes a potential conflict between the interests of federal procedure and state professional responsibility rules. In some circumstances it may be possible to seek an advisory ruling from a state agency before acting. Often, however, only the federal court will be in a position to act in time to support continued efficient development of the federal proceeding.

The variety of potential conflicts between procedure and professional responsibility is too great to support any explicit standard for weighing the competing interests. Violation of a rule of responsibility may lie at the extended margin of application that involves little if any significant interest, or may lie at the core of a vitally important state policy. A slight change in procedural course might avoid any conflict in some circumstances, while other circumstances may pit a vital procedural need against the requirements of professional responsibility. All that can be said is that the federal court should be sympathetically sensitive to the interests embodied in the state rules of professional responsibility, and should take care to be sure that federal interests weigh so heavily as to overcome the state interests involved in the specific conflict.

A determination that proposed conduct does not violate the rules of professional responsibility should not always preclude consideration of the federal procedural interests involved. The question of professional responsibility may be close and may involve interests that are significantly more important than the potential federal procedure interest. A court may decline to enter an exemption order in such circumstances.

* * *

Subdivision (e). Subdivision (e) is the necessary complement of subdivision (c). The subdivision (c) power to serve the needs of federal procedure by exempting attorney conduct from state rules of professional responsibility requires that state tribunals recognize the exemption. The exemption includes an absolute immunity against civil liability for the exempted conduct.

The absence or even explicit refusal of a Rule 1(c) exemption order does not prevent a state disciplinary authority from considering federal procedural interests in determining whether there has been a violation of professional responsibility requirements or in deciding on a sanction after finding a violation.

Reporter's Note

This draft avoids at least one important question: when may the federal court enter an exemption order? Only before the relevant conduct? Also after, but before any state disciplinary inquiry is launched? After a state disciplinary inquiry is launched, but before final disposition? The answer may be complicated by the residual ambiguities of the concept that addresses conduct in connection with a federal action or proceeding. It may be difficult to insist that an exemption order be obtained before prefiling conduct is undertaken.

Alternative: Retroactive Federal Protection By Order

This version would discard the subdivision (e) preemption provision entirely, and replace subdivision (c) by the following provision:

(c) Protective Order.

(1) A United States District Court or Court of Appeals may enter an order that protects an attorney from any sanction, civil liability, or other consequence under a state rule of professional responsibility for conduct in connection with any action or proceeding in that court.

(2) An application for a protective order under Rule 1(c)(1) may be made only after a standard of professional responsibility is invoked against the applicant in state proceedings.

(3) In determining whether to grant a protective order under Rule 1(c)(1), the court should consider:

(A) whether the attorney's conduct violated any applicable rule of professional responsibility, and the nature and severity of any possible violation;

(B) whether the attorney's conduct was required or authorized by order of the federal court, by federal procedure, or by other federal interests derived from federal substantive law; and

(C) whether the federal interests served by the attorney's conduct outweigh the interests served by completion of the state proceedings in which the rule of professional responsibility is invoked.

Committee Note

Subdivision (c) recognizes the conflicts that may arise between federal interests and state rules of professional responsibility. If a federal court orders an attorney to engage in specified conduct, the interests both of the court and of the attorney forbid imposition of sanctions or liability under inconsistent state rules. Federal courts also must be able to develop and apply their own procedure free from indirect control by state rules of professional responsibility. An attorney who complies with federal procedural requirements, or who seizes opportunities made available by

federal procedure, must be protected against state-imposed sanctions unless the attorney could have achieved the same procedural ends by other means consistent with federal procedure and also consistent with important state rules of professional conduct. Overriding federal interests also may derive from substantive federal principles.

These abstract principles are difficult to translate into practice. It is particularly difficult to ask state disciplinary bodies and state courts to interpret and vicariously apply the federal rules of procedure and the interests that may derive from federal substantive law. It is better that the balancing of federal interests against state interests be made by the federal court connected to the attorney conduct that has been called into question in state proceedings. A protective order issued by the federal court provides the means to effectuate this balancing. At the same time, there is little point in submitting federal courts to a continuing barrage of anticipatory applications by attorneys who fear that their conduct may some day be called into question in state proceedings. State authorities in fact have shown no general inclination to pursue professional responsibility sanctions for conduct in connection with federal proceedings that arguably serves federal interests. The need to protect federal interests is best served by allowing an application for a protective order only after a state rule of professional responsibility is actually invoked in state proceedings.

The federal court's decision whether to issue a protective order is a matter of discretion that requires balancing federal interests against state interests. The strength of the federal interest is direct and overwhelming when the attorney's conduct was directed or authorized by order of a federal court. If at the time of making the order the federal court was aware of the facts that give rise to the issue of professional responsibility, it is difficult to imagine the extraordinary circumstances that should allow imposition of state sanctions for conduct that complies with the order. Absent a directly applicable order, the nature of the federal interest will, standing alone, be important in some circumstances and less important in others. One very important dimension of the federal interest is interdependent with the potentially prohibiting rule of professional responsibility. There is, for example, little federal interest in protecting against a rule of professional responsibility if at the time of the attorney's conduct there was good reason to fear violation of the rule, the professional responsibility interest is important, and the federal purposes could be well served by alternative conduct that would not violate the rule.

In balancing federal and state interests, the federal court need not reach its own final conclusion whether the attorney's conduct violated a state rule of professional responsibility. If there is reasonable doubt on this question, it is enough to take account of the probability — high or low — that there was a violation.

A protective order, once issued, commands the res judicata effects of any federal judgment. State tribunals are obliged to honor the effect of the order according to its terms.

Reporter's Note

This approach emerged for the first time during discussions at the February 2000 invitational conference. It attracted substantial support during the open discussion. At least some participants have had second thoughts. Two particular doubts have been expressed. The first is that this ex-post opportunity for protection will do little or nothing to reassure attorneys who see a potential conflict

between federal procedural opportunities and state professional responsibility rules, and who do not know how to resolve the conflict. Many are likely to seek protection by seeking an order authorizing the desired conduct, so as to enhance the identifiable federal interest and to dissuade state authorities from pursuing possible discipline. Otherwise the opportunity for intervention by a federal court may assure a more sympathetic and better-informed understanding of federal law, but provides scant protection. The whole purpose of this approach is to avoid this kind of anticipatory request to the federal court; the purpose may in practice be difficult to achieve. The second doubt is whether state authorities really would find this approach more congenial. This approach forces a direct confrontation between the federal court and state authorities in every case — although the federal court is considering a "protective order" rather than an "injunction," the effect on state proceedings is the same as an injunction.

Simplified Rule: No Conflict-of-Law, No Federal Interests

This version would adopt a rule of dynamic conformity, confirm the § 1654 power of a federal court to control admission to practice before it, and provide a few details about the distinction between sanctions imposed by state authorities for professional responsibility violations and sanctions imposed by federal courts to protect their own needs. It would not expressly state the primacy of federal procedure interests, nor would it provide any vehicle for federal-court protection against state disregard of federal interests. This approach rests on a combination of concerns. In part, it reflects the belief that there are no real problems. State authorities do not seek to impose professional responsibility sanctions for conduct pursued in reliance on federal procedure or in service of federal substantive interests. There is no need to state a principle that is honored in practice. And in part, this approach reflects the concern that open statement of the principles of federal primacy has generated substantial opposition, even though the principles are followed in practice. Some of these questions might be addressed in the Committee Note.

FRAC 1 in this form would be:

(a) Admission to Practice. A court of the United States may establish and enforce rules governing the right to appear as counsel in and practice before that court.

(b) Professional Responsibility. The professional responsibility of an attorney for conduct in connection with any action or proceeding in a United States court is governed by the rules that apply to an attorney admitted to practice in the state where the court sits. A United States court may conduct an investigation of an infraction of a rule of professional responsibility and — with or without an investigation — may refer any question of professional responsibility to the proper state authority. Whether or not an infraction is so referred, the court may independently impose appropriate sanctions, including forfeiture of fees, reprimand, censure, or revocation of the privilege to appear before the court.

Committee Note

Most federal courts have undertaken to regulate matters of professional responsibility by adopting local rules. These local rules have not been successful. There are wide variations of approach among federal courts, even among different federal districts within a single state. Many of the local rules adopt models that are inconsistent with local state rules; even if local state rules appear to be adopted, the federal court may assert the right to interpret the same text at odds with the state interpretation. There seems to be a growing tendency in some federal courts to disregard even their own local rules, looking toward development of a federal common law of attorney conduct that is cut free from any authoritative text. This tendency toward decisional principles is fed by the context in which federal courts face issues of attorney conduct — almost invariably, the question is not one of professional discipline, but instead is a procedural question affecting conduct of the

federal court's own proceedings. The result has been that an attorney appearing in federal court often cannot know what rules of professional responsibility apply to conduct in connection with the federal proceeding. The problem is exacerbated in some federal courts by the opacity of the local federal rules. The problem is further exacerbated for the growing number of attorneys who appear in federal courts away from their home states.

The time has come to replace the confusing welter of local federal rules with a uniform national rule. This rule adopts the rules that apply to an attorney admitted to practice in the state where the federal court sits. For a federal court of appeals, this state is the state where the court has its administrative headquarters. *[Reporter's Query: What do we do about the Federal Circuit? It refers many matters of procedure and substance to regional circuit law. How about this one? Everything according to D.C. rules?]* For all courts, the rules that apply to an attorney admitted to practice in the state mean the rules that would be applied by the courts of that state. If the local state would undertake to apply the professional responsibility rules of a different state — most likely the state in which an out-of-state attorney is licensed — the federal court makes the same choice. Adoption of the state rules means more than mere adoption of the current printed text of the state rules. It means also adoption of the interpretation placed on the state rules by state courts, adhering to the general rules that govern a federal court when it seeks to ascertain the content of state law.

Adoption for federal courts of local rules of professional responsibility leads to an inevitable interplay between federal interests and enforcement of the local rules. Federal courts never have undertaken to impose professional discipline in a form that affects an attorney's license to practice in state courts or standing in a state bar. But federal courts regularly consider issues of professional responsibility in ruling on matters that come before them in the course of litigation, and will continue to do so. In choosing procedural alternatives, for example, the federal court may be influenced by the prospect that one alternative is nearly as satisfactory as another for procedural purposes and should be preferred because it avoids significant issues of professional responsibility. And federal courts also consider matters of professional discipline for their own purposes. 28 U.S.C. § 1654 establishes the authority of a federal court to adopt rules that permit an attorney "to manage and conduct causes therein." By statute, court rule, and inherent power, federal courts can impose sanctions for procedural violations and the unreasonable and vexatious multiplication of proceedings. Considerations of professional responsibility may inform the exercise of these powers. Federal courts also share the interest of the entire legal profession in ensuring proper professional behavior by all attorneys. A federal court that learns of conduct connected to its own proceedings that may violate the applicable rules of professional responsibility is interested — and at times has the responsibility — to refer the question to state authorities. Under Attorney Conduct Rule 1, the federal court may make such a reference after conducting its own investigation or without conducting an investigation. A confidential federal investigation may protect an innocent attorney against the burdens that go with a formal referral, but often the federal court will prefer that responsible state authorities undertake any appropriate investigation.

Simple Dynamic Conformity

This model avoids all of the complications:

The professional responsibility of an attorney for conduct in connection with an action or proceeding in a United States District Court or Court of Appeals is governed by the rules that apply to an attorney admitted to practice in the state where the court sits.

Committee Note

(The Committee Note would include at least the first two paragraphs of the Note for the preceding rule. It might venture to adopt the whole of that Note, addressing some of the issues that are omitted from the text of the rule. The rule might add a subdivision recognizing the authority to "establish and enforce rules governing the right to appear as counsel.")

Simple Dynamic Conformity Without the Courts of Appeals

The professional responsibility of an attorney for conduct in connection with an action or proceeding in a United States District Court is governed by the rules that apply to an attorney admitted to practice in the state where the court sits.

Committee Note

(The Committee Note would be similar to the Note for the Simple Dynamic Conformity Rule, but would point out that the courts of appeals are governed by Appellate Rule 46. It might include a suggestion that a court of appeals should recognize the importance of continuity between district court proceedings and appellate proceedings, particularly with respect to the question whether a possible conflict of interest that was permissible in the district court should disqualify an attorney from participating in the appeal.)

Draft Minutes

Standing Committee Attorney Conduct Rules Subcommittee

The Attorney Conduct Rules Subcommittee of the Standing Committee on Rules of Practice and Procedure held an invitational conference at the Administrative Office of the United States Courts in Washington, D.C., on February 4, 2000. Judge Anthony J. Scirica presided as chair of the Standing Committee, assisted by Professor Daniel R. Coquillette as Standing Committee Reporter. Invited Guests who attended included Leo V. Boyle, Esq.; Professor Stephen B. Burbank; J. Scott Davis, Esq.; Claudia Flynn, Esq.; Lawrence J. Fox, Esq.; Professor Bruce A. Green; Robert M.A. Johnson, Esq.; Greg P. Joseph, Esq.; Professor Andrew L. Kaufman; George Kuhlman, Esq.; Professor Margaret C. Love; Hon. John W. Lungstrum (as liaison from the Judicial Conference Committee on Court Administration and Case Management); Michael E. Mone, Esq.; Alan B. Morrison, Esq.; Hon. Marvin H. Morse; Professor Linda S. Mullenix; Robert S. Peck, Esq.; Hon Thomas J. Perrelli; Gerald K. Smith, Esq.; Guy Miller Struve, Esq.; Hon. Ewing Werlein, Jr.; and Hon. Michael D. Zimmerman. Members of the rules committees who constitute the Attorney Conduct Rules Subcommittee who attended included Professor Daniel J. Capra; Darryl W. Jackson, Esq.; Hon. Douglas Letter; Professor Myles V. Lynk; Professor Jeffrey W. Morris; Hon. Paul V. Niemeyer; Hon. David W. Ogden; Hon. Lee H. Rosenthal; Hon. Jerry E. Smith; and Hon. John Charles Thomas. Two other members of the Subcommittee, Professor Geoffrey C. Hazard, Jr., and Hon. John M. Roll, attended by telephone. Edward H. Cooper was present as Civil Rules Advisory Committee Reporter. Administrative Office staff who attended included Patricia S. Ketchum; Karen M. Kremer; Peter G. McCabe; Mark S. Miskovsky; and John K. Rabiej. Marie Leary attended for the Federal Judicial Center. Others in attendance included Juliet Eurich, Esq., and Lynn Rzonca, Esq.

Introduction

Judge Scirica welcomed the participants, stating that the conference is not a public hearing but a dialogue of differing views, reflecting perspectives that may in part draw from the experiences of different constituencies. This conference is not the end of the subcommittee process, and is not the occasion for subcommittee decisionmaking. The time for decision will stretch out at least for several months, unless Congress acts in a way that requires an accelerated response.

Professor Coquillette, aided by many of those who have joined in this conference, has done a great deal of work on the question whether the time has come to adopt one or more federal rules of attorney conduct. Veterans of the process will help to advance this work still further. Newcomers will both have the chance to learn of the work that has been done and provide the benefits of fresh views. Following introductions of those in attendance and an opening summary, the first part of the

agenda will consist of individual statements by each invited guest reflecting on the value of the "FRAC" enterprise.

Judge Scirica continued by noting that many years ago Congress expressed concern about the proliferation of local rules. Congress remains concerned about local rules, in part because local rules are not reviewed by Congress in the way the federal rules are reviewed. Lawyers also are concerned about local rules. The American Bar Litigation Section will soon move for adoption of a resolution urging restraint in the local rules process. One of the reforms adopted by Congress requires circuit council review of local rules.

Phase 1 of the Local Rules Project resulted in the elimination of many local rules. Many districts, obedient to the command of amended Civil Rule 83(a)(1), have renumbered their local rules.

One of the discoveries of the Local Rules Project was that there is a wide variety of inconsistent local rules on professional responsibility. The inconsistencies exist in every direction. Local federal rules often are inconsistent with the rules of the forum state, and commonly are inconsistent with the local rules of other districts. Even when a local rule purports to adopt the text of the local state rule, the federal court may interpret the text in ways that depart from the state interpretation.

It is recognized that a federal court must be able to control the conduct or proceedings before it, and likewise must be able to control admission to practice before it. But at the same time, it is recognized that the states are primarily responsible for professional discipline. The difficulty is that practice and professional responsibility overlap, in ways that may be complementary but also may be competitive.

The major problems experienced by lawyers in the midst of this confusion relate to conflicts of interest, confidentiality and privilege, and the duty of candor to the tribunal. Government lawyers have particular problems with rules governing contact with represented persons. The McDade Amendment, 28 U.S.C.A. § 530B, now provides direction on the source of law for professional responsibility. The Tenth Circuit has concluded that a state rule governing the practice of subpoenaing an attorney to testify before a grand jury is a matter of professional responsibility for purposes of § 530B, and thus controls in federal court.

Negotiations on Model Rule 4.2 revisions continue among the two ABA committees — Ethics 2000 and the standing committee, the Conference of Chief Justices, and the Department of Justice. There seems to be some interest in the Senate in reconsidering § 530B.

It is important to know whether conflicts between federal procedure and state professional responsibility rules pose real problems for private lawyers. Whether or not real problems are frequently encountered now, as a matter of principle it is important to decide whether a lawyer who

complies with federal procedure or a federal court order is protected against state discipline. It also is important to consider conduct undertaken before litigation actually commences, and to determine whether federal interests may be meaningfully affected in this setting.

Significant federalism interests are at stake. Justice Veasey, who could not attend today's meeting, wants to remind us of the primary state interests in professional responsibility. But there also are federal interests.

It also is important that the subcommittee and Standing Committee continue to be prepared to respond if Congress asks the Judicial Conference to consider these issues.

Professor Coquillette provided a supplemental introduction, designed to provide an overview of progress over the last several years and to capture the spirit of the Rules Enabling Act process.

The Enabling Act process works well because of the opportunities it provides for hearing from many voices. This conference is one valuable part of that process. A particular strength of the Enabling Act is that it expressly involves the legislative and judicial branches, and in fact involves the executive branch as well. The executive branch is represented through the Department of Justice on the advisory committees and the Standing Committee, and has been a very important participant in the process. A further strength is that people from many backgrounds and interests work together, both as members of the committees and as witnesses and writers of comments.

The attorney conduct inquiry has its roots in 1986. Congress became concerned with local rules. Local rules continue to be a problem. They circumvent the Enabling Act process; they often are hard to find — 30% of the districts still have failed to honor the renumbering command of Civil Rule 83(a)(1); they often restate the federal rules, but incompletely or confusedly; and they sometimes are invalid because inconsistent with statute or federal rule.

On matters of attorney conduct, some districts have local rules that adopt forms of the Model Rules or Model Code that are inconsistent with the rules in effect in their own states. One district continues to adhere to the original Canons of Professional Ethics. Some districts have adopted their own unique rules, unlike any national model or any actual state system. The District of Colorado provides a recent example of a system that adopts the state rules by local rule, but then sets out exceptions by an administrative order that is difficult to find. The project book of studies, including FJC studies, documents these findings in detail.

The Standing Committee is responsible to promote consistency of federal rules and otherwise to advance the administration of justice. At present, regulation of professional responsibility by local federal court rules has no consistency. The problems are so great that in 1988 it was decided to exclude them from the first phase of the Local Rules Project. In 1995, however, the Standing Committee concluded that the topic should be taken up. In 1997, seven studies had been completed — two by the Federal Judicial Center, and five by Professor Coquillette.

The McDade amendment creates a problem for the Department of Justice because its command that federal lawyers comply with both state and local federal rules ignores the frequent inconsistencies between state and local federal rules.

It has become clear that bankruptcy is different from other areas of federal practice. The Bankruptcy Code establishes different standards for conflicts of interest. There is no parallel to these standards in state professional responsibility rules.

The first two invitational conferences focused on four options. One option is to do nothing to change the present situation. This course is favored by those who believe that there are not real problems, not even for the Department of Justice. It also is favored by those who believe that federal courts are solving the problems by ignoring their own local rules and developing a body of federal common law. Recent research shows that frequently there is no citation of local rules in federal opinions on attorney conduct, and often other federal court decisions are cited — the very model of common law.

A second option is to adopt a simple rule that adopts local state professional responsibility rules for each district, without any qualification. This would be "dynamic conformity," in which a federal court adheres to every change in the formal state rules and to state interpretations of the state rules. There would be a choice-of-law rule for the courts of appeals. Supporters of this option do not like the present local rules situation, and also are wary of the evolution of a federal common law of attorney responsibility. They believe that these are state issues, and that the Enabling Act process should be used to return authority to the states, or more accurately to confirm paramount state authority. The objective is to decrease, not increase the role of the states.

A third option adopts dynamic conformity to state rules as the default rule, but also would establish specific federal rules for the issues that have arisen most frequently in federal courts. The federal rules likely would be modeled on the ABA Model Rules, seeking the version of each rule that most resembles the mode of state adoptions. This model was prepared for discussion purposes, consisting of a general dynamic conformity rule supplemented by nine additional rules. There is not much support for this approach at the moment. A Note in the Harvard Law Review expressed dissatisfaction. Many other important observers have expressed similar reservations.

The fourth option explored in the prior conferences would be adoption of a comprehensive federal code of professional responsibility, most likely based on the most current ABA model, holding open the possibility of adopting special rules for bankruptcy. There has never been much support for this approach.

Since the first two conferences, a fifth model has emerged. This model adopts local state rules, including choice-of-law rules, to govern all matters of professional responsibility, both in general and with respect to matters connected to proceedings in federal court. But it also expressly

recognizes federal power to regulate federal procedure, and protects acts dictated by federal procedure or court order against sanctions based on state professional responsibility rules. At present, only this "FRAC 1" has been drafted, and the draft is only for discussion purposes. It is possible that there will be a FRAC 2, dealing with bankruptcy, and a FRAC 3 dealing with federal government attorneys. While still additional rules might be adopted, no subject for additional rules has yet been suggested. It also is possible that only FRAC 1 will be pursued.

Discussion of all five models leaves substantial support for doing nothing. But § 530B has aggravated the problems faced by federal government attorneys. Support of dynamic state conformity is mingled by some with support for permitting independent federal interpretation of the text of local state rules.

Bills in the Senate reflect different approaches. One would override § 530B. Another would invite the Judicial Conference to advise Congress on the problems faced by government attorneys. The Washington Post has opined this very day that these bills are among the important bills calling for action during this session.

Finally, Professor Coquillette expressed great thanks to the Administrative Office staff for helping both with the series of invitational conferences and with the work of the subcommittee.

Individual Statements

The conference then turned to brief opening statements made by each of the invited guests, primarily in the order of seating around the conference table.

Andrew Kaufman began by asking whether there is a problem. There was a problem all these years, but no one knew about it until Professors Burbank and Coquillette pointed it out. Once the problem is pointed out, lawyers see an opportunity for conflict and confusion that <u>will</u> generate conflict and confusion. Academics tend to like uniform rules as a solution to such problems. Uniform rules can respond to an internal logic. They also are easier to teach. But work with state rules shows the difficulty of achieving uniformity. The Massachusetts Supreme Judicial Court has just revised its rules of professional conduct. The advisory committee operated under the "Coquillette Rule," adhering to member Coquillette's advice that the prima facie choice should be adherence to the ABA Model Rules, departing only for good reason. Notwithstanding this approach, many changes were made in the ABA rules. The reason is that the ABA rules, although developed with great effort and great good will, are the product of a committee of lawyers. The time has come for the judges of this country to become more actively involved; rulemaking should not be run by the private bar. In Massachusetts, it was a great mistake not to involve the federal judges in the process; involvement of the federal judges would have helped to resolve many of the tensions that have emerged between the new state rules and the federal courts. Rule 4.2 would be a good place to start bringing judges into the process, beginning with more active participation by the Conference

of Chief Justices. Finally, the distinction between federal procedure and state professional responsibility rules reflected in draft FRAC 1 is right. But all of the illustrations are wrong in result.

Michael Zimmerman began by observing that it is nice to think of involving the Conference of Chief Justices more actively, but that three years of trying to broker Rule 4.2 between the ABA and the Department of Justice have shown how difficult this is. Rule 4.2 is shaping up to be a 30-year war, perhaps a 100-year war. There is no forum with enough power to force a resolution, unless it is Congress. And professional ethics problems are not well suited to resolution in the political process. But if the Rule 4.2 problem can be solved, it will be proper to do nothing else. The present situation of local rules is horrid on paper, but has not proved to be a problem in practice. The states have 50 different professional responsibility cultures. An ABA rule, whatever it is, will not be easily accepted in all states. If Congress tells the Standing Committee to do something, something will be done. But perhaps the solution will be worse than the problem.

Stephen Burbank noted that in the early 1990s it seemed that the problem was primarily one of paper inconsistencies. The inconsistencies of rules on paper have persisted, and perhaps have grown worse. But we would need a study to tell us whether there is a real problem. So, absent a study, it is important to decide where the burden lies. The Standing Committee's responsibility for achieving uniformity in federal practice suggests that perhaps the burden should be on those who champion inconsistency. But that leaves it to decide what is the real burden of inconsistency — one example is provided by the Seventh Circuit ruling on the question whether a lawyer can advance the costs of a federal class action despite a prohibition in local rules of professional responsibility. There is no apparent need for consistency among federal courts; a uniform federal borrowing rule that adopts local state rules for each federal court makes sense. Borrowing, however, borrows also the "transremedial" approach that is often found no matter what the source of professional responsibility rules. The transremedial approach takes a professional responsibility rule and translates it to other purposes such as disqualification or civil liability. The ALI Restatement Third of the Law Governing Lawyers is an illustration of the transremedial fallacy. We need to identify this phenomenon before we can clearly identify the areas where federal interests are paramount. It is intolerable to have a system in which federal law allows a prosecutor to contact a witness but state law can discipline the same conduct. But it may be tolerable to allow a state to impose discipline for a conflict of interests even though the federal court refuses to disqualify the attorney for the same asserted conflict. Finally, we should be careful to distinguish evidentiary privilege from confidentiality.

Guy Miller Struve noted that the Association of the Bar of the City of New York was galvanized to action on these questions by the "FRAC 10" draft. They thought the principle of adopting several detailed federal rules of attorney conduct to be a very bad thing. Disuniformity between federal court rules and local state rules is a serious problem. There is an element of unfair surprise in unnecessary differences. The Association study did not directly focus on the current draft that proposes dynamic conformity to state practice but contemplates the possibility of some

departures. In the recent overhaul of the local rules of SDNY and EDNY, the approach to professional responsibility was to adopt the text of New York rules as interpreted by the federal courts. This approach was taken because of Second Circuit precedent that chose the path of independent interpretation. Judge Weinstein suggested that a distinctive federal interest should be required to justify departure from the state interpretation of the state text, but the cases seem to show that federal judges disagree whenever they feel strongly that the state has it wrong without regard to any distinctive federal interest. Federal judges are not likely to want state control.

Gerald Smith reminded the conference that bankruptcy is unique. There is national law, but applicable professional rules come into play as well. Generally application of state conflict-of-interest standards presents no problem. But there is a federal "adverse interest" standard for professionals who represent a fiduciary such as a trustee or debtor-in-possession. This standard applies to a variety of professions, such as accountants, as well as lawyers. These other professions have their own ethical norms. The rulemaking process affords an opportunity to give meaning to the adverse interest standard, which is not defined in the statute and is given different ad hoc interpretations by bankruptcy judges. It would be an achievement to develop a definition of adverse interest. Adverse interest informs disclosure, and that is important. But drawing the adverse interest line will be controversial. In approaching these questions, we must remember that bankruptcy is part administration, part negotiation, and part litigation. Bilateral litigation rules do not fit — strict application would make it very difficult to initiate a bankruptcy. But of course a bankruptcy proceeding can become adversarial at some point. Can an attorney, for example, propose a plan that would adversely affect a participant in the bankruptcy proceeding when the participant is the attorney's client for an unrelated matter? Giving at least some parameters to the adverse interest rule, and in particular narrowing the extent of firm-wide disqualification, would be a good achievement.

Claudia Flynn stated that disuniformity is a substantial and significant problem for the Department of Justice. The Professional Responsibility Advisory Office has fielded 500 or 600 inquiries since it was opened last April. The questions go beyond Rule 4.2 to include such matters as unauthorized practice, conflicts of interests, and public statements about pending matters. The Department has encountered conflicts between local federal court rules and state rules. It also has found conflicts between state rules and federal court interpretations of the state rules. Department attorneys are clamoring for uniformity. They are concerned about their ability to do their work, and are concerned also about liability and their professional licenses. Core law-enforcement interests are a special concern. Some state interpretations of rules on contact with represented persons create difficulties, as do some state applications of fraud and deceit concepts to undercover operations. Some states seem bent on using rules of professional responsibility to regulate federal procedure. The Tenth Circuit has recently ruled that for purposes of § 530B a state rule regulating grand-jury subpoenas addressed to lawyers is indeed a rule of professional responsibility, binding on federal

courts, rather than a rule of procedure. Section 530B subjects Department attorneys to both state and federal rules. Any help in addressing the problems caused by § 530B will be welcome. There also is a case pending in the Fourth Circuit that raises the question whether a local pro hac vice rule can supersede the federal statute that allows the Department to send its attorneys anywhere in the country.

Thomas Perrelli began with the reminder that the Attorney General is very interested in trying to find solutions to these problems. Department of Justice concerns focus on the confusion that arises from present rules, and on the ways in which state rules impede law enforcement. The confusion could be reduced substantially by adoption of uniform federal rules through the Enabling Act process. Even then, however, legislation also is likely to prove necessary — § 530B is open to too many different interpretations. A number of ethics rules affect law enforcement. But Rule 4.2 is 95% of the problem. It would meet the Department's problems in large part to solve the Rule 4.2 problem and add a bit of "wiggleroom" in other areas where attorneys supervise law enforcement. The Department really believes that matters are not far from the point where reasonable compromise is possible.

George Kuhlman suggested that the remarks about vast numbers of howling United States Attorneys reflects the wisdom of Professor Kaufman's remarks: if we say there is a problem, responsible attorneys will seek advice. The fact that questions are being asked is not as important as the answers that are being given. Is it possible to find an answer? Are the answers pretty much uniform? Do the answers cause trouble across the board? Justice Zimmerman's remark about 50 different legal cultures strikes a chord. It is a failure of the ABA that there are such differences. The ABA sought to achieve uniform adoption of the Model Rules, but failed. The present balkanization of professional responsibility rules, however, has not led to great harm. The changes in interjurisdictional practice may augment the problems. For there are different cultures on ethics problems in different states. We are going to have to live with this. The best answer may be the simple one: discipline should not be sought when there is a good faith effort to find the applicable rules and comply with them.

Alan Morrison reminded the conference of a comment made by Attorney General Bell on a proposal — it looks awful on paper, but it will work well in practice. That may describe the current local rules situation. Section 530B, however, is bad. Federal courts should make the law, whether we view these problems as those of procedure, professional responsibility, or something else. Such matters as bankruptcy conflicts of interest, disqualification of counsel, and the conduct of class actions should not be governed by state law. Still, it is not clear that there is a practical problem. If and when there is a need for a federal answer, local rules and standing orders are not the proper means to develop the answer. In a way, questions like contact with represented persons are substantive: they affect outcomes. These questions should not be controlled by the Department of Justice or by judges alone. If these topics are to be taken up, it would be good to do something about

the local rules that limit appearances by out-of-local counsel. Some local federal rules impose undesirable restrictions, requiring that local counsel be involved more extensively than makes sense, or limiting pro hac vice appearance to once every two years, or exacting re-registration fees.

Margaret Love finds that these problems grow more complex, and less tractable, as the discussion expands. Rules may not be possible. So the Model Rules themselves should be made simpler, not more complex. The Ethics 2000 undertaking is providing a forum for this conversation; perhaps we can talk our way back down the limb we have crawled out on. This is an open process, not controlled by the private bar. Whatever the next steps may be, however, we should remember that in practice the sky is not falling.

Michael Mone believes that the "do nothing" option grows more attractive as the discussion of alternatives develops. Experience in litigating professional responsibility cases, and on the Massachusetts Board of Bar Overseers, shows that in practice the problem is not great. There may be a few hard cases around the country, but they seem not to have made bad law.

Linda Mullenix is not surprised that these problems have proved complex. Rule 4.2 problems have been well discussed. Professor Kaufman is right in observing that we did not know there was a problem until these recent processes started talking about it. The Georgine asbestos settlement provides an intriguing launching pad for inquiry. In addressing the ethical challenges made to the settlement, Judge Reed stated that Pennsylvania rules applied. What, in fact, do federal courts do with respect to state law? What they do varies from district to district. Every court does it differently. Perhaps more important, every attorney asked in a random survey did not know what rules apply in federal court. There is no empirical evidence that this random behavior and general ignorance is a problem. But the lack of a present problem is not the point. The point is that for an attorney with a national practice there is a potential problem. The problem will grow over time. The problem is not simply that the present situation is not tidy. There is a real problem of notice, of the inability of an attorney in federal court to know what rules apply. It is good to be forward-looking, to solve the problem before it becomes real "on the street." An effort should be made to deal with the problems we can see coming before they mature. So it is not satisfying to support the "do nothing" alternative by pointing to the gradual development of a federal common law free from the local rules; this development simply shows the reality of the notice problem, of an attorney's inability to know what the rules are until the court or other agency has decided a professional responsibility problem. But there are troubling Enabling Act problems with what is going on here. Some district courts treat professional responsibility as an Erie problem, and by referring to state law implicitly view professional responsibility as a matter of substance. If they are right, how can an Enabling Act rule properly address the problem? And there is a need for conflict-of-law thinking. Should a federal court, adhering to a dynamic conformity to state law, include the state choice-of-law rules? Finally, both Professors Burbank and Kaufman are right in asserting that the divide between procedure and professional responsibility is not clear.

Marvin Morse, drawing on forty years of experience in federal litigation and administrative law judging, believes there should be a uniform national answer, not a series of fragmented answers. The Federal Bar Association, however, is likely to prove schizoid on this topic. It is a grass-roots organization, and has a tradition that local chapters work closely with the local federal judiciary. If local rules are to remain, the organization is likely to support them. For all of that, uniformity is better. The lack of rigorous empirical evidence of problems "on the ground" is not a reason for doing nothing.

Leo Boyle limited the scope of his comments by noting that ATLA does not represent the criminal defense bar or prosecutors, and does not focus much attention on bankruptcy. ATLA members mostly try civil cases for plaintiffs. This constituency has not asked that ATLA address the problems being discussed here. The practicing-in-the-trenches plaintiff trial lawyer does not seem to be worried about these things. But it is a bit surprising to discover that Congress may be worried about conduct in court; Congress should not play a major role with these problems.

Lawrence Fox thinks that these discussions resemble the ABA discussions of multidisciplinary practice. We would not be talking about these things if it were not for the Department of Justice obsession with Rule 4.2. If we could get that problem off the table, we would conclude that there is nothing that has to be done. States regulate lawyers. Only states admit to the practice of law. Incorporation of local state rules for the federal courts seems the best approach. The idea of two sets of rules, especially at a time when a lawyer does not know whether a representation lead to any court proceeding, much less what court may be involved, is bad. But then federalism often is confusing. It is surprising, indeed, that the Department of Justice reports only 500 or 600 inquiries since April; Fox, in his own firm, has had that many inquiries in that period. Most of the questions he gets are Rule 4.2 questions — all lawyers want to talk to others without deposing them. These questions often have to be addressed for multiple states in a single case; it is the lawyer's job to deal with such complexity and confusion, and to come up with the right answer. So dynamic conformity alone is enough; there is no pressing federal interest that requires explicit articulation of an exception for federal procedural interests or like interests, as draft FRAC 1 would do. And it should be noted that the minutes of the May and September subcommittee meetings seem to accept the Department of Justice concerns with Rule 4.2; these concerns should not be accepted at face value. It must be remembered that the rules are adopted to protect not only attorneys but also clients and, at times, courts. There are differences of view on when, and how far, to protect clients. But that is the main purpose. We should bear the interests and needs of clients in mind as we pursue these discussions.

Another guest spoke from the perspective of prosecuting professional responsibility cases. At least in his own sparsely populated state, "it ain't broke." State disciplinary authorities are satisfied with the present state of affairs, and the chief federal district judge is perfectly happy. The federal court has adopted the state code. Federal judges file complaints with the state disciplinary

officials. The perhaps myopic view of bar discipline counsel, dealing with what is happening in the pits, is that there is little that raises problems, apart from Rule 4.2. But the question of notice of the applicable rules is close to the top of the list of topics that might be addressed: it is important to know what rules apply. Comity is another concern when federal courts disagree with state rules. The line between procedure and professional responsibility may not work. An illustration is provided by a personal experience when a federal judge, acting in a fraud prosecution against a lawyer, signed a subpoena for all state disciplinary complaint files involving the lawyer. Under state law these preliminary investigation files are confidential. Bar counsel sued the United States Attorney in state court for a declaratory judgment. The state judge ordered that one of the 12 files be revealed. One file was released; the federal judge accepted the state order and respected the state confidentiality rule. This problem seems to involve procedure. But remember that, apart from Rule 4.2, this is not a real problem. Judge Scirica agreed that comity is an important part of the mix, but wondered whether the issues become more complex in the states where the federal courts have not adopted state professional responsibility rules. The response was that probably there still is no problem — so long as the federal court orders exemption from the state rule, discipline is not likely to be pursued. A lawyer who complies in good faith with a reasonable interpretation of federal requirements need have no fear. An illustration is provided by the inadvertent receipt of privileged material — the misaddressed facsimile transmission. Our federal court says that the privilege is waived. The state rule is the opposite, recognizing continuing privilege. Neither state nor federal court talks about the rules of professional responsibility. To muddy the waters further, there is an advisory state ethics opinion that rejects the ABA approach, and concludes that although there is an obligation to notify the sender of the receipt, the misdirected material can be freely used by the unintended recipient. In this situation, it would be difficult for bar counsel to advise an inquiring lawyer as to the proper approach.

Greg Joseph found this example a good bridge to draft FRAC 1, which provides protection to the lawyer in these circumstances if the federal court applies its waiver rule. There is a problem. Suppose, for example, two related class actions, one pending in federal court and one in state court. There may be three sets of rules to consult; the practical result is that the lowest common denominator controls. We should not abandon the "FRAC 10" model; it would help. So, for another example, New York allows an attorney to resign when a client commits perjury; most states require that the perjury be revealed to the tribunal. What should a federal court in New York do? In another state, when the representation is centered in New York? These are serious issues. As class actions proliferate, we will have greater problems.

Robert Johnson began by observing that state prosecutors do get into federal court. Uniformity is desirable. A set of core federal rules would not be a problem. Those who practice in federal court should be protected from state ethics authority. Thirty years of practice have provided far too many examples of situations in which change is called for, but change is defeated by inability

to agree fully on all details of the change. It is better to act, and then — if needed — to clean up the reformed rules in light of further experience. These problems will continue to evolve; it is important to assert control now.

Bruce Green said ruefully that his record in advising on useful approaches to these problems should be remembered in evaluating his remarks. Four years ago he argued that a court is responsible for the lawyers before it — federal courts should control the rules that apply to lawyers in federal proceedings. Then he wrote that conflict issues are the most common, and that the standard for discipline should be different from the standard for disqualification — and the ALI has rejected that approach. Now his view is that § 530B is deeply flawed in every way we can think of; and it persists. So we should ask whether federal decisions on attorney conduct should be governed by federal law. Most will be governed by federal law through rules of procedure. Rule 11, contempt, and like federal rules obviously control. There is a small overlapping area covered by the rules of professional responsibility, such as conflicts of interest and investigation outside of discovery (Rule 4.2). Most of the rules of professional responsibility cover matters that will not come before the federal court, such as commingling funds. And all the law of every state is pretty much similar at the core. The differences are at the margin: and there are a lot of issues, like the misdelivered facsimile transmission, that are not dealt with by any rule. If you refer to state law, do you refer also to state interpretations? To the uncodified "understandings"? A federal court has to predict what a state court would say; the best approach is to ask what makes sense. There are federal interests in play here. An illustration is provided by proceedings that arose out of a New Jersey injunction against selling "stamps" with the image of The Beetles. A lawyer went out to buy stamps to show that the injunction was being violated. The question was whether this was deceit; the federal court, acting as a matter of federal common law, said this practice was proper. The issue came up a year later in a federal court in New York; it said that the New York state rule seems to bar this practice, but state authorities have not really dealt with the precise question, so it sought guidance by following the federal court in New Jersey. This approach is better when there is no clear state rule; it is not profitable to try to guess what the state court would do in an uncertain situation. It would be desirable to adopt the ABA rules by federal rule. That course would promote uniformity in several ways. Federal courts would have a uniform set of rules. The rules often would agree with existing state rules. And the federal example would encourage the states to reduce or eliminate departures from the ABA model, thereby generating greater uniformity among the states themselves.

Robert Peck believes that uniformity is not possible. Balkanization is the rule in legal ethics, even in a single state court. There may not be a rule. Interpretations of a single rule text may differ between advisory groups and the courts. The substantive law of an action may control what a lawyer has to do.

Geoffrey Hazard urged that the end result should be dynamic conformity. Professor Kaufman is right — there is a great diversity of outlook across the country. But there are strong

practical pressures to reduce major discrepancies in the rules. Fortunately, there are not many major discrepancies. Most of the tough problems are highly fact-specific and complex. There is not much that can be done to reduce this complexity. There are problems in relating the regulatory law of professional responsibility to decisions on disqualification in a judicial proceeding, fee forfeiture, or the like; but these are the problems of uncertainty that affect all persons in dealing with the law, not only lawyers. It is very difficult to know whether Rule 4.2 should allow government lawyers more leeway in dealing with represented persons than government lawyers think they have or than in fact they have. There is profound disagreement in Congress between the Senate and the House; if Congress cannot internally decide this question, as a political-policy question, it is not an area where the Standing Committee should tread.

Discussion of Draft FRAC 1

Professor Cooper presented a summary introduction to draft FRAC 1. The basic purpose of the draft is to accomplish two things: to establish dynamic conformity to state rules of professional responsibility, and to ensure that federal control of federal procedure is not jeopardized by state regulation of professional responsibility. State control of professional responsibility is recognized by applying state rules to conduct in connection with a federal action or proceeding as well as to all other attorney conduct. There is no need to grapple with the distinctive problems that would arise if federal rules of professional responsibility were to attach at some indefinite point at which a professional representation ceases to be general and comes to be sufficiently directed at a federal judicial proceeding to come within the federal rules. State control of professional responsibility is just that — application of the state rules is to be made by state authorities if the question is one of professional responsibility sanctions, not one of procedural sanction. A federal court can control the right to practice before it, but cannot affect the right to practice in state courts and cannot reprimand or censure in a way designed to affect state license practices. When a federal court has occasion to consider state rules for purposes other than professional discipline, moreover, conformity means that the federal court should ask what is the meaning of state rules to state enforcement authorities, not what meaning would the federal court independently attribute to the official text of a state rule. Federal control of federal procedure, however, is stated in Rule 1(c), as a predicate for the Rule 1(e) provision that protects a lawyer who complies with the requirements and opportunities of federal procedure or a federal court order against consequences under state professional responsibility rules.

In considering this draft and the broader questions, it is important to do our best to determine whether there are real problems, now or in the future, that can be made better by adopting federal rules. Even if the problems are of our own making — if no one would have worried about them, proceeding in blithe and protected ignorance — attention has been called to them, and that makes them real to lawyers. Lawyers are concerned about the relationship between state professional responsibility rules and federal law — federal law of procedure, federal law of professional responsibility as embodied in local court rules and common law, and at times federal substantive

law. These concerns are likely to grow. Problems of notice become increasingly severe as people make conscious efforts to determine what law applies and to conform to its requirements. If it is possible to do something effective, it may be useful to act to head off problems that may become more intractable if they are allowed to develop unchecked.

The constant reminders that it is difficult to distinguish between procedure and professional responsibility are well taken. That is, of course, the source of the problem. There is not a clear divide, not even a vague and uncertain divide. Instead, a great many aspects of lawyer conduct involve both procedure and professional responsibility. That is what makes the problems of federalism so severe. Federal courts must respect state regulation of professional responsibility, but must preserve their own authority over federal procedure. More particularly, federal courts cannot be made subject to the occasional temptation to adopt state rules of professional responsibility to win control of federal procedure for purposes that are rejected in the rulemaking and other processes of regulating federal procedure.

A more particular point is that draft FRAC 1 is intended to adopt state choice-of-law rules. It does not incorporate the law of the local state, but rather the law that would be applied by the local state. If, for example, Illinois would choose Michigan law to govern the relations between a Michigan client and a Michigan lawyer admitted pro hac vice in Illinois, a federal court in Illinois — and also disciplinary authorities in Michigan — should do the same.

The question of Enabling Act authority is affected by the particular area of professional responsibility in issue. The questions are not always easy, and become more difficult as the distance increases between the regulated attorney conduct and actual federal court proceedings. But the question whether a particular issue involves a matter of "practice and procedure" for Enabling Act purposes is not the same as the Erie question. It is clear, to the contrary, that a question can be "substantive" for Erie purposes when there is no applicable Enabling Act rule, but at the same time can be "procedural" in the sense that it can be addressed by a valid Enabling Act rule. The new rule then supersedes the former reliance on state law.

Since the last meeting of the attorney conduct rules subcommittee, an alternative has been added to draft FRAC 1. This alternative protects an attorney against state discipline only when there is a specific federal court order that exempts the attorney from the state rules. This draft reflects discussion in the Federal-State Jurisdiction Committee. The Federal-State Jurisdiction Committee was concerned that application of the open-ended draft that protects compliance with federal procedure must be made by state disciplinary authorities. The question whether particular attorney conduct is authorized by federal procedure, and the question whether the same procedural goals could be reached by means that do not thwart state professional responsibility interests, is always difficult. It is much more difficult for a tribunal that is removed from the actual federal court proceeding, that is not especially familiar with federal procedure, and that is acting after the fact.

There will be virtually no opportunity for federal review; the Supreme Court cannot provide review in any meaningful fraction of the cases that must be handled by state authorities, Rooker-Feldman doctrine and more elemental concepts of res judicata prohibit review of state decisions in lower federal courts, and federal courts should not be able to enjoin the state disciplinary proceedings. All of these difficulties can be reduced if a lawyer who is in doubt about a perceived conflict between federal procedure and state disciplinary rules asks the federal court to review the conflict, weigh the competing interests, and determine whether there is a pressing procedural need that in a particular case justifies exemption from an applicable, or arguably applicable, state discipline rule.

Professor Coquillette reminded the conference that Congress has shown an interest in these problems, and that some bills would ask the Judicial Conference to make recommendations. The timetables set up in these bills are shorter than the regular Enabling Act process, but inevitably the Judicial Conference will need to rely on the Standing Committee and — to the extent feasible — the advisory committees.

The first comment suggested several drafting changes. (1) The adoption of state choice-of-law rules is so important that it should be made explicit in the rule language. Something like "including choice-of-law rules" should be added to the reference to state law. (2) Subdivision (c) is troubling. The first long sentence that states the primacy of federal procedure in federal court should be eliminated. The second sentence can be retained, but the reference to notice and opportunity for hearing should be stricken as unnecessary and moderately insulting; federal courts know they must provide notice and opportunity for hearing in enforcing their own procedural rules. (3) Subdivision (e) should be deleted; it should be replaced by a provision [illustrated by a draft provided later in the discussion] that allows for an ex post federal order if a professional responsibility standard is invoked in state proceedings. The federal court can determine whether to confer protection against state sanctions. The ex post proceeding is better because it will greatly reduce the burdens on federal courts — there are very few if any instances now in which state sanctions are sought for conduct that complies with federal procedure, and there will be few if any in the future. Ex post determination is also better for all of the reasons that make it undesirable to engage in premature anticipation of abstract problems that may never arise, or that may arise in forms different from those foreseen at the time of an anticipatory ruling. It also will be easier, in this context, to distinguish between what federal procedure permits and what state law may properly forbid.

This proposal was supported by the argument that the "preemption" tag affixed to draft Rule 1(e) is a red flag that creates automatic rather than thoughtful opposition. Preemption of state authority is opposed reflexively not only by state officials but also by many in Congress. There is, moreover, little need for preemption. If in fact a lawyer acts from a desire to comply with a federal rule, there is no more than a minuscule prospect that state disciplinary proceedings will even be undertaken. There is still less prospect that either disciplinary sanctions or civil liability will actually

be imposed by state authorities. An ex-post opportunity for seeking exemption from federal court should give all needed reassurance and protection. After striking Rule 1(e), the Committee Note should be amended to reflect how unlikely it is that state sanctions will be sought or imposed.

In parallel vein, it was noted that in Massachusetts there is ongoing litigation between the United States Attorney and the State Board of Bar Overseers on Rules 3.8 and 4.2. This form of proceeding provides an alternative means of seeking clarification without incurring the hazards of professional discipline.

It was suggested that an express preemption of state authority, as by draft Rule 1(e), gives added protection, but that the first priority of the Department of Justice is to get desirable rules of professional responsibility.

A request was made for examples of the overlap between procedure and professional responsibility. Tentative examples were offered, with the recognition that there is room to debate the outcome of any of them. One involves a large set of problems that were noted by several of the introductory comments: many issues in the conduct of a federal class action, from the initial quest for representative parties to responsibility for court costs to dealings with nonrepresentative class members and relationships between class counsel and individual clients, pose issues of professional responsibility that have not really been contemplated in the formation of state rules of professional responsibility. Or a federal court may address a conflict-of-interests question and conclude either that there is no conflict or that a conflict that might better have been avoided has no such real importance as to justify the disruption of disqualifying counsel in the middle of a complex proceeding. Or, to take a more abstruse illustration, a federal court might wish to approve an agreement for book or movie rights between counsel and a criminal defendant as an important vehicle for securing representation by an attorney preferred by the defendant. In response to these examples, it was suggested that the primacy of federal procedure proposed by Rule 1(c) would swallow up the primacy of state professional responsibility rules and state enforcement ostensibly established by Rules 1(a) and 1(b). Every state rule could be undermined by an argument for a federal procedural interest We need a principled, narrow, cabined, "slick" explanation of the narrow area in which federal interests might prevail.

It was suggested again that these problems are fact-specific, and that this characteristic is an important reason to prefer the ex-post exemption proposal that invites a federal court to address a potential conflict when, and only when, a state proceeding actually is initiated. That is when it is possible to develop a meaningful, focused body of federal law. The proponent of the ex-post exemption approach added that it is not meant to authorize a federal court to disagree with state rules of professional responsibility simply as a matter of differing views of professional responsibility. The proposal is meant to require that the federal court point to an exogenous source of federal interests, such as Civil Rule 23 on class actions.

The substitution of "exemption" for "preemption" as the locution of federal primacy was questioned on the ground that the softer word does not disguise the fact of federal control. But it was asked who would be on the other side of the application for a federal court order, whether ex ante or ex post? Will the opposing party in the underlying federal proceeding appear to champion the state interest, particularly if it is an ex-post proceeding that will not affect the outcome of the federal proceeding? Should state disciplinary authorities be invited to participate in the federal exemption proceeding — or the state court or opposing parties if there is a state proceeding to impose civil liability? Most lawyers will be willing to take their chances if a federal judge says that something is proper, relying on the actual present practice of tacit accommodation between state authorities and federal courts. The exemption process may not be worth the effort in either ex-ante or ex-post forms. The effect of an ex-post order, for that matter, is the effect of an injunction. It is surprising to suggest that state authorities would prefer the direct confrontation of an injunction-like order to a more general principle to be administered by the state authorities themselves.

Another suggestion was that the ex-post procedure does not solve all problems. Many issues arise in the course of federal proceedings and will need to be addressed. It is uneasy, however, to rely on the "procedural" characterization; this may not help us to cabin anything. And the idea of looking for an exogenous source of federal interest does not explain much. What generally happens in fact is that federal courts simply weigh the interests differently than state rules or authorities do. There should be a presumption against departing from the state rule.

This suggestion was met with the elaboration that the federal rule could protect against state-law consequences where federal statute, federal rule, or federal order otherwise requires or provides, drawing from the language of the Rules of Decision Act. An order refusing to disqualify counsel would be an example.

And this elaboration was met in turn with the question whether a focus on an explicit order in a particular case simply gives federal courts carte blanche to do what they wish. The reply was that it is an order for the conduct of the case. Then when — if — state discipline is sought, the federal judge exempts if there is an irreconcilable inconsistency between federal interests and state rules, but not otherwise. And the rejoinder was that the issue will be joined when the first application is made for a federal court order. The party opposing the order will oppose on all grounds, including arguable interference with state professional responsibility interests, and the federal court will be forced to confront the issue head-on from the outset.

The discussion returned to the procedure-responsibility divide with the suggestion that there is a value in distinguishing between procedure and responsibility. There are many procedural sanctions — most notoriously Civil Rule 11 — that do not draw from rules of professional responsibility. But it was asked why FRAC 1(c) is needed at all? We know procedure when see see it. Federal courts have authority to regulate their own procedure. That is not a problem. FRAC 1(a),

coupled perhaps with FRAC 1(b), is all we need. The statement of dynamic conformity to state rules of professional responsibility must inevitably be implemented by recognizing the primacy of federal procedure when it applies. This is self-evident. Federal courts can protect their own interests.

This suggestion was seconded by observing that the weight of draft FRAC 1(c) can be carried by statement in the Committee Note without the need for express rule provision. The Note could say that there are many circumstances governed by federal procedure or federal substantive law. The Note would reverse the history reflected in the May and September minutes. Two examples were offered to test these propositions. In the first, on motion to disqualify a federal judge determines that there is indeed an egregious violation of conflict-of-interest principles, expresses the hope that the appropriate authorities will impose discipline, but further concludes that all the harm has been done and that it is better to deny disqualification and continue the representation through the conclusion of the federal proceeding. State disciplinary authorities should not be precluded from acting. In the second example, a disgruntled client revealed to a lawyer a plan to burn down an apartment house. The lawyer went to the police, who prevented the fire. In the subsequent prosecution of the client, the court ruled that attorney-client privilege barred testimony by the lawyer, but also observed that the attorney had acted properly in going to the police.

These comments were extended by suggesting that the ex-post exemption proposal is moving in the right direction, although there may be problems with a lawyer's need for advance assurance. The ex-post exemption draft that has been provided during this conference, however, does not suggest the basis for ordering an exemption. As the draft stands, a lawyer might be able to win an exemption by confessing that a mistake was made and pleading for an exemption on grounds that should be resolved by state authorities rather than the federal court — for example, that the mistake was made while acting under great personal pressure or emotional distress.

Discussion turned to the draft FRAC 1 language that refers to acts "in connection with" federal proceedings. This is elastic language. Is a Rule 11 investigation before filing in connection with a federal proceeding? Can an attorney contact a potential class member before filing as part of the Rule 11 investigation? How about disclosure as a waiver of confidentiality, and how does this tie to Evidence Rule 501 on privilege? Draft FRAC 1(c) and (e) talk about orders that need not have anything to do with procedure. Most importantly, it must be determined whether a federal exemption is to be binding in state proceedings, having the same effect as an injunction. The proponent of the ex-post exemption approach agreed that there is a problem in this dimension.

A chorus of law professors agreed that draft Rule 1(c) should go. But a practicing lawyer said that the principle of federal procedure primacy should not be relegated to a Committee Note. We need the principle in the text of the rule. It might be sufficient to move the expression to draft Rule 1(a), expressing it as an exception to the general invocation of state rules of professional responsibility. The draft might be drawn from § 1652 — "except where the Constitution or treaties

of the United States or Acts of Congress [or rules adopted under 28 U.S.C. § 2072] otherwise require or provide." This would grant the needed protection and assurance to lawyers.

It was urged again that the distinction between professional responsibility and procedure remains important. The states use ethics rules to affect procedure. The Colorado rule on subpoenaing an attorney is an example. Federal courts do have an interest in this.

Turning to choice-of-law issues, it was suggested that many states do not have explicit choice-of-law provisions as part of their rules of professional responsibility. Model Rule 8.5 has been adopted in only a few states. This presents a real problem for Department of Justice attorneys, particularly when a team of two or more attorneys has members who are admitted to practice in different states and are governed by different rules of professional responsibility. It is difficult to manage a team when one lawyer is prohibited from doing or learning something that another lawyer on the team can properly do or learn. An after-the-fact exemption is not sufficient protection. The 500 or 600 inquiries that come to the Department in Washington are only the tip of the iceberg, the top of the professional-responsibility pyramid. There are many, many more problems addressed on a daily basis by the many attorneys and attorney offices of the Department. If we can only tell people that perhaps a court will approve their conduct after they get in trouble with state disciplinary authorities, and perhaps a court will not approve, there is no comfort. These remarks were extended by noting that after-the-fact consideration of an exemption in response to an initiated state inquiry may seem to be more, not less, invasive of state concerns. At the same time, it must be noted that without express authorization, some situations may not yield to ex-ante court consideration. The Department of Justice had a "court order" provision in the regulations governing contact with represented persons, but found that some federal judges believed there was no Article III case or controversy to support an investigation-stage inquiry by a court.

The proponent of the ex-post exemption approach agreed that if state disciplinary authorities should refuse to heed the federal court order, there would be problems with the rules governing federal injunctions of state proceedings and with notions of comity, particularly "Younger" abstention theories.

The view was expressed again that lawyers "just want to know when we act."

Returning to the suggestion that an express exception for federal procedure should be incorporated in a dynamic incorporation rule, it was suggested that while the exception may seem obvious to members of this conference, it should be in the rule as a means of reminding those who do not frequently consider these matters.

Renewed support was voiced for the ex-post approach on the ground that it will spare federal judges the burden of many anticipatory requests that start at the shadows of improbable state proceedings.

Choice-of-law problems returned to the discussion. It was suggested that while many states may not have developed approaches for the specific problems of professional responsibility, all states do have choice-of-law systems. It is important to address the incorporation of state choice-of-law in the text of a dynamic incorporation rule. And it should be noted that the draft Committee Note is inconsistent with the general rules that apply to a § 1404 transfer in federal court. The general rule is that a transfer brings with the action the choice-of-law rules of the transferring forum state. The draft Note invokes the choice rules of the receiving state.

Attention turned to the choice rules framed by draft FRAC 1(a)(2) for proceedings in the courts of appeals. The principle that the law of a district court's state should apply to proceedings on appeal from a district court, or addressed to a district court, was generally approved. The provisions drawn from Model Rule 8.5 for other situations met greater resistance. The effect of the provisions is that in administrative review proceeding involving lawyers from three states, for example, each participating lawyer might be governed by a different body of professional responsibility rules. This result was thought undesirable. There are, to be sure, problems with simply referring all professional responsibility questions to the law of the state where the court of appeals sits, even if the reference is to the law of the single state where the court has its "domicile," rather than the law of the state where an appeal actually is heard. But it may be better to rely on the geographic location of the tribunal being reviewed. For proceedings that begin in the court of appeals, it may be possible to find a connection to a district court that supports application of the general principles of draft FRAC 1(a)(1) — an application for leave to initiate a second or successive habeas corpus petition would be an example. If all else fails, reference to the court of appeals headquarters may be the best solution. At the same time, some support was offered for referring to the attorney's state of licensure, along the lines of Model Rule 8.5 as adopted in the draft FRAC 1(a)(2). It also was noted that the Ethics 2000 inquiry extends to Model Rule 8.5; it is recognized that the rule is not good, and an effort will be made to mark out a new approach. The new approach will be important to any federal rule that may emerge, particularly against the background purpose to conform any federal rules of attorney conduct as near as may be to the mode of state practice.

The discussion returned to draft FRAC 1(c) and the express statement of federal procedural primacy. It was urged that this is desirable even if it does "swallow up" the dynamic conformity principle. What, for example, of the situation in which, in the middle of the joint representation of the employer and an employee as defendants in an employment discrimination action, a conflict emerges between employer and employee: the attorney seeks to withdraw from representing the employee, the employee seeks disqualification of the attorney from representing the employer, and the court concludes that the attorney should be permitted to continue to represent the employer. Or, to make it even more poignant, the court denies the attorney's motion to resign from representing the employer as well as the employee. Is this a matter of practice or professional responsibility? Or what about inadvertent privilege waiver?

These questions were used to juxtapose an earlier illustration. In the earlier example, the court concluded that there had been a reprehensible conflict of interests, but that the effects had been spent and that the representation should continue for the efficient completion of the federal proceeding. In this setting, it was urged, the answer should be twofold: state authorities should have the power to impose discipline for any violation of professional responsibility rules up to the time of the federal order, while they should be barred for imposing sanctions for continuing the representation after the order. For that matter, state authorities should be free to impose sanctions for conduct up to the time of the federal order even if the federal court expressed no view on the question. So in the more recent example: there was nothing blameworthy up to the time the conflict emerged, the lawyer responded to the conflict by seeking to withdraw, and the court explicitly approved or ordered the course of conduct that ensued. The federal order should protect the lawyer.

Turning to the confidentiality problem, a clear example would emerge if, in an action on a federal claim, a federal court applied federal privilege concepts under Evidence Rule 501 to rule that a particular privilege had been waived, as in the misaddressed facsimile example so often discussed. The attorney then objects that state confidentiality rules nonetheless prohibit testifying. Some states apparently do not include an express "court order" exception in their confidentiality rules, but are thought to rely on an implicit exception. If there is a conflict between the state confidentiality rule and the federal privilege-waiver ruling, a lawyer who is ordered to testify by the federal court should be protected against state professional-responsibility sanctions.

It was suggested that unauthorized practice issues provide a further complication.

The unauthorized practice problem led to discussion of the provision in draft FRAC 1(b) that bypasses the problem of identifying the "proper" state disciplinary body to apply the state rules of professional responsibility incorporated in subdivision (a). Generally a bar undertakes to impose discipline on attorneys admitted to practice before it. A Michigan lawyer representing an Ohio client in a federal court in Illinois, for example, is clearly subject to disciplinary proceedings in Michigan. If the lawyer is not also admitted in Ohio, the only interest Ohio may assert is one in regulating the unauthorized practice of law in Ohio. If Illinois courts would apply Michigan law to measure the relationships between the Michigan lawyer and the client, it is easy for the Michigan authorities to act. But what if Illinois would apply Illinois rules: how easy is it for Michigan authorities to apply them also? What if, left to their own devices, Michigan authorities would apply Michigan law? How far can Illinois authorities impose meaningful professional responsibility sanctions on a Michigan attorney, apart from precluding any further pro hac vice appearances in Illinois?

Future Directions

The question of the purposes of this Conference was put to frame the concluding discussion. We have learned, or reaffirmed, several things. Bankruptcy problems are special, and need to be carved out. Federal government attorneys seem to have special, even unique, problems that differ

from private lawyers' problems. Straight civil litigation does not seem to present much of a real problem. Notice of the rules that apply, concern with the deterrent effects of uncertainty as to what rules apply, and anxiety among lawyers seem to be present nonetheless.

Facing these and other parts of the discussion, there is no purpose to attempt to forge a consensus at this meeting. The problems remain difficult. The attorney rules subcommittee will reflect on this discussion, and will work through the problems yet again. It may be able to generate new drafts that can be circulated for further comment by the participants in this conference. The discussion has focused the issues.

It remains possible that Congress will act in a way that will accelerate the natural pace of deliberations. It is wise to be as well prepared as possible against this eventuality.

The Rule 4.2 issue is different. Until the principal players sit down to work out their differences, the attorney conduct rules subcommittee should hold the problem in abeyance.

It was suggested that the further deliberations should consider the assertion that the principle of dynamic conformity reflected in draft FRAC 1 is flawed. Federal rules are better. States in fact do not undertake to regulate unauthorized practice in federal courts. To the contrary, all the cases that have been found seek to regulate only practice in state courts, recognizing the power of a federal court to permit practice, if it wishes, by an attorney who is not authorized to practice in state courts. It was responded that pro hac vice appearance in a federal court is a distinctive problem. But it was rejoined that this is not what the state cases are about — Maryland, for example, has recognized the right of an attorney who cannot practice in Maryland to appear before a federal court in Maryland, and indeed to maintain an office in Maryland to serve the needs of clients in connection with federal court proceedings in Maryland. The surrejoinder was that this is simply a generalized illustration of pro hac vice appearance.

Discussion turned to the question whether the right to control admission to practice in a federal court eviscerates the dynamic conformity approach seemingly recognized in draft FRAC 1. It was responded that draft FRAC 1(d) simply confirms the power established by 28 U.S.C. § 1654. Federal judges have expressed the desire to have this power confirmed in any federal rule, lest negative implications be drawn.

And the group was reminded that the present situation is one in which 94 different local district rules regulate professional responsibility in federal courts. The regulation abounds in inconsistencies, both among federal courts and with state law. Anything proposed by the draft FRAC 1 in fact enhances, or at least clarifies, the primacy of state law.

It was stated again that state disciplinary counsel do not seek to interfere with procedural rulings by federal courts that have "ethical overtones." It is common to refuse to respond to requests from federal judges for advice on what should be done in a particular case. But the question of

timing remains important. Many bar counsel would not approve the ex-post exemption order approach. They prefer that a federal court be able to act only ex ante, while ruling on its own concerns, and not be directed to intervene directly with state proceedings that have actually been launched.

It was urged that the draft Rule 1(d) recognition of the power of federal courts to regulate admission to practice in federal court is important to make the rule self-contained and clear. It would be better to expand the draft to state explicitly that this power includes the power to suspend or revoke the privilege of practicing in federal court, lest a negative implication be drawn from the draft Rule 1(b) reference of enforcement to the proper state disciplinary body.

As to choice-of-law, clarity and predictability are very important. Looking to the state where the district court sits is right. For the courts of appeals, perhaps the reference should be to the state where the court of appeals sits, if only for the values of clarity and achieving a single rule that applies to all counsel in a proceeding. At the same time, incorporating state choice rules may defeat clarity. Perhaps the default rule for a court of appeals should be the geographic location of the tribunal being reviewed. As to administrative agency review, that often will be to the law of the District of Columbia; so be it.

The group also was reminded that a clear choice-of-law rule will not always, or even often, yield a clear rule of law. The underlying rules of professional responsibility often are unclear. Such standards as conduct unbecoming to the profession or prejudicial to the administration of justice are often used. These standards themselves may be subject to constitutional challenges for vagueness, unless given more specific content by local rules or common-law development. Appellate Rule 46 is an example of this problem; it has been upheld only because it is given specificity by local circuit rules.

If the choice is made to do nothing, the result will be more, and eventually more uniform, federal common law of professional responsibility. Or the result may be that Congress acts, either directly or by first asking for the views of the Judicial Conference. In one way or another, the approach reflected in the draft of ten Federal Rules of Attorney Conduct may again return to the fore. But it is important to continue to think about the choice between doing nothing and adopting an approach that resembles the draft FRAC 1.

The final observation was from a lawyer who manages many lawyers on a daily basis, and who believes that the value of any federal rule will depend on the sense of security it engenders. If it means taking your chances before state disciplinary authorities later on, the rule will not be much help.

By common acquiescence, it was agreed that these problems are important and complex. They should not be put aside, but deserve continued work to determine whether effective solutions

can be found.

Respectfully submitted,

Edward H. Cooper

Appendix

(This draft was prepared and circulated by Professor Burbank during the conference to illustrate the rough dimensions of the "ex post" exemption approach. It would replace the draft FRAC 1(e) and the alternative draft 1(e).)

In the event that a standard of professional responsibility is invoked in state proceedings to impose a sanction, civil liability, or other consequence on an attorney for conduct in connection with an action or proceeding in a United States district court or court of appeals, the attorney may apply to the federal court for an exemption from such imposition.

In determining whether to enter an order granting an exemption, the court should consider whether the conduct violates a rule of professional responsibility and whether there is an irreconcilable conflict between such rule and the federal interests served by or implicated in the conduct.

FRAC Models: Introduction

The years of work and discussion on the proposal to create a uniform Federal Rule of Attorney Conduct have progressed through the February 2000 invitational meeting. Two basic alternatives have come to the fore through this process. One is to do nothing. The other is to adopt, for the moment, a single Federal Rule of Attorney Conduct. Several variations of this FRAC 1 are set out below. The theme common to all of these variations is that all district courts and courts of appeals should look to state law for rules of professional responsibility. At the same time, these federal courts must retain control over their own practice and procedure, and similarly must retain the control that 28 U.S.C. § 1654 recognizes over the right to appear as an attorney. These principles are expressed in more or less detail in the several drafts.

The reasons for considering adoption of a national rule have become familiar. Federal courts now regulate professional responsibility in two different ways. The more visible regulation stems from local rules. The local-rule pattern in the district courts is more random noise than pattern. Almost every conceivable approach has been adopted somewhere. Some districts simply incorporate the local state rules of professional responsibility. Some districts adopt the ABA Model Rules of Professional Responsibility, or the ABA Model Code of Professional Responsibility, or — in one district — the ABA Canons of Ethics. The version adopted by the federal court may or may not coincide in written text with the version adopted by the local state, and interpretations of even the same written text may differ. Some districts have adopted their own stand-alone systems, different not only from the local state rules but different also from any other system anywhere. In multidistrict states, different districts may take different approaches. The result often is not only a complete lack of national uniformity but also disuniformity, and — often far more disruptive — uncertainty.

Beyond the local rules, federal courts also address matters of professional responsibility through their decisions. The common-law process that generates these decisions does seem to be working toward uniformity among federal courts on the issues that arise most frequently. The decisional uniformity, however, is reached by treating decisions based on one set of local rules as precedent in courts that have quite different local rules, and often by ignoring all of the local rules.

Confronting all of this mess, the Local Rules Project for many years concentrated its attention on other local rules problems. It is now able to return to the local rules aspect of professional responsibility, in part because resolution of many of the other problems releases energy for the task. In addition, the mess or local rules appears to be the source of increasing concern both for present practice and for the future. More and more lawyers and law firms are engaging in multiforum practice, and feel threatened by the frequent inscrutability of local federal rules and the prospect that conflicts will emerge between the federal rules and state rules. Some observers have suggested that these fears have been stirred in part by the very fact that the Local Rules Project has brought attention to the problem. Even if the Project has played some role, the problems are now recognized. Doing nothing will not, of itself, erase awakened consciousness.

Some support remains for the "do nothing" approach. The central argument is that none of the theoretical problems are real. Federal courts do not in fact undertake to impose professional discipline apart from sanctions designed to regulate practice in federal court — even if the sanction

calls for payment to the court, censure, or suspension or revocation of the right to practice in federal court, there is no direct effect on the attorney's state license to practice or standing in the state bar. State authorities do not in fact undertake to impose professional discipline for actions undertaken under the authority of federal procedure or under order of a federal court. Although the Department of Justice believes that it encounters serious problems with the eccentric interpretations that a few states place on local rules of professional responsibility, most of the Department's problems relate to investigative behavior that in any event is not a proper subject for regulation under the Rules Enabling Act. We are getting along perfectly well as matters stand now, and there is no reason to adopt remedies that may have undesirable consequences.

The alternatives to doing nothing have been explored in depth. There is no support for adopting a complete and nationally uniform set of rules of professional responsibility for the federal courts, even if the rules were to be taken directly from the rules adopted and occasionally revised by the American Bar Association. There has been little more enthusiasm for relying generally on local state rules, while carving out for uniform federal treatment a discrete set of rules addressed to the problems that have most frequently appeared in federal decisions. Those alternatives have been put aside, at least for the foreseeable future. All that remains of them is the prospect that if FRAC 1 is adopted, it may some day prove useful to adopt another Rule for bankruptcy practice, which has distinctive problems and already is regulated in part by the Bankruptcy Code, and perhaps another Rule to address specific needs of the Department of Justice.

The surviving alternative to doing nothing is to adopt some form of "dynamic conformity" to state practice. The starting point is simple: each federal court conforms to the professional responsibility rules that would be applied by the local state. This conformity is dynamic in the sense that it continually adapts to state rules as the text may be changed from time to time and as the meaning of the text is fleshed out by authoritative state interpretations.

The models built out of this starting point can be more or less elaborate. The most elaborate approach spells out the need to rely on local state choice-of-law rules, expressly defers professional responsibility enforcement proceedings to state authorities, spells out the primacy of federal procedure in federal courts and the right of federal courts to control the right to practice in federal court, and expressly forbids imposition of state sanctions for conduct that conforms to the requirements or opportunities of federal procedure. This approach is set out first in the models that follow because it identifies the issues that should be addressed. Successive models simplify the expression. The first relies for attorney protection on specific federal court order, not an abstract statement of the primacy of federal procedure. This model might be changed to allow retroactive protection by federal court order after state disciplinary proceedings are launched; a sketch is provided for that approach. Still simpler models pare off the statement of federal protection, relying on development by decision and on the common sense of state disciplinary authorities. The choice-of-law problem that confronts the courts of appeals also can be simplified, or perhaps put aside entirely. All that remains at the end is a very simple rule that, by mandating dynamic conformity to local state rules, preempts local federal rules and does nothing more. This rule is presented with an alternative that excludes the courts of appeals. Professor Coquillette's research shows that there is no problem in the courts of appeals; it may be better to leave Appellate Rule 46 as it stands.

FEDERAL RULES OF ATTORNEY CONDUCT

Rule 1. Applicable Rules.

(a) Rules of Professional Responsibility.

(1) District Court. ~~Except as provided in these rules, t~~The professional responsibility of an attorney for conduct in connection with any action or proceeding in a United States District Court is governed by the rules [that apply to an attorney admitted to practice in the state where the district court sits]{that would be applied by the courts of the state in which the district court sits}.

(2) Court of Appeals. ~~Except as provided in these rules, t~~The professional responsibility of an attorney for conduct in connection with any appeal or proceeding in a United States Court of Appeals is governed:

(A) With respect to any appeal from a district court, and any other proceeding directed to a district court, by the rules that apply [to an attorney admitted to practice in the state where the district court sits]{in the district court under Rule 1(a)(1)}.

[**(B)** With respect to any other action or proceeding:

(i) if the attorney is admitted to practice only in one state, by the rules of that state, or

(ii) if the attorney is admitted to practice in more than one state, by the rules of the state in which the attorney principally practices, but the rules of another state in which the attorney is licensed to practice govern conduct that has its predominant effect in that state.]

{**(B)** With respect to any other action or proceeding, by the law of the state where the court of appeals has its administrative headquarters.}

(b) Enforcing Professional Responsibility. The rules of professional responsibility that govern under Rule 1(a) are enforced by the proper state authority. A United States District Court or Court of Appeals may initiate an investigation of an alleged infraction of a rule of

professional responsibility, and — with or without an investigation — may refer any question of professional responsibility to the proper state authority.

(c) Procedure. Federal law governs all matters of procedure in the United States District Courts and Courts of Appeals[, whether addressed by the Federal Rules of *Attorney Conduct*, Appellate Procedure, Bankruptcy Procedure, Civil Procedure, Criminal Procedure, or Evidence; by judicially developed rules; by local court rules; or by the court in its inherent power]. The court may, after notice and opportunity to be heard, enforce the procedural rules and its orders by all appropriate sanctions, including forfeiture of fees, reprimand, censure, or suspension or revocation of the privilege to appear before the court.

(d) Practice in United States Court. A court of the United States may establish and enforce rules governing the right to appear as counsel in that court.

(e) State Sanctions Preempted. No state authority may impose any sanction, civil liability, or other consequence on an attorney for conduct in connection with an action or proceeding in a United States District Court or Court of Appeals if the conduct is authorized by order of the United States court or by the federal law of procedure that applies under Rule 1(c).

Committee Note

The purpose of these rules is to separate issues of professional responsibility from control of the procedure in the United States District Courts and Courts of Appeals. Matters of professional responsibility are allocated to state law. Matters of procedure are controlled by federal law.

Attorneys are licensed by state authorities, not by the United States nor by United States courts. By continuing tradition, rules of professional responsibility have been a matter of state responsibility, not federal responsibility. This tradition has become threatened, however, by the adoption of hundreds of local rules in the district courts and courts of appeals. These rules provide a crazy-quilt pattern that defeats any possibility of national uniformity and that often defeats uniformity within a state. See the extensive studies by the Reporter of the Standing Committee and the Federal Judicial Center published as: *The Working Papers of the Committee on Rules of Practice & Procedure: Special Studies of Federal Rules Governing Attorney Conduct*, September, 1997. [Hereafter *"Working Papers."*] Some local rules are drafted in opaque terms that defy understanding and — if enforcement is attempted — threaten to deny due-process principles of fair notice. See *Working Papers* 3-121. When the time comes for enforcement, moreover, some courts invoke authority outside their local rules and on occasion simply ignore the local rules. See *Working Papers* 3-44, 99-121, 187-193, 235-244. This rule preempts all of these local rules by occupying the field of professional responsibility in the district courts and courts of appeals.

Subdivision (a). The rules that apply with respect to a district court are the rules that would be applied by the state in which it sits. This approach means that ordinarily all attorneys involved in any proceeding are governed by the same rules; there is no risk that an attorney for one party may win an advantage over an attorney for another party by exploiting differences in the rules of the different states by which the attorneys are licensed. Different rules will apply only if local state choice-of-law rules would, because of different circumstances affecting the attorneys' conduct and client relationships, apply different rules to the different attorneys.

This rule does not address all choice-of-law questions. An attorney's involvement with the issues that eventually appear in litigation commonly begins before litigation. This rule does not choose the law that governs before an action comes to the federal court. Local state rules apply from the moment an action or proceeding comes before the district court. The local rules include local choice-of-law rules. If the local state would choose the rules of a different state to govern a particular situation, those are the rules that govern. Removal from a state court presents no difficulty — the same rules as would be applied by the state court carry over. If a case is transferred to a district court from another federal court, the rules that would be applied by the receiving court's state apply after the transfer becomes effective. If actions are consolidated in a single district for pretrial purposes under 28 U.S.C. § 1407, the rules of the multidistrict court's state apply to all proceedings in the multidistrict court. Other situations must be addressed as they arise.

The rules that apply with respect to a court of appeals depend on the nature of the proceeding in the court of appeals. If the proceeding is an appeal or is otherwise directed to a district court, as on petition for an extraordinary writ, the rules are those that apply in the district court. This approach prevents the confusions that might arise when there is a change of counsel or when the parties choose attorneys from different states. Some proceedings in a court of appeals, however, are not directed to a district court. Review of an administrative agency is the most common example, but there are other examples such as contempt proceedings arising from an order entered by the court of appeals. [A three-part test applies to these proceedings. If the attorney is admitted to practice in only one state, that state's rules apply. If the attorney is admitted to practice in more than one state, the rules that apply are those of the state where the attorney principally practices, unless the attorney's conduct has its principal effect in another state where the attorney is also licensed.]{In order to ensure that a single body of law applies to all attorneys in a single proceeding, the rules of professional responsibility for these situations are taken from the state where the court of appeals has its administrative headquarters.}

Subdivision (b). Enforcement of state rules of professional responsibility remains with the proper state authority. Ordinarily the state will be the state whose rules apply under subdivision (a). Only that state can provide an expert and authentic interpretation and application of the controlling rules. If the attorney is licensed in that state, other states should defer to its enforcement decisions to the same extent as they would defer if the attorney's conduct had been undertaken in connection with a court of that state. If another state initiates disciplinary proceedings because the attorney is not admitted to practice in the state of the district court, or does so even though the attorney is admitted to practice in the district court's state, the enforcing state is bound by the choice-of-law rule in subdivision (a).

In considering whether to investigate or refer a professional responsibility question, a district court must be sensitive to the consequences that flow even from an investigation or referral. The court should make its investigation as discreet as possible, and should seize every opportunity for confidentiality in state referral procedures.

Subdivision (c). Subdivision (c) recognizes the fundamental imperative that the federal government must be able to control the procedure in federal courts. A state may not regulate federal procedure through the guise of state rules of professional responsibility. The distinction between matters of procedure and matters of professional responsibility is as clear at the core, and as uncertain at the edges, as the familiar distinctions that draw lines between procedure and substance. The distinction between procedure and substance reflects different policies, and may yield different results, in such separate contexts as state-state choice of law, federal-state choice of law, and determining the retroactivity of legislation. The policies that separate federal control of federal procedure from state regulation of professional responsibility also are different, although quite similar to the policies that distinguish "substance" from "procedure" under the doctrine of *Erie R.R. v. Tompkins*, 1938, 304 U.S. 64.

Although a federal court is free to regulate its procedure in ways that require departure from the state rules of professional responsibility that govern under subdivision (a), the state rules should be considered in making procedural rulings. Needless affront to state principles should be avoided.

A federal court may enforce procedural requirements by all appropriate sanctions. The sanctions may be those expressly provided in a rule of procedure, such as Appellate Rule 38, or Civil Rules 11, 26(g), and 37. The sanctions also may be contempt sanctions or other sanctions supported by inherent power. These sanctions may include those that often are invoked for professional-responsibility violations, including disqualification, fee forfeiture, reprimand, censure, or suspension or revocation of the privilege to appear before the federal court. These sanctions are appropriate remedies for procedural violations, necessary to deter such violations and to protect the court against recidivism by attorneys whose conduct has threatened to disrupt or subvert proper procedure.

Requirements of notice and opportunity to be heard apply to the imposition of procedural sanctions. Such requirements are already familiar through the developed procedures used to adjudicate contempt issues or to impose procedural sanctions.

Subdivision (d). 28 U.S.C. § 1654 establishes the right of parties in the courts of the United States to plead and conduct their cases "by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." Subdivision (d) recognizes that the power to establish these rules includes the power to provide for enforcement. Enforcement may include such measures as limitation, suspension, or revocation of the right to appear as counsel in the court, or before a particular judge of the court. Enforcement by suspension or revocation may be based on acts that do not relate directly to the attorney's conduct in the proceedings. Examples include disbarment by state authorities or criminal prosecution or conviction. Such steps are designed to protect the court's interest in regulating the right to practice before the court, not to impose professional discipline as such.

Subdivision (e). The principle that federal law must control federal procedure must not be defeated by imposition of state standards for attorney conduct authorized or required by federal procedure. This preemption of state sanctions includes conduct undertaken to comply with a specific federal court order.

The need to preempt state sanctions can be illustrated by one example. Thirty months into a complex litigation, a motion is made to disqualify opposing counsel for violations of professional responsibility rules relating to confidential client information and conflicts of interest. The federal court determines that there is no violation, or that a violation does not warrant disqualification in light of the costs that disqualification would entail. The federal court's interest in regulating its own proceedings supersedes the interest of any state in imposing sanctions for the conduct approved by the federal court.

The law governing lawyers may impose civil liability for conduct that also violates the disciplinary rules of professional conduct. The federal interest in enforcing federal procedure requires that a lawyer who complies with federal procedure in federal-court proceedings be protected against civil liability as well as against disciplinary sanctions.

Alternative (c), (e) Court-order Provisions

(c) Exemption. A United States District Court or Court of Appeals may, on motion or on its own, enter an order that exempts an attorney from an otherwise applicable rule of professional responsibility with respect to conduct in connection with an action or proceeding in that court. In determining whether to enter the order the court should consider whether the conduct violates any rule of professional responsibility and should weigh any violation against the procedural interests served by the conduct.

* * *

(e) State Sanctions Preempted. No state authority may invoke any standard of professional responsibility to impose any sanction, civil liability, or other consequence on an attorney for conduct in connection with an action or proceeding in a United States District Court or Court of Appeals that was protected by an exemption ordered under Rule 1(c).

Committee Note

Subdivision (c). Subdivision (c) recognizes the fundamental imperative that the federal government must be able to control the procedure in federal courts. The sources of federal procedure include court rules, both national and local; judicially developed doctrines; and inherent power. Federal procedure drawn from these sources serves not only the interests of the federal courts but also the substantive principles of federal law that account for much federal judicial business. A state may not control federal procedure under the guise of state rules of professional responsibility. At the same time, it is appropriate to accommodate the interests of federal procedure to the interests that underlie state regulation of attorney responsibility.

Accommodation of these competing interests might be left to a general provision that exempts from state responsibility rules any conduct undertaken in compliance with federal procedure. This general approach would encounter at least two major difficulties. The first difficulty is that there are many broad areas in which the same conduct involves both judicial procedure and professional responsibility. When procedure interests collide with responsibility interests, each interest may be important, trivial, or significant. One interest may be trivial while the other is important. It is important to achieve a case-specific accommodation of the competing interests in a way that would not be served by a broad principle that federal procedural interests always supersede state responsibility interests. The accommodation is too sensitive and too difficult to be left to the unguided judgment of individual attorneys. Explicit judicial review and disposition is required.

The second difficulty with a mere general principle is that enforcement ordinarily would occur in state professional discipline proceedings. State-created institutions would be required to make determinations of federal procedure divorced from the underlying federal proceeding,

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 11, 2000

MEMORANDUM TO STANDING RULES COMMITTEE

SUBJECT: *Financial Disclosure*

The Standing Rules Committee requested the Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules to prepare appropriate rules governing disclosure of financial interests. The Appellate, Civil, and Criminal Rules Committees have drafted pertinent rules and Notes for publication for public comment, which are included in each of the respective committee reports and are attached for convenience. The Bankruptcy Rules Committee continues to work on a draft rule. The complexity inherent in regulating the disclosure of financial interests of interested persons in bankruptcy proceedings requires more time for study.

After the advisory rule committees met in the spring, Judge Scirica asked the reporters to attempt to achieve more uniformity in the language of the three draft financial disclosure rules. The attached side-by-side comparison of the three rules, as revised by the reporters, represents their product. The respective committee chairs have reviewed the revised versions and are satisfied that revisions are consistent with the draft rules approved by their committees.

Although the language of the revised rules is now quite similar, a few differences continue. Some reflect the forum, e.g., district or circuit court, others are unique to a single set of rules, e.g., organizational victims in the criminal rules, while still another reflects the judgment that there is a greater likelihood of misdirected information in civil cases, i.e., the Civil Rules' version requires that a copy of the information be delivered to the individual judge.

A report from the Federal Judicial Center showing the wide variations among the extant local district court and court of appeals rules governing disclosure of financial interests is included. Also attached is a March 8, 2000, letter from Judge Carol Amon, chair of the Committee on Codes of Conduct, expressing the views of her committee on earlier drafts of a financial disclosure rule and recommending that a different approach be taken regarding the extent of disclosure. The advisory rules committees carefully considered the views of the Committee on Codes of Conduct in revising the draft financial disclosure rules.

John K. Rabiej

Attachments

CIVIL RULES	APPELLATE RULES	CRIMINAL RULES
Rule 7.1 Disclosure Statement	**Rule 26.1 Disclosure Statement**	**Rule 12.4. Disclosure Statement**
(a) Who Must File.	**(a) Who Must File.**	**(a) Who Must File.**
(1) Nongovernmental Corporate Party. A nongovernmental corporate party to an action or proceeding in a district court must file two copies of a statement that:	**(1) Nongovernmental corporate party.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that:	**(1) Nongovernmental corporate party.** Any nongovernmental corporate party to a proceeding in a district court must file a statement that:
(A) identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation, and	**(A)** identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation, and	**(A)** identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation, and
(B) discloses any additional information that may be required by the Judicial Conference of the United States.	**(B)** discloses any additional information that may be required by the Judicial Conference of the United States.	**(B)** discloses any additional information that may be required by the Judicial Conference of the United States.
(2) Other Party. Any other party to an action or proceeding in a district court must file two copies of a statement that discloses any information that may be required by the Judicial Conference of the United States.	**(2) Other party.** Any other party to a proceeding in a court of appeals must file a statement that discloses any information that may be required by the Judicial Conference of the United States.	**(2) Organizational Victim.** If an organization is a victim of the alleged criminal activity, the government must file a statement identifying the victim. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 12.4(a)(1).
(b) Time for Filing; Supplemental Filing. A party must: **(1)** file the Rule 7.1(a) statement upon its first appearance, pleading, petition, motion, response, or other request addressed to the court, and	**(b) Time for Filing: Supplemental Filing.** A party must file the Rule 26.1(a) statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents.	**(b) Time for Filing; Supplemental Filing.** A party must: **(1)** file the Rule 12.4(a) statement upon its first appearance, pleading, petition, motion, response, or other request addressed to the court, and
(2) promptly file a supplemental statement upon any change in the information that the statement requires.	A party must supplement its statement whenever the information that must be disclosed under Rule 26.1(a) changes.	**(2)** promptly file a supplemental statement upon any change in the information that the statement requires.

(c) Form Delivered to Judge. The clerk must deliver a copy of the Rule 7.1(a) statement to each judge acting in the action or proceeding.	**(c) Number of Copies.** If the Rule 26.1(a) statement is filed before the principal brief, or if a supplemental statement is filed, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.	

(c) Form Delivered to Judge. The clerk must deliver a copy of the Rule 7.1(a) statement to each judge acting in the action or proceeding.	**(c) Number of Copies.** If the Rule 26.1(a) statement is filed before the principal brief, or if a supplemental statement is filed, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.	

II Action Items: Proposals for Publication

Each of the three proposals to publish amendments for comment is the result of work coordinated with other advisory committees. The disqualification disclosure proposal involves several other committees. The proposal on entry of judgment involves the Appellate Rules Advisory Committee. The Rule 81(a)(2) proposal involves the Criminal Rules Committee.

II A: Disqualification Disclosure

The question of financial disclosure has been raised by the Committee on Codes of Conduct and was delegated to the several advisory committees by the Standing Committee. The Appellate Rules have, in Rule 26.1, the only present national rule on disclosure. Most of the circuits also have local rules that supplement the requirements of Rule 26.1. Disclosure requirements in the district courts are established by practice or local rule. The local circuit and district rules differ substantially among themselves. Substantial concern has arisen from two well-publicized newspaper accounts of situations in which federal judges failed to recognize investment conflicts that should have led to recusal. It may be desirable to respond to these pressures by publishing for comment a uniform disclosure rule that would apply to civil and criminal proceedings in the district courts, and to all proceedings in the courts of appeals. The uniform rule may also provide the template for a Bankruptcy Rule, but there are special problems that most likely will require development of special provisions that distinguish the Bankruptcy Rule from the uniform rule.

Two central needs must be recognized. The first is to get information from the parties to all actions. The second is to bring this information home to each judge who acts in a case. Although a national rule can direct that the clerk provide the information to each judge — and such a direction is included in draft Rule 7.1 — this problem is an internal administrative problem to be handled primarily within each court. The central focus of a national rule will be the need to get information from the parties. It is not entirely clear that even this subject should be addressed by a Rule of Appellate, Bankruptcy, Civil, or Criminal Procedure. The subject seems within the scope of the Enabling Act, however, and Appellate Rule 26.1 has already set an example.

If there is to be a national rule that requires some measure of uniform disclosure, the extent of the disclosure must be chosen. No one believes that a national rule can require disclosure of all the information that might be relevant to a recusal decision. Nor does anyone claim to know what reduced level of disclosure would reach the most common and important grounds for recusal. It is generally agreed that Appellate Rule 26.1 disclosure will cover a major fraction of the circumstances that actually call for disclosure, but no one can say whether the proportion is 60%, 90%,

or some more reassuring number. Few have suggested that a national rule should require disclosure about the attorneys who appear in a case; the focus commonly is on parties, excluding even amici curiae. (An addition might be made in the criminal rules to require disclosure of any corporation that may benefit from a restitution award.) As to parties, the focus commonly is on financial information, not on personal information. Appellate Rule 26.1 narrows this focus still further, addressing only parties that are nongovernmental corporations, and requiring information only about "parent corporations and * * * any publicly held company that owns 10% or more of" the corporation's stock.

Appellate Rule 26.1 is about as narrow a financial disclosure rule as could be drafted. When a somewhat broader form of Rule 26.1 was adopted in 1989, the Committee Note recognized the rule represented "minimum disclosure requirements" and observed that a court of appeals could "require additional information * * * by local rule." Although many local circuit rules do require additional information, there is no common pattern. Some require only modest additional disclosures; some require a great deal of additional information. These rules, and local district rules, are described in the Federal Judicial Center materials that accompany the present drafts.

The Civil Rules Advisory Committee considered draft rules that embodied several different approaches to disclosure, along with many different draft Committee Note provisions. The discussion is summarized at pages 9 to 15 of the draft Minutes. Two major questions were emphasized. The first is whether the time has come to require more extensive disclosures than Appellate Rule 26.1 requires. The Committee on Codes of Conduct believes that the best approach is simply to adopt Appellate Rule 26.1 in the rules that govern the district courts. The Advisory Committee agreed that it would not be wise to attempt to enshrine more detailed requirements in the Rules of Appellate, Bankruptcy, Civil, or Criminal Procedure. But it also concluded that it is desirable to leave the way open for adoption of additional disclosure requirements by a procedure that is more flexible than the Rules Enabling Act procedure. Inspiration for additional disclosure requirements may arise from at least two sources. Many courts, both circuit and district, require disclosures that extend beyond Appellate Rule 26.1. Experience with these local requirements may support development of more detailed national requirements. A second source of support for more detailed rules may be the continuing development of judicial support software. As computer systems become ever more powerful, it may prove feasible to bring together more complicated bodies of information about individual judges and about those involved in litigation. Draft Rule 7.1 leaves the way open to take advantage of these possible developments by authorizing adoption of a disclosure form by the Judicial Conference. There is no mandate that a form be developed. But there was strong support for the conclusion that if additional

disclosures are to be required, the best procedure for developing the requirements lies in the Judicial Conference. The Judicial Conference can act with the support of the Codes of Conduct Committee and the Administrative Office, and can adjust any form that may be adopted with greater facility than the Enabling Act permits.

The second question was whether the national rules should be framed to preempt local rules. This question is made difficult by competing considerations. Preemption of local rules can be easily supported. There is no apparent reason to believe that there is any local variation in the circumstances that affect the desirable level of disclosure. If the proposed model is the best disclosure rule, national uniformity has important advantages. One advantage is adherence to the Enabling Act ideal that there be uniform federal procedures. A second advantage is that parties and law firms that regularly appear in different federal courts are spared the burden of learning local rules and generating the different sets of information required by different local rules. Continued recognition of local rules, however, also can be easily supported. The Appellate Rules Advisory Committee recognized the role of local circuit rules when it first drafted Appellate Rule 26.1 in a form that required greater disclosure than the more recently amended version of Rule 26.1. This recognition reflected the drafting history, which began with more detailed disclosure requirements but receded in the face of substantial opposition. Most of the circuits have in fact adopted local rules that require disclosures more detailed than Rule 26.1 requires. Some district courts, acting in the absence of any national rule, also have adopted local rules that require disclosures more detailed than Rule 26.1 disclosure. This experience suggests that the minimal requirements of Rule 26.1 may not embody the best long-range approach. The compromise embodied in draft Rule 7.1 is to address local rules only in the Committee Note. The final paragraph of the Committee Note states that Rule 7.1 does not prohibit local rules unless the Judicial Conference adopts a disclosure form that preempts local rules.

Proposed Rule 7.1(c), which directs the clerk to deliver a copy of the Rule 7.1(a) disclosure to each judge acting in the action or proceeding, does not have a parallel in the drafts of Appellate Rule 26.1 and Criminal Rule 12.4. The Civil Rules Advisory Committee believes that there are justifications that distinguish the Civil Rules from the Appellate Rules and Criminal Rules on this matter. The experience of some committee members is that disclosure information does not always come promptly to the district judge. An express direction to the clerk will help ensure that the disclosure accomplishes the intended function. The other rules address different circumstances. Appellate Rule 26.1(b) requires that the disclosure be included in a party's principal brief, assuring that it will come to the attention of each judge who considers the appeal on the merits. The occasions for action

by a circuit judge before the principal briefs are filed are not so frequent as to require a direction to the clerk. Relatively few criminal cases involve corporate parties, and not many involve likely corporate restitution recipients.

Rule 7.1 Disclosure

(a) Required Disclosure. A party to [that appears in] an action or proceeding in a district court must:

(1) if it is a nongovernmental corporation, file two copies of a statement that

(A) identifies all its parent corporations [companies?] and also identifies any publicly held company [corporation?] that owns 10% or more of its stock, or

(B) states that there is nothing to report under Rule 7(a)(1)(A); and

(2) file two copies of a form providing any additional information required by the Judicial Conference of the United States.

(b) Time for Filing. A party must file the Rule 7.1(a) statement or form with its first appearance, pleading, petition, motion, response, or other request addressed to the court. A supplemental statement or form must be filed promptly upon any change in the circumstances that Rule 7.1(a) requires the party to identify.

(c) Form Delivered to Judge. The clerk must deliver a copy of the Rule 7.1(a) disclosure to each judge acting in the action or proceeding.

Committee Note

Rule 7.1 is drawn from Rule 26.1 of the Federal Rules of Appellate Procedure, with changes to adapt to the circumstances of district courts that dictate different provisions for the time of filing, number of copies, and the like. The information required by Rule 7.1(a)(1) reflects the "financial interest" standard of Canon 3C(1)(c) of the Code of Conduct for United States Judges. This information will support properly informed disqualification decisions in situations that call for automatic disqualification under Canon 3C(1)(c). It does not cover all of the circumstances that may call for disqualification under the subjective financial interest standard, and does not deal at all with other circumstances that may call for disqualification.

Although the disclosures required by Rule 7.1(a)(1) may seem limited, they are calculated to reach a majority of the circumstances that are likely to call for disqualification on the

basis of financial information that a judge may not know or recollect. Framing a rule that calls for more detailed disclosure will be difficult. Unnecessary disclosure requirements place a burden on the parties and on courts. Unnecessary disclosure of vast volumes of information may create a risk that a judge will overlook the one bit of information that might require disqualification, and also may create a risk that unnecessary disqualifications will be made rather than attempt to unravel a potentially difficult question. It has not been feasible to dictate more detailed disclosure requirements in Rule 7.1(a)(1).

Despite the difficulty of framing more detailed disclosure requirements, developing experience with divergent disclosure practices and with improving technology may provide the foundations for exacting additional requirements. The Judicial Conference, supported by the committees that work regularly with the Codes of Judicial Conduct and by the Administrative Office of the United States Courts, is in the best position to develop any additional requirements and to keep them adjusted to new information. Rule 7.1(a)(2) authorizes adoption of additional disclosure requirements by the Judicial Conference, to be embodied in a uniform form that can be used by all courts.

Rule 7.1(a)(2) requires every party to file a disclosure form if the Judicial Conference acts to adopt a form that reaches a party that is not a nongovernmental corporation. It cannot be predicted what information will be required, of what parties, if the Judicial Conference adopts a form. The Judicial Conference may adopt a form that applies only to some, not all parties. In that case, only the designated parties need file. Even if the form applies to all parties, it seems likely that many parties, and particularly individual parties, will not have any information that falls within the required categories. In that case, the Rule 7.1(a)(2) requirement is satisfied by filing a form that indicates that there is nothing to disclose as to any of the required categories.

Rule 7.1 does not prohibit local district or circuit rules that require disclosures in addition to those required by Rule 7.1 unless the Judicial Conference adopts a form that [expressly] preempts additional disclosures.



Rules 8 and 10 of both sets have been amended to reflect the change in title of magistrate judges to United States magistrate judges. In addition, Rule 8 of the Rules Governing § 2254 Proceedings has been amended to reflect the change in designation of 18 U.S.C. § 3006A.

Finally, Rule 9 in both sets of rules has been amended to reflect amendments to 28 U.S.C. § 2244, where Congress limited the ability of petitioners and movants to obtain relief on successive actions; under the amendments, the person seeking relief must first obtain approval from a court of appeals before filing a second or successive petition.

The proposed amendments and Committee Notes are at Appendix C to this report.

Recommendation—The Committee recommends that Rules 1, 2, 3, 6, 8, 9 and 10 of the Rules Governing § 2254 Proceedings and Rules 1, 2, 3, 8, 9, and 10 of the Rules Governing § 2255 Proceedings be approved and separately published for public comment.

VI. ACTION ITEM—Publication of Rule 12.4 for Comment.

The Criminal Rules Committee has recommended that new Rule 12.4 be promulgated to address the issue of filing disclosure statements with the court. Similar amendments are being proposed in Appellate Rule 26.1 and Civil Rule 7.1. Although Rule 12.4 closely tracks those two rules in most respects, Rule 12.4(b) includes a requirement that the government disclose to the court the identities of any organizational victims in the case. While the scope of the Civil and Appellate Rules are limited to corporate parties, Rule 12.4 would extend the disclosure requirement to organizational victims which would include business associations and partnerships. The Committee believed that the ethical rules require judges to recuse themselves if they have a financial interest in an organizational victim. Absent such disclosure, a judge may not know the identity of the organizational victim.

The proposed Rule and Committee Note are at Appendix D to this report.

Recommendation—The Committee recommends that new Criminal Rule 12.4 be approved and published for public comment.

Attachments:

Appendix A. Rules 1 to 60 — Style Package.
Appendix B. Substantive Package (Rules 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41, and 43).

Rule 12.4. Disclosure Statement

(a) Who Must File.

(1) Nongovernmental corporate party. Any nongovernmental corporate party to a proceeding in a district court must file a statement that:

(A) identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation, and

(B) discloses any additional information that may be required by the Judicial Conference of the United States.

(2) Organizational Victim. If an organization is a victim of the alleged criminal activity, the government must file a statement identifying the victim. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 12.4(a)(1).

(b) Time for Filing; Supplemental Filing. A party must:

(1) file the Rule 12.4(a) statement upon its first appearance, pleading, petition, motion, response, or other request addressed to the court, and

(2) promptly file a supplemental statement upon any change in the information that the statement requires.

COMMITTEE NOTE

Rule 12.4 is a new rule modeled after Federal Rule of Appellate Procedure 26.1 and parallels similar provisions being proposed in new Federal Rule of Civil Procedure 7.1. The purpose of the rule is to assist judges in determining whether they must recuse themselves because of a "financial interest in the subject matter in controversy." Code of Judicial Conduct, Canon 3C(1)(c)(1972). It does not, however, deal with other circumstances that might lead to disqualification for other reasons.

Under Rule 12.4(a)(1), any nongovernmental corporate party must file a statement that indicates whether it has any parent corporation that owns 10% or more of its stock or indicates that there is no such corporation. In addition, the rule requires that party to disclose any other information that may be required by the Judicial Conference. Although the term "nongovernmental corporate party" will almost always involve organizational defendants, it might also cover any third party that asserts an interest in property to be forfeited under new Rule 32.2.

Rule 12.4(a)(2) requires an attorney for the government to file a statement that lists any organizational victims to the alleged criminal activity; the pupose of this disclosure is to alert the court to the fact that a possible ground for disqualification might exist. Further, if the organizational victim is a corporation, the statement must include the same information required of any nongovernmental corporate party.

Although the disclosures required by Rule 12.4 may seem limited, they are calculated to reach the majority of circumstances that are likely to call for disqualification on the basis of information that a judge may not know or recollect. Framing a rule that calls for

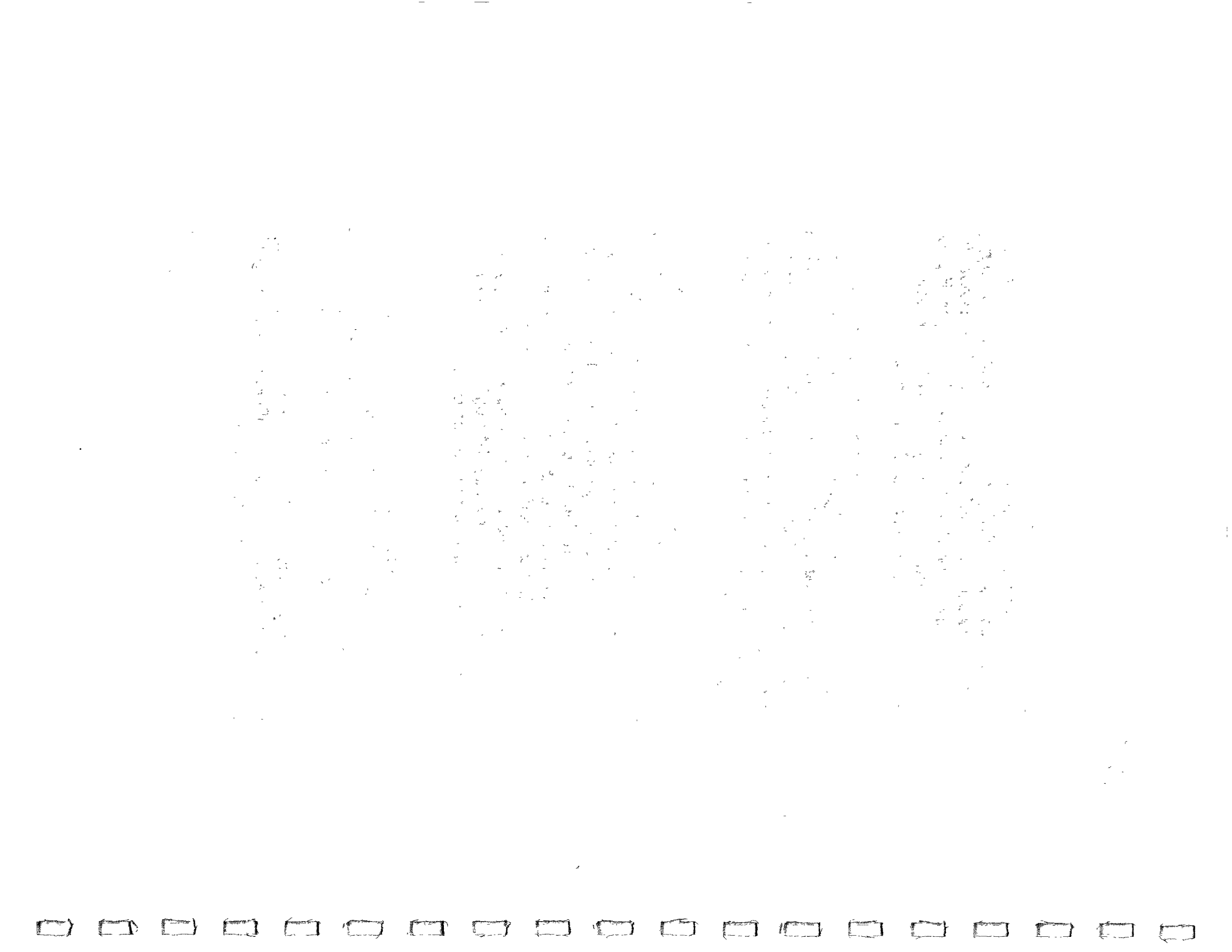
more detailed disclosure is problematic and will inevitably require more information than is necessary for purposes of automatic recusal. Unnecessary disclosure of volumes of information may create the risk that a judge will overlook the one bit of information that might require disqualification, and may also create the risk that courts will experience unnecessary disqualifications rather than attempt to unravel a potentially difficult question.

The same concerns about overbreadth are potentially present by in any local rules that might address this topic. Rule 12.4 does not address the promulgation of any local rules that might address the same issue, or supplement the requirements of the rule. However, the authority granted to the Judicial Conference to require additional disclosures provides authority to preempt any local rules on the same topic.

The rule does not cover disclosure of all financial information that could be relevant to a judge's decision whether to recuse himself or herself from a case. The Committee believes that with the various disclosure practices in the federal courts and with the development of technology, more comprehensive disclosure may be desirable and feasible. The Committee further believes that the Judicial Conference is in the best position to develop any additional requirements and to adjust those requirements as technological and other developments warrant. Accordingly, Rule 12.4(a)(1)(B) authorizes the Judicial Conference to promulgate more detailed financial disclosure requirements for criminal cases.

Rule 12.4(b)(1) indicates that the time for filing a financial disclosure statement is at the point when the parties first have formal contact with the court on criminal proceeding. In some instances, that might be as early as the initial appearance.

Finally, Rule 12.4(b)(2) requires the parties to file supplemental statements with the court if there are any changes in the information required in the statement.



D. Rule 26.1 (Financial Disclosure)

Like the other advisory committees, the Appellate Rules Committee approved amendments regarding financial disclosure at its spring meeting. At your request, Profs. Cooper, Coquillette, Schiltz, and Schlueter conferred by telephone on May 4 and made a number of changes in the financial disclosure amendments that had been approved by the Appellate, Civil, and Criminal Rules Committees, in order to achieve as much substantive and stylistic consistency as possible. The proposed amendment to Rule 26.1 reproduced below reflects several stylistic changes made as a result of the reporters' conference. I have approved those changes on behalf of the Appellate Rules Committee.

My understanding is that the three sets of financial disclosure amendments differ substantively in only two respects (putting aside differences that are necessary because of the differences between trial courts and appellate courts, or between civil cases and criminal cases):

First, the civil rules provision, unlike the appellate rules provision and the criminal rules provision, explicitly requires the clerk to give financial disclosure information to the judge. The Appellate Rules Committee (and, I'm told, the Criminal Rules Committee) chose not to adopt such a provision. The rules of practice and procedure assume that *everything* filed with a clerk is provided to a judge; the Appellate Rules Committee is afraid of the negative implication that might arise if the rules start specifying that certain information must be given to a judge while remaining silent about other information. That said, such a requirement may be more defensible in the civil (and criminal) rules than in the appellate rules, as in the district courts it is common for cases to be pending longer with more interim judicial actions before final resolution.

Second, the criminal rules provision requires "[a]ny . . . party" to a criminal proceeding to identify "any organizational victims of the criminal activity." The appellate rules provision does not include such a requirement. Putting aside the Fifth Amendment and other problems raised by the specific proposal approved by the Criminal Rules Committee, the Appellate Rules Committee believes that any expansion of disclosure obligations beyond what is presently required by Rule 26.1 should be left to the Judicial Conference, using the authority given to it under the amended rules. In our view, the Standing Committee should focus on extending Rule 26.1 to the other rules of practice and procedure and providing a process for future expansion of disclosure obligations. To try to undertake such an expansion now — especially such a controversial expansion — might imperil the other goals.

Rule 26.1 ~~Corporate~~ Disclosure Statement

(a) Who Must File.

(1) **Nongovernmental corporate party.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that:

(a) identifyingies ~~all its~~ any parent corporations and ~~listing~~ any publicly held ~~company~~ corporation that owns 10% or more of ~~the party's~~ its stock or states that there is no such corporation, and

(b) discloses any additional information that may be required by the Judicial Conference of the United States.

(2) **Other party.** Any other party to a proceeding in a court of appeals must file a statement that discloses any information that may be required by the Judicial Conference of the United States.

(b) Time for Filing; Supplemental Filing. A party must file the Rule 26.1(a) statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. A party must supplement its statement whenever the information that must be disclosed under Rule 26.1(a) changes.

(c) Number of Copies. If the Rule 26.1(a) statement is filed before the principal brief, or if a supplemental statement is filed, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.

Committee Note

Subdivision (a). Rule 26.1(a) presently requires nongovernmental corporate parties to file a "corporate disclosure statement." In that statement, a nongovernmental corporate party is required to identify all of its parent corporations and all publicly held corporations that own 10% or more of its stock. The corporate disclosure statement is intended to assist judges in determining whether they must recuse themselves by reason of "a financial interest in the subject matter in controversy." Code of Judicial Conduct, Canon 3C(1)(c) (1972).

Rule 26.1(a) has been amended to require that nongovernmental corporate parties who currently do not have to file a corporate disclosure statement — that is, nongovernmental corporate parties who do not have any parent corporations and at least 10% of whose stock is not owned by any publicly held corporation — inform the court of that fact. At present, when a corporate disclosure statement is not filed, courts do not know whether it has not been filed because there was nothing to report or because of ignorance of Rule 26.1(a).

Rule 26.1(a) does not require the disclosure of all information that could conceivably be relevant to a judge who is trying to decide whether he or she has a "financial interest" in a case. Experience with divergent disclosure practices and improving technology may provide the foundation for more comprehensive disclosure requirements. The Judicial Conference, supported by the committees that work regularly with the Code of Judicial Conduct and by the Administrative Office of the United States Courts, is in the best position to develop any additional requirements and to adjust those requirements as technological and other developments warrant. Thus, Rule 26.1(a) has been amended to authorize the Judicial Conference to promulgate more detailed financial disclosure requirements — requirements that might apply beyond nongovernmental corporate parties.

As has been true in the past, Rule 26.1(a) does not forbid the promulgation of local rules that require disclosures in addition to those required by Rule 26.1(a) itself. However, along with the authority provided to the Judicial Conference to require additional disclosures is the authority to preempt any local rulemaking on the topic of financial disclosure.

Subdivision (b). Rule 26.1(b) has been amended to require parties to file supplemental disclosure statements whenever there is a change in the information that Rule 26.1(a) requires the parties to disclose. For example, if a publicly held corporation acquires 10% or more of a party's stock after the party has filed its disclosure statement, the party should file a supplemental statement identifying that publicly held corporation.

Subdivision (c). Rule 26.1(c) has been amended to provide that a party who is required to file a supplemental disclosure statement must file an original and 3 copies, unless a local rule or an order entered in a particular case provides otherwise.

III. Information Items

I have only one item of information to share with you: Prof. Schiltz will be leaving Notre Dame Law School this summer to accept an appointment as Associate Dean and Professor of Law at the law school that the University of St. Thomas is opening in Minneapolis (Prof. Schiltz's hometown). Prof. Schiltz will be instrumental in hiring faculty and staff, raising funds, designing the building, putting together the curriculum, and otherwise shaping this new Catholic law school, which will open its doors in August 2001. I am pleased to inform you that Prof. Schiltz will also be continuing to serve as Reporter to the Appellate Rules Committee.



Item 14

Rule 902

The suggestion that Rule 902 might be amended involved two different matters: 1) A proposal from the Department of Justice to consider amending Rule 902(2) to provide for self-authentication of public documents by way of certification, i.e., providing an alternative to the requirement of a seal; and 2) a proposal to consider amending Rule 902(6) to provide for self-authentication of regular online reports. Committee members noted that it was important to proceed with caution before deciding to amend a rule as to which another amendment is currently pending before Congress.

Sealing Requirement

The question raised by the Committee was whether the sealing requirement is creating a substantial problem in practice, rendering it necessary to provide for an alternative form of self-authentication of public documents. Mr. Pauley stated that there is anecdotal evidence of difficulty in getting states to provide a sealed document. This is because many states no longer mandate the sealing of their public documents. Committee members expressed concern that an amendment would be proposed on the basis of some anecdotal evidence. Mr. Pauley stated that a survey of United States Attorneys would be conducted to try to find out whether the sealing requirement is imposing substantial problems for government attorneys. He agreed to report back to the Committee at the October meeting. The Committee agreed that it would consider a proposed amendment to the sealing requirement if a substantial problem exists in practice. But Committee members noted that the hardships of the sealing requirement are to a large extent alleviated by the current Rule 902(2), which provides for self-authentication of unsealed documents if an official affixes a seal to a certification that the document is genuine. The Rule 902(2) sealing requirement does not mandate a government seal; a notary seal or the like is sufficient. The Committee agreed that if the Rule is to be amended, the reference in Rule 902(1) to the Panama Canal Zone and the Trust Territory of the Pacific Islands should be deleted as those references are no longer relevant.

Online Materials

As to a proposed amendment to Rule 902(6), Committee members expressed the view that online materials might be more easily forged than hardcopy. Therefore it did not make sense at this point to provide for self-authentication of online materials. The consequence of not including online materials under Rule 902 is simply that they must be authenticated under the circumstances, as provided in Rule 901. The question is: which party should have the burden on the question of authenticity? Given the fact that technological advances have increased the risk of forgery, the Committee determined that it was generally appropriate to leave the burden of showing authenticity to the proponent of the evidence. Close questions should be called in favor of an actual showing of authenticity under Rule 901, rather than providing for self-authentication under Rule 902. Thus the Committee concluded that it was not appropriate at this time to amend

Rule 902(6).

One Committee member argued that the risk of forging any document or picture has increased due to technological advances. He suggested that the Evidence Rules should be amended to protect against this heightened risk. Committee members agreed that the potential for forgery has increased, and that this increased potential counsels against increasing the scope of the Rule 902 grounds for self-authentication. Committee members, however, generally rejected the proposition that concern over the increasing potential for forgery should lead to any amendment of an Evidence Rule. The problem of forgery can be handled adequately by the principles of Rule 901--the possibility that a computerized document or picture might be forged is simply a factor that a court takes into account in determining whether the evidence is what the proponent says it is under Rule 901.

In sum, the Committee resolved not to proceed with an amendment to Rule 902(6). It reserved the question whether to proceed with an amendment to Rule 902(2), making Committee consideration dependent on a showing by the Department of Justice that the current Rule is posing a substantial problem in practice for United States Attorneys.

Rule 608(b)

At the October, 1999 meeting of the Evidence Rules Committee, the Reporter had been directed to prepare a report on whether the extrinsic evidence limitation of Rule 608(b) should be amended. The problem perceived is that as written, Rule 608(b) prohibits extrinsic evidence when used to impeach a witness' "credibility". Read literally, this would mean that extrinsic evidence could never be offered to prove any aspect of a witness' credibility. But the Supreme Court has made clear in *United States v. Abel* that the term "credibility" really means "character for truthfulness." So if the proponent is using the extrinsic evidence for impeachment on any ground other than an attack on character (specifically, to show bias, prior inconsistent statement, contradiction, or lack of capacity), the extrinsic evidence limitation of Rule 608(b) is not applicable. The Reporter was directed to provide a background memorandum on whether the use of the overbroad term "credibility" in Rule 608(b) has created a problem for the courts.

The first question for the Committee was whether the fundamental approach that was intended to be embodied in the Federal Rules (as indicated by *Abel*) is indeed the correct approach to the admissibility of extrinsic evidence offered for impeachment. That approach distinguishes a character attack (as to which extrinsic evidence is absolutely inadmissible) from all other forms of impeachment (as to which extrinsic evidence can be admitted subject to Rule 403). Why distinguish an attack on the witness' character from other forms of attack? The Committee unanimously agreed that the basic approach of the Federal Rules–the distinction between an attack on the witness' character and other forms of impeachment–is correct and should not be changed. An attack on a witness' character for truthfulness can be overbroad and extraneous to the issues in the case; extrinsic proof of bad acts will almost always result in a

waste of time and confusion of the jury on a collateral matter. It makes sense, therefore, to employ a categorical rule of exclusion of extrinsic evidence when offered to attack a witness' character for truthfulness. Extrinsic evidence of other forms of impeachment might well be more central to the issues in the case (e.g., contradiction of a material fact, or an inconsistency in a prior statement that is material to the witness' testimony), and so it makes sense to take a case by case approach under Rule 403.

The next question for the Committee was whether Rule 608(b) should be amended to accord with what the Rule is supposed to mean--i.e., that extrinsic evidence is absolutely prohibited when offered to prove a witness' character for truthfulness, and that Rule 403 governs use of extrinsic evidence for all other forms of impeachment. The Committee noted that many of the reported appellate cases apply the Rule correctly, even though the Rule uses the overbroad term "credibility". The fact remains, however, that court opinions can be found that misapply the Rule by invoking it to preclude extrinsic evidence offered for non-character forms of impeachment. Committee members also expressed concern that litigants are misapplying the Rule at the trial level, and that many litigants do not proffer extrinsic evidence for non-character impeachment because they think that the Rule on its face prohibits it. A motion was made to recommend some kind of an amendment to Rule 608(b) to carry out the original purpose of the rule, i.e., that the limitation on extrinsic evidence applies only to an attack on the witness' character for truthfulness, and that admissibility of extrinsic evidence for other forms of impeachment is governed by Rule 403. That motion passed unanimously.

The question then shifted to how the Rule should be amended to best accomplish its original purpose. The Committee considered three alternatives. One alternative would simply substitute the term "character for truthfulness" for the word "credibility" in Rule 608(b); the Committee Note to this alternative would specify that the use of extrinsic evidence to prove prior inconsistent statement, bias, contradiction and lack of capacity is governed by Rules 402 and 403. The second alternative would substitute "character for truthfulness" for "credibility" and would also add a new subdivision specifying that subject to Rule 403, extrinsic evidence could be used to prove prior inconsistent statement, bias, contradiction or lack of capacity. The third alternative would combine either of the first two alternatives with a provision that where extrinsic evidence is prohibited, it cannot be referred to directly or indirectly. This proposed language is intended to prevent an abusive practice by which parties seek to smuggle in extrinsic evidence by referring to consequences suffered by the witness for his alleged misconduct (e.g., that the witness had been suspended or disciplined for the underlying misconduct).

Some Committee members were favorably disposed to the alternative that would specifically mention the other forms of impeachment in the text of the Rule. But most Committee members expressed reservations about this proposal. These members were concerned that by specifically mentioning the basic forms of impeachment, the drafters might inadvertently leave out other forms of impeachment, creating confusion for courts and litigants. These members believed that the better approach was to mention the standard non-character forms of impeachment in the Committee Note, and to specify that the admissibility of extrinsic evidence

for these forms of impeachment is governed by Rules 402 and 403, not by Rule 608(b). All Committee members believed that if Rule 608(b) is going to be amended, it would be good policy to specify that extrinsic evidence cannot be used, either directly or indirectly, when offered to impeach the witness' character. Permitting the cross-examiner to refer to the consequences of a witness' misconduct, such as suspension, results in an impermissible end-run around the extrinsic evidence limitation, and also brings inadmissible hearsay before the factfinder.

A vote was taken on which alternative to propose for further consideration at the October, 2000 meeting. Alternative 3 (substituting the phrase "character for truthfulness" for the word "credibility"; specifying in the Committee Note that extrinsic evidence offered for non-character impeachment is governed by Rules 402 and 403; and providing that extrinsic evidence cannot be referred to when the impeachment is for character) was approved by a 5 to 3 vote (the three "nays" favoring the more detailed alternative including the other forms of impeachment in the text of the Rule). The Reporter was directed to prepare a draft proposed amendment to Rule 608(b) and draft committee note, taking the approach tentatively agreed to by the Committee.

Rule 803(18)

The Committee considered a proposal by District Judge Grady of the Northern District of Illinois, to delete or amend the last sentence of Evidence Rule 803(18) to permit the jury to take a learned treatise into the jury room. Judge Shadur noted that the current Rule states that a learned treatise can be read into evidence but cannot be admitted as an exhibit. Judge Shadur stated that one of the reasons often mentioned for preventing learned treatises from being admitted as an exhibit is that the jury might rummage through the treatise in the jury room, without proper guidance. He and other Committee members noted, however, that any risk of rummaging could be alleviated by redacting those portions of the treatise that have not been admitted. One Committee member pointed out that the point of any amendment would be to permit the jury to review the learned treatise in the jury room. However, it would be inappropriate for an Evidence Rule to specify how a piece of evidence should be handled in the jury room, since that is a question of trial practice, not admissibility.

Judge Shadur and other members pointed out that the most important reason for the second sentence of the Rule is that learned treatises may be given undue weight if they are admitted as trial exhibits. For example, the jury is not ordinarily permitted to bring the transcript of an expert's testimony into the jury room, since the testimony is not an exhibit. Since learned treatises essentially operate as expert testimony, it would be inappropriate for the jury to be allowed to bring a treatise into the jury room–the treatise might receive more weight than the equivalent expert witness testimony. It might even occur that a learned treatise offered to impeach an expert witness would receive greater attention from the jury than the expert's testimony itself. An even greater danger might be posed by allowing learned treatises to be considered by the jury without the benefit of contemporaneous explanation by an expert.

Judge Shadur asked whether any Committee member was prepared to offer a motion to

propose an amendment to Rule 803(18) that would permit learned treatises to be submitted to the jury. No such motion was made.

The Committee then considered whether Rule 803(18) should be amended to specify that the hearsay exception covers authoritative materials in non-book form. The Reporter informed the Committee that the Second Circuit recently encountered the problem of a videotape offered as a "learned treatise". The opponent of the evidence argued that the tape could not be admitted because Rule 803(18) specifies only hardcopy published material for admissibility. The Second Circuit held that the tape was admissible under Rule 803(18) even though the text of the Rule did not so specify.

Committee members recognized that the Rule as written does not cover learned treatises in non-book form. However, the Committee determined that the courts are not having a problem with the textual limitations in the Rule--as indicated by the Second Circuit opinion. The Committee unanimously agreed that it was unnecessary to propose an amendment to Rule 803(18) at this time.

Rule 804(b)(3)

Rule 804(b)(3) provides a hearsay exception for declarations against penal interest. In criminal cases, the Rule as written states that an accused must provide corroborating circumstances clearly indicating the trustworthiness of the statement. This requirement does not, by the terms of the Rule, apply to government-proffered declarations against penal interest. Nor does the corroborating circumstances requirement apply on its face in civil cases. At the October, 1999 Evidence Rules Committee meeting, the Reporter had been directed to prepare a memorandum on whether Rule 804(b)(3) should be amended to extend the corroborating circumstances requirement to government-proffered hearsay and to civil cases.

Judge Shadur noted that the one-way corroboration requirement resulted from misconceptions in Congress about the scope of Rule 804(b)(3). Members of Congress apparently believed that inculpatory declarations against penal interest could not be admitted against criminal defendants due to the rule of *Bruton v. United States*. Therefore the corroboration requirement was written to apply only against accused-proffered hearsay. But it is clear that government-proffered declarations against penal interest can be and are often admitted against criminal defendants. Thus the one-way corroboration requirement was not justified at its inception; and as commentators and courts have noted, there is no justification for the one-way corroboration requirement today. Committee members recognized that most courts in fact apply the corroborating circumstances requirement to government-proffered declarations against penal interest (contrary to the text of the Rule). But some do not, and it is possible that criminal defense counsel do not demand corroboration of government-proffered statements because a look at the text of the Rule indicates that the requirement is inapplicable.

Judge Shadur polled the Committee on whether it would be appropriate to amend Rule 804(b)(3) to provide for two-way corroboration in criminal cases. The Committee unanimously agreed in principle that it is appropriate and necessary to prepare a proposal to amend Rule 804(b)(3) to require the prosecution to provide corroborating circumstances as a condition to admitting inculpatory declarations against penal interest.

Another question posed by the Reporter was whether the Rule should be amended to lower the threshold of corroborating circumstances required to support admissibility under Rule 804(b)(3). The Rule currently requires a showing that corroborating circumstances "clearly" indicate the trustworthiness of the statement. Some judges and commentators have argued that this standard is too stringent. One possibility is to delete the word "clearly" from the Rule. Committee members noted, however, that deletion of the word "clearly", in light of the extensive case law on the subject, might send out the wrong signal and would be disruptive to the courts. Deletion of "clearly" might also lead to unreliable hearsay being admitted against criminal defendants and other litigants. The Committee resolved unanimously to retain the word "clearly" in Rule 804(b)(3)

The Committee next considered whether the corroborating circumstances requirement should be extended to civil cases. Committee members noted that the question of application to civil cases would have to be addressed in any proposed amendment. That is, the corroborating circumstances requirement would have to be either specifically applied to or specifically excepted from civil cases. The Committee could find no justification for excepting civil cases from the corroborating circumstances requirement. To the contrary, Committee members recognized that it would make sense to have a unitary approach for all declarations against penal interest.

The next issue considered by the Committee was whether the factors pertinent to the corroborating circumstances requirement should be explicated in the text of the Rule. The Committee resolved that any such explication would be problematic because it would create a risk that some pertinent factors might not be included. On the other hand, the Committee recognized that courts are in dispute over the meaning of "corroborating circumstances." For example, some courts have held that in determining whether corroborating circumstances exist, the court must take into account whether the witness who relates the declaration against penal interest in court is reliable; other courts have held that the reliability of the witness is irrelevant to whether the declarant's statement is supported by corroborating circumstances. In light of the conflicts in the case law, the Committee resolved that it would be helpful for any amendment to Rule 804(b)(3) to set forth a non-exclusive list of factors that are pertinent to the determination of corroborating circumstances. The Committee agreed, however, that such a list would be better placed in the Committee Note than in the text of the Rule.

The Committee tentatively agreed to propose an amendment to Rule 804(b)(3) that would apply the corroborating circumstances requirement to all proffered declarations against penal interest, together with a Committee Note that would provide a non-exclusive list of factors that courts should take into account in determining whether the corroborating circumstances

requirement is met. The Reporter was directed to prepare a proposed amendment for consideration at the next Committee meeting.

Privileges

Judge Smith, the Chair of the Subcommittee on Privileges, reported on a meeting of the Subcommittee and sought input from the Committee. The Subcommittee has prepared a preliminary draft of three privilege rules: 1) a catchall provision, providing that the state law of privilege applies in diversity cases and containing a provision to govern application of privileges not specifically established in the Rules; 2) a rule governing waiver; and 3) a rule covering the lawyer-client privilege. Judge Smith emphasized that the privileges project is a long-term project and that no decision to propose new privilege rules has yet been made. He noted that the Subcommittee had incorporated most of the suggested changes of the Style Subcommittee of the Standing Committee.

Committee members reviewed the Subcommittee drafts, and discussion covered the following points:

1. The draft provides that privileges are granted only by the Constitution, statute, or Supreme Court-initiated Rule. A Committee member pointed out that certain federal regulations exempt some government agents from pretrial discovery in criminal cases. Committee members responded that any such privilege really results from a judicial construction of Criminal Rule 16–therefore the proposal would not change the law with respect to protection of these government agents. Committee members suggested that this problem be mentioned in a Committee Note should an amendment ever be proposed.

2. The draft catchall provision states (as does current Rule 501) that the "State" law of privilege controls where the rule of decision is based on state law. Committee members questioned whether the language would cover the law of the District of Columbia, Puerto Rico, etc. A suggestion was made that the word "jurisdiction" be substituted for the word "State." But this could mean that foreign privilege law would apply whenever foreign law supplied the rule of decision. Some Committee members thought that a federal court should have the option, at least in some cases, to apply federal privilege law even where foreign law supplies the substantive rules of decision. Another problem is that Evidence Rules 302 and 601 also refer to "State law", so any attempt to take a different approach in the privilege rules might be confusing. The Subcommittee agreed to do further research on this subject and to report back to the Committee at the next meeting.

3. One Committee member suggested that privileges in federal court should always be controlled by federal law. That is the position to which Congress took exception when privilege rules were proposed by the original Advisory Committee on Evidence Rules. Committee members generally opposed the view that the federal rules of privilege should apply even in diversity cases. They noted *Erie* and forum-shopping concerns, and were reluctant to change

well-established law.

4. The catch-all provision in the Subcommittee draft proposed that "new" privileges could be established, subject to a balancing of public and private benefits and the cost of the loss of probative evidence. A Committee member raised the possibility that if privilege rules were proposed, Congress might accept some privileges and not others. This could leave privileges well-established in the common law, and yet not "new". The Committee resolved that the catch-all provision should encompass privileges established under the common law that might not be adopted in any codification of the privilege rules. The Subcommittee agreed to reconsider whether the balancing test set forth in the draft was broad enough to accomodate "public" privileges (e.g., the state secrets privilege) as well as private ones.

5. Judge Smith informed the Committee that the Subcommittee had chosen the term "lawyer-client" privilege, rather than "attorney-client" privilege, because "lawyer-client" was chosen both by the original Advisory Committee and by the drafters of the new Uniform Rules. Questions were raised about the scope of the term "client" in the draft–specifically whether the definition was broad enough to cover all potential clients. The Subcommittee agreed to study this question and report back to the Committee.

6. Questions were also raised about the definition of "lawyer" in the draft, specifically whether it was broad enough to cover people in foreign countries who perform legal services, such as notaries. The Subcommittee agreed to research this question and report back to the Committee.

7. The Committee discussed whether the draft's definition of "privileged persons" might lead to unwarranted protection of communications between two clients where a lawyer was not present. Federal courts have rejected the privilege in such circumstances. The Subcommittee agreed to consider this question further and to report back to the Committee.

8. The question was raised whether the crime-fraud exception to the lawyer-client privilege should be expanded to preclude the privilege when the client is communicating to the lawyer for the purpose of committing tortious conduct. The Committee believed that this would make the exception too broad, and that there was insufficient support for this expansion in the case law.

9. The draft rule on lawyer-client privilege contains an exception for cases in which it is necessary for the lawyer to defend herself by using privileged communications (most commonly in malpractice cases). The consultant to the Privileges Subcommittee observed that this exception may not be broad enough to cover in-house lawyers who are fired for whistleblowing and who sue for retaliatory discharge. He stated that he would research this question and report back to the Committee.

10. The Committee unanimously agreed that the "fiduciary" exception to the lawyer-

client privilege, established in *Garner v. Wolfinbarger*, should be retained in any proposed codification of the privilege.

11. The draft rule on waiver contains a provision permitting a party who receives inadvertently privileged information to use the fruits of that information. The justification for the provision is that otherwise the party receiving the inadvertently disclosed information would be placed in the unfair position of having to establish that other information was not derived in any way from the privileged material. Committee members pointed out, however, that the proper solution to this possible unfairness is to shift the burden to the party who disclosed the privileged information, to show that other information was in fact derived from the material inadvertently disclosed. The Subcommittee agreed to draft a burden-shifting provision and present it for the Committee's consideration at the next meeting.

Case Law Divergence Report

At the direction of the Committee, the Reporter prepared a report designed to highlight for lawyers and judges the existence of case law that diverges from the text of the Federal Rules of Evidence. Judge Shadur noted that the report is basically in final draft form. The suggestion was made that the report could be published by the Federal Judicial Center and placed on the Federal Judicial Center website. The Committee agreed that publication by the FJC would be a wise and useful option. Judge Shadur noted that other possible means of distributing the report will be looked into as well.

The Committee discussed what the goal of the report should be. Should it simply be a "red flag" report, alerting lawyers and judges to the fact that some case law diverges from the text of a rule, and encouraging further research on the matter? Or should the report be a complete compendium of all the case law, equivalent to a treatise, on every rule in which some case has diverged from the text? A strong majority of the Committee was of the view that the report should be a "red flag" report. While the Committee could perform a valuable service by drawing attention to case law divergence from the text of the Rules, it was not in the business of treatise-writing. The Committee agreed that the report should emphasize that it is operating only as a triggering mechanism–highlighting the fact that some case law diverges from certain specific rules, and emphasizing that the report does not purport to provide a thorough description of all of the reported cases discussing a particular Evidence Rule.

It will of course be made clear that the report is not an official Committee Note. The report is to be published by the Reporter at the direction of the Committee. It is not an official Committee report.

After discussion, the Reporter was directed to add some law review citations to the report where appropriate, and to address the fact that the rule of *Luce v. United States* is not covered by the text of Evidence Rule 103.

At the end of the discussion, the Committee unanimously agreed that the report, with some modifications, would provide an important service to lawyers, and that the Committee should ask the Standing Committee for its views as to appropriate publication of the report.

New Matters

Pending DNA Legislation–John Rabiej informed the Committee that a bill is pending in Congress that authorizes a court to order DNA testing on evidence in certain circumstances where a defendant claims that he was wrongly convicted. The bill was presented for information purposes only, as it has no direct bearing on the Federal Rules of Evidence.

Committee Business

Judge Shadur noted that the terms of Committee members Judge Smith and John Kobayashi are ending this year. On behalf of the Committee, he thanked them both for their excellent and dedicated service. He expressed the hope that Judge Smith might be able to continue to serve as the Chair of the Subcommittee on Privileges.

Next Meeting

The next meeting of the Evidence Rules Committee is scheduled for October 30th, 2000, in Washington, D.C..

The meeting was adjourned at 2:45 p.m., Monday, April 17th

Respectfully submitted,

Daniel J. Capra
Reed Professor of Law

Case Law Divergence From the Federal Rules of Evidence

By Daniel J. Capra

Philip Reed Professor of Law, Fordham Law School

Reporter to the Judicial Conference Advisory Committee on Evidence Rules

I. Introduction

Assume that a lawyer is reading one of the Federal Rules of Evidence to determine whether a piece of evidence will be admissible at trial–for example, the lawyer wants to know whether a videotape can be admitted as a learned treatise. Obviously, the best place to start is with the text of the Federal Rules of Evidence. But if the lawyer thinks that the text of a particular rule plainly answers the question of admissibility, or simply leaves the question open for argument, that lawyer will often be wrong. That is because the case law has diverged from the text of the Federal Rules on many important points. Thus, in our example, the Rule admitting learned treatises does not on its face permit introduction of videotapes, and yet such tapes have been admitted under the case law.

The Advisory Committee on Evidence Rules, which this author currently serves as Reporter, has expressed concern that the divergence between case law and the text of the Rule might create a trap for the unwary. See generally Becker and Orenstein, *The Federal Rules of Evidence After Sixteen Years–The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, ans Suggestions for Selective Revision of the Rules,* 60 Geo.Wash.L.Rev. 857, 868 (1992) (noting the need to "resolve discrepancies between the plain text of the Federal Rules and the generally shared interpretation of the Rules deriving from preexisting common law traditions"). One way to correct this divergence might be to propose an amendment to the text of any Rule subject to divergent case law. But the Advisory Committee is acutely aware of the costs of amending an evidence rule–amendments can lead to the disruption of settled expectations, and may create further problems of interpretation and divergence. The Advisory Committee resolved to take a less drastic course–a course that would not require an amendment of any rules and yet would highlight for lawyers and judges the existence of divergent case law. The Committee directed the Reporter to prepare this report in an effort to increase the awareness of counsel practicing in federal courts, as well as judges, about the possibility that case law has diverged from the text of some of the Federal Rules of Evidence. This divergence comes in two forms: 1) where the case law (defined as case law in at least one circuit) is flatly inconsistent with either the text of the Rule, the Advisory Committee Note explaining the text, or both; and 2) where the case law has provided significant development on a point that is not addressed by either the text of the Rule or the Committee Note.

This report highlights the major instances in which case law has diverged from an applicable Rule. Before proceeding to these illustrations, it is important to stress several qualifications on the scope of this report.

First, there is no intent to imply that any of the case law discussed herein is incorrect or "wrongly decided." The goal of this report is to point out the case law divergence from the Federal Rules of Evidence, without commenting on the merits of that divergence. Indeed, commentators have opined that much of the divergent case law is sensible and well-decided. See, e.g., Jonakait, *Text, Texts, or Ad Hoc Determinations: Interpretation of the Federal Rules of Evidence,* 71 Ind.L.J. 551, 571 (1996) ("Sometimes we must look beyond the words of the Rules to understand evidentiary doctrine. We must do so when the Rules are not definitive or ambiguous * * * but sometimes even when the text is clear.").

Second, there is no intent to imply that any of the Rules discussed herein are problematic or need to be amended. The fact that the case law diverges from the Rule might be relevant to the need for an amendment, but it is certainly not dispositive. Whether a particular Rule should be amended is a complex question that is well beyond the scope of this report.

Third, there is no attempt to be comprehensive in the treatment of the case law construing the Evidence Rules discussed herein. Divergent case law is defined as case law in at least one circuit that has diverged from the text of the particular rule. This report does not purport to provide a treatise-like discussion of all the pertinent case law, from all the circuits, construing a particular rule. The goal of this report is to raise "red flags" with lawyers and judges, by providing basic information about areas where case law can be found that diverges from the text of the Federal Rules of Evidence.

II. Examples of Case Law In Conflict With the Text of the Rule and/or Committee Note:

1. Rule 106: Rule 106 sets forth a rule of completeness, providing that when a party introduces a writing or recorded statement, the adversary may "require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Rule 106 by its terms permits the adversary to introduce completing statements only where the proponent introduces a *written or recorded* statement. The language of the Rule does not on its face permit completing evidence when the proponent introduces an oral statement, such as a criminal defendant's oral confession. Some courts have found, however, that Rule 106, or at least the principle of completeness embodied therein, applies to require admission of omitted portions of an oral statement when necessary to correct a misimpression. See *United States v. Tarantino,* 846 F.2d 1384 (D.C. Cir. 1988) (prior oral statements of a government witness were properly offered on redirect examination since the defendant had used portions of the statements in cross-examination and the omitted portions placed the statements in context). See also the discussion in *United States v. Branch,* 91 F.3d 699 (5th Cir. 1996) (noting the case law permitting criminal defendants to offer omitted parts of statements they make to law enforcement officers that provide exculpatory information). Compare *United States v. Harvey,* 914 F.2d 966 (7th Cir. 1990) (Rule 106 does not apply to oral statements).

Moreover, some courts have held that Rule 106 can operate as a de facto hearsay exception when the opponent opens the door by creating a misimpression by offering only part of

a statement. In other words, completing evidence is found admissible under Rule 106 even if it would otherwise be hearsay. See *United States v. Sutton,* 801 F.2d 1346, 1369 (D.C.Cir. 1986) ("Rule 106 can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that that proffered evidence should be considered contemporaneously"). See also C. Wright & K. Graham, *Federal Practice and Procedure: Evidence* § 5078, at 376 (supporting this approach). Such a reading is not apparent from the text or Committee Note. See *United States v. Wilkerson,* 84 F.3d 692 (4th Cir. 1996) (interpreting Rule 106 as purely a timing device, not as a rule permitting the admission of otherwise inadmissible evidence).

2. Rule 403: Rule 403 provides that a trial judge may exclude proffered evidence if its probative value is substantially outweighed "by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Of the negative factors listed that would support exclusion, only one refers to the jury directly--the danger of "misleading the jury". This would seem to indicate that other negative factors mentioned in the Rule, specifically the danger of unfair prejudice and confusion of the issues, must be taken into account in a bench trial. Yet courts have held to the contrary, reasoning that unfair prejudice and confusing evidence will not have the same negative impact on the judge as it would have on the jury. See, e.g., *Schultz v. Butcher,* 24 F.3d 626 (4th Cir. 1994) (trial court erred in excluding evidence in a bench trial on the ground of its prejudicial effect); *Gulf States Utils. v. Ecodyne Corp.*, 635 F.2d 517 (5th Cir. 1981) (the portion of Rule 403 referring to prejudicial effect "has no logical application in bench trials").

3. Rule 404(a): The Rule states that no party is permitted in the first instance to introduce character evidence to prove action in accordance with character, except for the "accused"--i.e., only the "accused" can open the door to circumstantial use of character evidence. Thus, the Rule seems explicit in prohibiting the circumstantial use of character evidence in civil cases. And the Advisory Committee Note confirms this exclusionary principle. Yet some courts have permitted civil defendants to use character evidence circumstantially "when the central issue in a civil case is by its nature criminal." *Palmquist v. Selvik,* 111 F.3d 1332, 1342 (7th Cir. 1997) (assuming that character evidence could be admissible in certain civil cases); *Perrin v. Anderson,* 784 F.2d 1040 (10th Cir. 1986) (police officers charged with excessive force are permitted to prove the decedent's character for violence).

4. Rule 407: Rule 407 prohibits the admission of actions taken after an injury or harm which, if taken previously, would have made the injury or harm less likely to occur, if the remedial measure is offered to prove negligence, culpable conduct, product defect, design defect, or failure to warn. The Rule by its terms would appear to preclude evidence of any action by *anyone* that would have made the injury or harm less likely to occur. Courts have held, however, that subsequent remedial measures are not excluded by Rule 407 if the measure is taken by someone *other than the defendant*, i.e., if it is a "third party repair." See, e.g., *TLT-Babcock, Inc. v. Emerson Elec. Co.,* 33 F.3d 397 (4th Cir. 1994) (design change not excluded by Rule 407 where the change was made by an entity that was not a party to the case); *Dixon v. International Harvester Co.,* 754 F.2d 573 (5th Cir. 1985) (repair by tractor owner after an accident not excluded when offered against tractor manufacturer).

Also, the Rule states that "impeachment" is a proper purpose for admitting subsequent remedial measures. Taken literally, this would mean that a plaintiff in a product liability case could offer proof of a subsequent remedial measure to "impeach" a defense witness' assertion that the product used by the plaintiff was safely designed. Yet courts have generally limited the use of subsequent remedial measures when offered for impeachment by way of contradiction. The fear is that this exception would swallow the rule of exclusion. See, e.g., *Harrison v. Sears, Roebuck & Co.*, 981 F.2d 25 (1st Cir. 1992) (a desire merely to undercut an expert's credibility cannot be sufficient to trigger the impeachment exception to Rule 407, or else the exception would swallow the rule of exclusion); *Kelly v. Crown Equip. Co.*, 970 F.2d 1273 (3d Cir. 1992) (subsequent remedial measure cannot be offered for simple contradiction of expert's statement that a design was safe). Thus, the "impeachment" permitted by the Rule has been limited to cases where defense witnesses have made extravagant claims of safety. See *Wood v. Morbark Indus.*, 70 F.3d 1202 (11th Cir. 1995) (post-accident design change admissible for impeachment where defense witness testified that the original design was the safest possible design); *Muzyka v. Remington Arms Co.*, 774 F.2d 1309 (5th Cir. 1985) (design change should have been admitted for impeachment where defense witnesses testified that the product was the best and safest product of its kind).

5. Rule 601: Rule 601 essentially states that all questions that had been treated previously as matters of competency are now matters of credibility for the factfinder. The Advisory Committee Note, elaborating on the Rule, indicates an intent to prohibit a trial judge from excluding a witness on grounds of incompetence. Yet courts have excluded witnesses who have been found incapable of testifying in a competent fashion. See, e.g., *United States v. Gates,* 10 F.3d 765, 766 (11th Cir. 1993) ("Notwithstanding Rule 601, a court has the power to rule that a witness is incapable of testifying, and in an appropriate case it has the duty to hold a hearing to determine that issue."); *United States v. Gutman,* 725 F.2d 417, 420 (7th Cir. 1984) (trial court retains the power, and sometimes the duty, to hold a hearing "to determine whether a witness should not be allowed to testify because insanity has made him incapable of testifying in a competent fashion.").

6. Rule 607: The Rule states categorically that a party can impeach any witness it calls. On its face, the Rule permits the following scenario: 1) in a criminal case, a witness would testify at trial that the defendant was not at the scene of the crime, yet having stated previously to a police officer that the defendant committed the crime; 2) the prior statement to the police officer could not be admitted as substantive evidence because it is hearsay; 3) but the prosecutor calls the witness, knowing he will give testimony favorable to the defendant, and then "impeaches" the witness with his prior statement to the police officer, on the ground that it is inconsistent with the witness' in-court testimony. Thus, Rule 607 by its terms permits the prosecutor to proffer prior inconsistent statements, not made under oath (and therefore not admissible for their truth under Rule 801(d)(1)(A)) in the guise of impeachment. Yet despite the affirmative and permissive language of the Rule, the courts have held that a prosecutor cannot call a witness solely to impeach that witness, because to allow this practice would undermine the hearsay rule. See, e.g., *United States v. Hogan*, 763 F.2d 697, 702 (5th Cir. 1985) ("The prosecution, however, may not call a witness it knows to be hostile for the primary purpose of eliciting otherwise inadmissible impeachment testimony, for such a scheme merely serves as a subterfuge to avoid

the hearsay rule. The danger in this procedure is obvious."); *United States v. Morlang*, 531 F.2d 183 (4th Cir. 1975) (conviction reversed on the ground that the government should not have been permitted to call a witness for no other purpose than to impeach him). See generally Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence,* 68 Tex. L. Rev. 745 (1990) (noting this and other situations where courts have felt compelled to diverge from the text of an Evidence Rule in order to reach a just result).

7. Rule 608(b): This Rule states that specific instances of the conduct of a witness, "for the purpose of attacking or supporting the witness' *credibility* * * * may not be proved by extrinsic evidence." Read literally, "the first sentence of (b) could bar extrinsic evidence for bias, competency and contradiction impeachment since they too deal with credibility."American Bar Association Section of Litigation, *Emerging Problems Under the Federal Rules of Evidence* 161 (3d ed. 1998). Yet courts have held that the Rule 608(b) extrinsic evidence ban is not applicable unless the sole reason for the impeachment is to attack the witness' character for veracity. See, e.g., *United States v. Winchenbach,* 197 F.3d 548 (1st Cir. 1999) (impeachment with proof of prior inconsistent statement is governed by the balancing process of Rule 403 rather than the absolute exclusion of Rule 608(b)); *United States v. Tarantino*, 846 F.2d 1384, 1409 (D.C.Cir. 1988) (admissibility of extrinsic evidence offered to contradict a witness is governed by Rules 402 and 403, not Rule 608(b)); *United States v. Lindemann,* 85 F.3d 1232 (7th Cir. 1996) (admissibility of extrinsic evidence of bias is governed by Rules 402 and 403, not by Rule 608(b)).

8. Rule 613(b): The Rule and the Advisory Committee Note both indicate that it is not necessary to give a witness an opportunity to examine a prior inconsistent statement before that statement is admissible to impeach the witness. All that is necessary is that the witness be given an opportunity at some point in the trial to explain or deny the statement. The Rule thus rejects the common-law rule from Queen Caroline's case, under which the proponent was required to lay a foundation for the prior inconsistent statement at the time the witness testified. Despite the language of the Rule and Note, however, some courts have reverted to the common-law rule. See, e.g., *United States v. Sutton,* 41 F.3d 1257 (8th Cir. 1994) (trial judge properly excluded testimony as to inconsistent statements by a prosecution witness on the ground that the witness had not been given an opportunity to explain or deny the prior statement while cross-examined by defense counsel); *United States v. Marks,* 816 F.2d 1207, 1211 (7th Cir. 1987) (trial judge is entitled despite the language of Rule 613(b) "to conclude that in particular circumstances the older approach should be used in order to avoid confusing witnesses and juries").

9. Rule 704(b): Rule 704(b) would seem to prohibit all expert witnesses from testifying that a criminal defendant either did or did not have the requisite mental state to commit the crime charged. It states that "[n]o expert witness . . . may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto." But some courts have held (and others have implied) that the rule is applicable only to mental health experts, and therefore does not prohibit intent-based testimony from law enforcement personnel such as narcotics agents. See, e.g., *United States v. Gastiaburo,* 16 F.3d 582 (4th Cir. 1994) (stating that Rule 704(b) does not apply to the testimony of an expert law enforcement agent); *United States v. Lipscomb,* 14 F.3d 1236 (7th Cir. 1994)

(expressing sympathy with such a position, but finding it unnecessary to decide the matter). Other courts, while technically applying the Rule 704(b) limitation to all expert witnesses, have applied it in such a way as to nullify its impact--permitting, for example, an expert to opine as to the mental state of a hypothetical person whose fact situation mirrors the fact situation in issue. See, e.g., *United States v. Williams,* 980 F.2d 1463 (D.C.Cir. 1992) (permitting a law enforcement agent to testify that a hypothetical person carrying ziplock bags each containing small amounts of drugs was intending to distribute them; the hypothetical matched the facts of the case).

10. Rule 801(c) (Implied Assertions): Rule 801(c) defines hearsay as an out-of-court statement "offered in evidence to prove the truth of the matter asserted." The Committee Note states that "verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted" is excluded from the definition of hearsay "by the language of subdivision (c)". This would mean that a statement would be hearsay only if it were offered for the truth of the express assertion in the statement--offering it for any implied assertion would escape hearsay proscription. So for example, a statement "It is raining cats and dogs" would be admissible to prove it is raining--the statement would not be offered to prove the express assertion that cats and dogs were falling from the sky.

This highly constricted definition of hearsay generally has been rejected by the courts. The cases generally state that statements are hearsay if 1) they are offered for the truth of a matter *implied* in the statement and 2) the speaker *intended* to communicate that implication. See, e.g., *United States v. Reynolds,* 715 F.2d 99 (3rd Cir. 1983) (rejecting the government's suggestion that only a statement's express assertion should be considered in deciding whether it constitutes hearsay); *Lyle v. Koehler,* 720 F.2d 426, 433 (6th Cir. 1983) (concluding that letters were hearsay because "the inferences they necessarily invite form an integral part of the letters"; the reference to "matters asserted" in Rule 801(c) covers both express and implied assertions); *United States v. Jackson,* 88 F.3d 845, 848 (10th Cir. 1996) (stating that the important question under Rule 801(c) is whether the assertion, express or implied, "is intended"). See also Milich, *Re-examining Hearsay Under the Federal Rules: Some Method for the Madness,* 39 Kan. L.Rev. 893 (1991) (arguing for an intent-based test in determining whether implied assertions are hearsay).

11. Rule 801 Advisory Committee Note on Confrontation: The original Advisory Committee Note includes an extensive discussion of the law of confrontation as it existed at the time the Rules were proposed. This Note is quite outdated, since the Supreme Court has substantially developed and revised its interpretation of the Confrontation Clause since that time. For example, the Advisory Committee Note draws a fairly sharp distinction between the hearsay exceptions and the Confrontation Clause. But the recent jurisprudence leads to the conclusion that statements fitting within the Federal Rules hearsay exceptions will ordinarily satisfy the Confrontation Clause. All of the major Federal Rules exceptions, except the residual exception, have been found by federal courts to be "firmly rooted", which means that statements falling within these exceptions automatically satisfy the Confrontation Clause. And as to the residual exception, the reliability requirements of that exception have been found congruent with those imposed by the Confrontation Clause. See generally *Ohio v. Roberts,* 448 U.S. 56 (1980); *Idaho v. Wright,* 497 U.S. 805 (1990); *White v. Illinois,* 502 U.S. 346 (1992). See the discussion of this

case law in S. Saltzburg, M. Martin and D. Capra, *Federal Rules of Evidence Manual* 1702-5, 1852-4 (7th ed. 1998).

12. Rule 803(4): The Rule provides a hearsay exception for statements made for purposes of treatment or diagnosis when the statements deal with the "cause or external source" of the medical condition. The exception does not, by its terms, provide a hearsay exception for statements attributing fault. The Committee Note states that statements of fault "would not ordinarily qualify" under the exception, and distinguishes a statement "I was hit by a car" (admissible when made to medical personnel) from "I was hit by a car that ran a red light" (inadmissible). Yet in at least some classes of cases, statements attributing fault, when made to medical personnel, are admitted by the courts under Rule 803(4). The most common example is a statement from a child victim of sexual abuse, specifically identifying her attacker. See, e.g., *United States v. Renville,* 779 F.2d 430, 438 (8th Cir. 1985) (child's statement attributing fault is admissible under Rule 803(4) "where the physician makes clear to the victim that the inquiry into the identity of the abuser is important to diagnosis and treatment, and the victim manifests such an understanding"); *United States v. Joe,* 8 F.3d 1488, 1494 (10th Cir. 1993) ("[T]he domestic sexual abuser's identity is admissible under Rule 803(4) where the abuser has such an intimate relationship with the victim that the abuser's identity becomes reasonably pertinent to the victim's proper treatment.").

13. Rule 803(5): The Rule provides a hearsay exception for past recollection recorded: a record "containing a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately" where the record is "shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly." What happens, however, when a person makes a statement to another person, and that other person is the one who writes it down? The exception by its terms does not seem to permit a "two-party voucher" system of proving past recollection recorded, since it states that the record must be shown to have been "made or adopted by the witness." Thus, the Rule does not envision that a person with personal knowledge might make a statement recorded by another, with the record being made admissible by calling both the reporter and the recorder. Despite the language of the Rule, however, cases can be found that permit two-party vouching under Rule 803(5). See, e.g., *United States v. Williams,* 951 F.2d 853 (7th Cir. 1993).

14. Rule 803(6): The Rule defines a business record as one "made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted activity." This language could be read as abrogating the common-law requirement that the person transmitting the information to the recorder must have a business duty to do so. It states only that the transmitting person must have "knowledge", not that the person must be reporting within the business structure. Yet despite the text, the courts have held that all those who report information included in a business record must be under a business duty to do so--or else the hearsay problem created from the report by an outsider must be satisfied in some other way. See *United States v. Turner,* 189 F.3d 712, 719-20 (8th Cir. 1999) ("[W]hen the source of information and the recorder of that information are not the same person, the business record contains hearsay upon hearsay. If both the source and recorder of the information were acting in

the regular course of the organization's business, however, the hearsay upon hearsay problem may be excused by the business records exception to the rule against hearsay."); *Bemis v. Edwards,* 45 F.3d 1369 (9th Cir. 1995) (911 call was not admissible as a business record because the caller was not under any business duty to report, and the report did not independently satisfy any hearsay exception); *Cameron v. Otto Bock Orthopedic Indus. Inc.,* 43 F.3d 14 (1st Cir. 1994) (product failure reports submitted to the manufacturer after the plaintiff's accident were inadmissible; the reports were submitted by parties who had no business duty to report accurately to the manufacturer).

15. Rule 803(8)(B): Rule 803(8) provides a hearsay exception for public reports. But the Rule specifically excludes from its coverage public reports setting forth "matters observed by police officers and other law enforcement personnel" if such reports are offered "in criminal cases." Read literally, the Rule would not provide a hearsay exception for a forensic report prepared by the police that concluded that the defendant was innocent. Such a report would be offered by the defendant, but the exclusionary language of Rule 803(8)(B) covers all police reports offered in criminal cases. Yet some lower courts have refused to be bound by the plain meaning of the rule, reasoning that Congress intended to regulate only police reports that unfairly inculpate a criminal defendant, and that the exception should therefore apply to public reports offered by the accused. See, e.g., *United States v. Smith*, 521 F.2d 957 (D.C.Cir. 1975) (despite its exclusionary language, Rule 803(8)(B) should be read in light of Congress' intent to exclude police reports only when offered *against* a criminal defendant). But see *United States v. Sharpe,* 193 F.3d 852, 868 (5th Cir. 1999) (the defendant's reliance on Rule 803(8)(B) to admit an exculpatory police report was "misplaced" because the Rule does not grant admissibility for any such reports offered in criminal cases).

16. Rule 803(8)(B) and (C): Rule 803(8)(B) and (C) both contain language appearing to exclude from the hearsay exception all records prepared by law enforcement personnel, when such records are offered against a criminal defendant. Read literally, these provisions would prevent the government from introducing simple tabulations of non-adversarial information. For example, these subdivisions appear not to grant a hearsay exception for a routine printout from the Customs Service recording license plates of cars that crossed the border on a certain day, when offered in a criminal case. Courts have refused to apply the plain exclusionary language of these subdivisions literally, however. They reason that the language could not have been intended to cover reports that are ministerial in nature and prepared under non-adversarial circumstances; it is only adversarial, evaluative reports (such as crime scene reports) that carry the risk of fabrication that the exclusionary language was designed to regulate. See, e.g., *United States v. Orozco*, 590 F.2d 789 (9th Cir. 1979) (customs records of border crossings are admissible under Rule 803(8) because they are ministerial and not prepared under adversarial circumstances); *United States v. Grady*, 544 F.2d 598 (2d Cir. 1976) (reports concerning firearms' serial numbers were admissible because they were records of routine factual matters prepared in nonadversarial circumstances).

17. Rule 804(b)(1): The Rule provides a hearsay exception for prior testimony when offered against a party who either 1) had a similar motive and opportunity to develop the testimony at the time it was given, or 2) had a predecessor in interest with such a similar motive

and opportunity at the time the testimony was given. Some courts have defined the term "predecessor in interest" as *anyone* who had a similar motive and opportunity to develop the testimony, at the time it was given, as the opponent would have at the instant trial; these courts do not require some legal relationship between the prior party and the party against whom the evidence is now offered. This construction collapses the term "predecessor in interest" with the term "similar motive". See, e.g., *Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179 (3rd Cir. 1978) (prior testimony properly admitted against plaintiff, where prior party had a similar motive to develop the testimony as the plaintiff in the instant case would have were the declarant to testify at trial; Judge Stern, concurring, states that such an expansive definition of "predecessor in interest" effectively reads that term out of the Rule); *Horne v. Owens-Corning Fiberglass Corp.*, 4 F.3d 276 (4th Cir. 1993) (prior testimony from a different case properly admitted against the plaintiff, where the previous plaintiff, though not affiliated in any way with the plaintiff, had a similar motive to develop the testimony). Other courts have admitted such evidence not as prior testimony (for want of a predecessor in interest) but as residual hearsay. See *Dartez v. Fibreboard Corp.*, 765 F.2d 456 (5th Cir. 1985).

18. Rule 804(b)(3): The Rule provides that if a declaration against penal interest is offered to exculpate an accused, it is not admissible under this hearsay exception "unless corroborating circumstances clearly indicate the trustworthiness of the statement." On its face, the rule does not require a showing of corroborating circumstances for statements offered by the government that *inculpate* the accused. Yet many courts have required the government to establish corroborating circumstances for inculpatory statements offered under Rule 804(b)(3). See, e.g., *United States v. Barone*, 114 F.3d 1284 (1st Cir. 1997) (imposing a corroborating circumstances requirement for statements offered by the prosecution under Rule 804(b)(3), while acknowledging that the Rule does not explicitly require a showing of corroborating circumstances for such statements); *United States v. Garcia*, 897 F.2d 1413 (7th Cir. 1990) (requiring a showing of corroborating circumstances for inculpatory declarations against penal interest). Similarly, the corroborating circumstances requirement does not appear to apply when declarations against penal interest are offered in civil cases, since the requirement covers statements offered to exculpate the "accused." At least one court, however, has applied the corroborating circumstances requirement to declarations against penal interest offered in civil cases. See *American Automotive Accessories, Inc. v. Fishman*, 175 F.3d 534, 541 (7th Cir. 1999) (reasoning that it is important to have a "unitary standard" for declarations against penal interest, no matter in what case and no matter by whom they are offered).

19. Rule 805: The Rule states that hearsay within hearsay is not excluded if each part of the combined statement "conforms with an exception to the hearsay rule." However, admissions and certain prior statements of testifying witnesses are classified by Rule 801(d) as "not hearsay." Rule 805 could technically be read to preclude admissibility of multiple hearsay where one level of hearsay would be admissible under the Rule 801(d) exemptions, as opposed to an "exception" as is mentioned by Rule 805. But it has been held that the technical distinction between the Rule 801(d) category of "not hearsay" and the Rule 803, 804 and 807 categories of "hearsay subject to exception" cannot control the application of Rule 805's standard for admitting multiple levels of hearsay. See, e.g., *United States v. Dotson*, 821 F.2d 1034, 1035 (5th Cir. 1987) ("For the purposes of the hearsay-within-hearsay principle expressed in Rule 805, non-hearsay

statements under Rule 801(d) * * * should be considered in analyzing a multiple-hearsay statement as the equivalent of a level of the combined statement that conforms with an exception to the hearsay rule.").

20. Rule 806: The Rule states that a hearsay declarant's credibility may be attacked "by any evidence which would be admissible" if the declarant had testified as a witness. The language raises a problem when the proponent wishes to attack the declarant by proffering specific bad acts to prove the witness' bad character for veracity. Rule 608(b) prohibits extrinsic proof of bad acts when offered to show the witness' character for untruthfulness. Rule 806 could therefore be read literally as prohibiting bad acts impeachment of a hearsay declarant--since the only way to introduce such acts without the witness being there to admit them would be to proffer extrinsic evidence in apparent violation of Rule 608(b). But courts have stated that extrinsic evidence of a bad act offered to prove a hearsay declarant's character for veracity is admissible (subject to Rule 403). The reasoning is that since the declarant is not available for cross-examination, extrinsic evidence is "the only means of presenting such evidence to the jury." *United States v. Friedman,* 854 F.2d 535, n.8 (2nd Cir. 1988). See the extensive discussion of this problem in Cordray, *Evidence Rule 806 and the Problem of the Nontestifying Declarant,* 56 Ohio State L.J. 495 (1995).

21. Rule 807: Rule 807 provides a "residual exception" to the hearsay rule, granting admissibility to trustworthy statements that are "not specifically covered by" other exceptions. There are at least two ways in which the case law diverges from the text and/or Committee Note to Rule 807. First, the Rule permits the admission of residual hearsay only if that hearsay is "not specifically covered" by another exception. This might seem to indicate that hearsay that "nearly misses" one of the established exceptions should not be admissible as residual hearsay--because it is specifically covered by, and yet not admissible under, another exception. In fact, however, most courts have construed the term "not specifically covered" by another hearsay exception to mean "not admissible under" another hearsay exception. See, e.g., *United States v. Fernandez,* 892 F.2d 976 (11th Cir. 1989) (grand jury statement is "not specifically covered" by another hearsay exception because it is not admissible under any such exception). Compare *United States v. Dent,* 984 F.2d 1453 (7th Cir. 1993) (Easterbrook, J., concurring) (arguing that grand jury testimony can never be admissible as residual hearsay, since such testimony is specifically covered by, though not admissible under, the hearsay exception for prior testimony).

The second divergence between the case law and the text of the residual exception involves the notice requirement. The Rule states that "a statement may not be admitted" under this exception unless the proponent gives notice "sufficiently in advance of trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it." Most courts have read the notice requirement far more flexibly than its language would seem to indicate. For example, most courts have held that the notice requirement can be satisfied by providing notice at trial, so long as the adversary is given sufficient time to prepare. See, e.g., *United States v. Baker,* 985 F.2d 1248 (4th Cir. 1993). Other courts have read a good cause exception into the notice requirement. See, e.g., *United States v. Lyon,* 567 F.2d 777 (8th Cir. 1977). But see *United States v. Ruffin,* 575 F.2d 346 (2d Cir. 1978) (rejecting a good cause exception as not permitted by the text of the Rule).

III. Examples of Case Law Development Where the Rules and Committee Note Are Silent

1. Rule 103: The Rule provides conditions for a party wishing to preserve a claim of evidentiary error for appeal. It states that a party must make a timely objection or motion to strike, stating the specific ground of objection if that ground is not apparent from the context. An amendment to Rule 103, scheduled to take effect on December 1, 2000, further provides that if the trial court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal. But the Rule does not address the question whether a party can appeal an advance ruling holding evidence admissible, if the evidence is not actually admitted at trial. For example, assume that a criminal defendant moves in advance of trial to preclude the prosecution from impeaching him with his prior convictions. Assume further that the trial court rules definitively that the convictions are admissible impeachment evidence. Can the defendant decide not to testify at trial, and then argue on appeal that the trial court erred in its advance ruling?

While Rule 103 is silent on whether an appeal can be taken from a ruling holding evidence admissible where the evidence is not eventually admitted at trial, there is significant case law on this question. The Supreme Court, in *Luce v. United States,* 469 U.S. 38 (1984), specifically held that an accused must testify at trial in order to preserve a claim of error predicated upon a trial court's decision to admit the accused's prior convictions for impeachment. The *Luce* principle has been extended by many lower courts to other comparable situations. See *United States v. DiMatteo,* 759 F.2d 831 (11th Cir. 1985) (applying *Luce* where the defendant's witness would be impeached with evidence offered under Rule 608). See also *United States v. Goldman,* 41 F.3d 785, 788 (1st Cir. 1994) ("Although *Luce* involved impeachment by conviction under Rule 609, the reasons given by the Supreme Court for requiring the defendant to testify apply with full force to the kind of Rule 403 and 404 objections that are advanced by Goldman in this case."); *Palmieri v. DeFaria,* 88 F.3d 136 (2d Cir. 1996) (where the plaintiff decided to take an adverse judgment rather than challenge an advance ruling by putting on evidence at trial, the *in limine* ruling would not be reviewed on appeal); *United States v. Ortiz,* 857 F.2d 900 (2d Cir. 1988) (where uncharged misconduct is ruled admissible if the defendant pursues a certain defense, the defendant must actually pursue that defense at trial in order to preserve a claim of error on appeal); *United States v. Bond,* 87 F.3d 695 (5th Cir. 1996) (where the trial court rules *in limine* that the defendant would waive his fifth amendment privilege were he to testify, the defendant must take the stand and testify in order to challenge that ruling on appeal).

Rule 103 is also silent on whether a party who objects to evidence that the trial court definitively rules admissible, and who then offers the evidence to "remove the sting" of its anticipated prejudicial effect, thereby waives the right to appeal the trial court's ruling. Lower courts had been in conflict on this question. See, e.g., *Judd v. Rodman,* 105 F.3d 1339 (11th Cir. 1997) (an objection made *in limine* is sufficient to preserve a claim of error when the movant, as a matter of trial strategy, presents the objectionable evidence herself on direct examination to minimize its prejudicial effect); *Gill v. Thomas,* 83 F.3d 537, 540 (1st Cir. 1996) ("by offering

the misdemeanor evidence himself, Gill waived his opportunity to object and thus did not preserve the issue for appeal"). The Supreme Court, in *Ohler v. United States*, 117 S.Ct. – (2000), resolved this question by holding that [to be filled in when *Ohler* is handed down].

2. Rule 104(a): This Rule states that preliminary questions "concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court * * * ." But the Rule is silent on who bears the burden of proof on admissibility questions, and it is also silent on what standard of proof is to be employed. A significant body of case law has been developed to answer these questions. Most importantly, in *Bourjaily v. United States*, 483 U.S. 171 (1987), the Court held that the party seeking to admit the evidence–the proponent–generally has the burden of proving that the admissibility requirements set forth in the Federal Rules are met. Furthermore, the *Bourjaily* Court held that the burden of proving an admissibility requirement under Rule 104(a) is by a preponderance of the evidence. The specific holding in *Bourjaily* was that for a statement to be admissible under the coconspirator exception to the hearsay rule, the trial court must find that the prosecution has established by a preponderance of the evidence that the defendant and the hearsay declarant were members of the same conspiracy. The reasoning in *Bourjaily* has been extended to most other questions of admissibility under the Federal Rules of Evidence. See, e.g., *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 79 (1993) (proponent of expert testimony has the burden of showing it is more likely than not reliable). So for example, a proponent who proffers a hearsay statement under the excited utterance exception has the burden of showing it more likely than not that the declarant was under the influence of a startling event when he spoke. See *Miller v. Keating*, 754 F.2d 507 (3d Cir. 1985) (proponent must establish admissibility of an excited utterance by a preponderance of the evidence). One important exception arises with privileges. Because privilege rules operate to exclude relevant and reliable evidence, they are not favored. Therefore, the party seeking to *exclude* proffered evidence on the ground that it is privileged bears the burden of showing, by a preponderance of the evidence, that a privilege applies. See generally *United States v. Zolin*, 491 U.S. 554 (1989).

3. Rule 301: This Rule provides some guidance on the effect of a presumption. The Rule does not define the term "presumption"; it simply states that unless otherwise provided, "a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion." The Rule specifically leaves it to substantive law to determine when proffered evidence establishes a presumption that a fact exists. Generally speaking, presumptions are based on one or more of the following rationales: (1) one party has superior access to proof; (2) social or economic policies warrant a presumption; (3) experience indicates the high probability of a given conclusion from a given set of facts; (4) a presumption will promote efficiency and convenience. So for example, it has been held that proof that a letter was mailed establishes a presumption that it was received. *Anderson v. United States*, 966 F.2d 487 (9th Cir. 1982) (in a taxpayer's suit for a refund, the Government failed to rebut the common-law presumption of receipt that arose from the taxpayer's proof of mailing her return).

Rule 301 is also silent on whether a party favored by a presumption is entitled to a peremptory instruction if the party against whom the presumption operates fails to offer any

rebuttal evidence. For example, if a party proves that he mailed a letter, and the opponent provides no conflicting evidence, is the mailing party entitled to an instruction to the jury that the letter is to be deemed mailed? Courts have held that such an instruction must be given upon request. See, e.g., *A.C. Aukerman Co., v. R.L. Chaides Constr. Co.,* 960 F.2d 1020, 1037 (Fed.Cir. 1992) (where presumption applies, the presumed fact "must be inferred, absent rebuttal evidence."). See also C. Mueller & L. Kirkpatrick, *Evidence* at 137 (1st ed. 1995) ("[I]f the basic facts of a presumption are established, the presumption controls decision on the presumed fact unless there is counterproof that the presumed fact is not so. In jury-tried cases, the judge gives an appropriate instruction. In bench-tried cases, the judge must find the presumed fact.").

4. Rule 404(b): Rule 404(b) provides that a person's uncharged acts of misconduct can be offered to prove something other than a person's character, such as intent or motive. Rule 404(b) imposes a notice requirement on the prosecution in criminal cases, which is intended to protect the accused from unfair surprise; it provides that "upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial."

What happens if the government gives pretrial notice of its intent to proffer a prior bad act, and then subsequently discovers a *different* bad act that it wants to use as well? Or what if the government responds to a defense request by stating that it does not intend to use Rule 404(b) evidence, and *then* uncovers a bad act committed by the defendant that it does intend to use? The notice requirement of Rule 404(b) does not state whether the prosecution has a continuing obligation to notify the defendant, should it discover Rule 404(b) evidence after an initial response to the defendant's request. But it has been held that the Rule imposes a continuing obligation of notice. See, e.g., *United States v. Barnes,* 49 F.3d 1144, 1148 (6th Cir. 1995) (declaring that Rule 404(b) requires "a continuing obligation on the government to comply with the notice requirement * * * whenever it discovers information that meets the previous defense request"; noting that a contrary reading "would force the defense to make numerous, periodic requests until the trial has been completed–surely a wasteful procedure.").

The notice requirement of Rule 404(b) is conditioned on a request by the accused. The Rule does not state how specific the request must be to trigger the government's notice obligation. For example, is an omnibus motion for discovery sufficient to trigger the notice requirement? Courts have held that an omnibus motion is not sufficient to trigger the government's obligation to notify under the Rule. Rather, a request for notification, "at a minimum, must be sufficiently clear and particular, in an objective sense, fairly to alert the prosecution that the defense is requesting pretrial notification of the general nature of any Rule 404(b) evidence the prosecution intends to introduce." *United States v. Tuesta-Toro,* 29 F.3d 771, 774 (1st Cir. 1994) (notice not required where defense demanded outright pretrial disclosure of statements in any form, referring to the defendant in any way, without regard to their admissibility or the government's intention to introduce them). Compare *United States v. Williams,* 792 F.Supp. 1120, 1133 (S.D.Ind.1992) (notification required in response to detailed request reciting text of Rule 404(b)); *United States v. Alex,* 791 F.Supp. 723, 728 (N.D.Ill.1992) (notification required in response to request specifically referencing Rule 404(b)).

5. Rule 410: Rule 410 provides certain protections to criminal defendants during the process of plea bargaining. Rule 410 is silent, however, on whether its protections can be waived by a criminal defendant. In *United States v. Mezzanatto,* 513 U.S. 196 (1995), during guilty plea negotiations the defendant agreed that he could be impeached with statements made during the negotiations if he ultimately went to trial and testified inconsistently with those statements. The Supreme Court upheld the agreement, finding that the defendant had knowingly and voluntarily waived his right to the protection of Rule 410. The Court refused to hold that the Rule's silence on the matter meant that its protections could not be waived. Instead the Court presumed that any statutory right could be waived in the absence of a specific provision to the contrary, so long as the waiver was knowing and voluntary. The facts of *Mezzanatto* involved a waiver permitting the use for impeachment purposes of statements made during guilty plea negotiations. Neither *Mezzanatto* nor Rule 410 itself says anything explicitly about whether a defendant can waive the protections of the Rule so as to provide that the prosecution can admit his statements during plea negotiations as substantive evidence at trial, i.e., as party-admissions admissible even if the defendant does not testify. At least one court has relied on the rationale of *Mezzanatto* to uphold a waiver of Rule 410 protections that permitted the government to use the defendant's statements as substantive evidence in its case-in-chief. See *United States v. Burch,* 156 F.3d 1315 (D.C.Cir. 1998).

6. Article VI: Article VI governs treatment of testifying witnesses. The Article is silent about many of the common forms of impeachment, such as bias, contradiction, and mental capacity. There is, of course, a significant amount of case law dealing with impeachment matters on which Article VI is silent. Case law generally regulates the forms of impeachment not specifically covered by Article VI by using principles derived from Evidence Rules 402 and 403–such impeachment is permitted unless the probative value of the impeachment evidence is substantially outweighed by the risks of prejudice, confusion and delay. See *United States v. Abel,* 469 U.S. 45 (1984) (impeachment for bias governed by Rule 403 principles). See generally S. Saltzburg, M. Martin and D. Capra, *Federal Rules of Evidence Manual* 939-970, 1139-1148; 3 C. Mueller & L. Kirkpatrick, *Federal Evidence* 109-207, 327-470 (2d ed. 1994). See also Imwinkelreid, *The Silence Speaks Volumes: A Brief Reflection on the Question of Whether It Is Necessary To Fill the Seeming Gaps In Article VI of the Federal Rules of Evidence, Governing the Admissibility of Evidence Logically Relevant to the Witness's Credibility*, 1998 Univ. Ill. L.Rev. 1013, 1036 (noting that Article VI is silent about most matters of impeachment, but concluding that "as a general proposition, there is little to be gained and much to be lost by initiating the process of revising Article VI.").

7. Rule 615: Rule 615 provides that at the request of a party, and with some exceptions, "the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may also make the order of its own motion." The Rule specifically provides only for exclusion of witnesses from the courtroom. It is silent about whether a trial judge can order witnesses not to talk to each other outside the courtroom; it says nothing about a judge's power to order a potential witness to refrain from obtaining access to certain information, such as newspaper articles, that might taint the witness' testimony. The courts have held, however, that the trial court retains its common-law power to fashion a more far-reaching sequestration order

appropriate to the circumstances of the case.. See the extensive discussion in *United States v. Sepulveda,* 15 F.3d 1161, 1175 (1st Cir. 1993) (Rule 615 "demarcates a compact procedural heartland, but leaves appreciable room for judicial innovation beyond the perimeters of that which the rule explicitly requires"). This common-law power includes the discretion to sequester witnesses before, during, and after their testimony, see *Geders v. United States*, 425 U.S. 80 (1976), and to compel the parties to present witnesses in a prescribed sequence. *United States v. Machor*, 879 F.2d 945, 954 (1st Cir.1989). As the court in *Sepulveda* stated: "Rule 615 neither dictates when and how this case-management power ought to be used nor mandates any specific extra-courtroom prophylaxis, instead leaving the regulation of witness conduct outside the courtroom to the district judge's discretion."

8. Rule 801(d)(1)(B): This Rule provides that a statement is not excluded as hearsay if the witness is subject to cross-examination and the statement is "consistent with the declarant's testimony and is offered to rebut an express or implied charge of recent fabrication." The hearsay exemption for prior consistent statements does not specifically provide that the prior consistent statement must *precede* the existence of the alleged motive to falsify in order to be admissible. However, the Supreme Court in *Tome v. United States*, 513 U.S. 150 (1995), held that a statement is not admissible under Rule 801(d)(1)(B) unless it was made before the witness's alleged motive to falsify arose.

Rule 801(d)(1)(B) is also silent on whether prior consistent statements can be admitted independently of the Rule, not for their truth but rather to rehabilitate the credibility of the witness. The courts have held that a consistent statement could be probative and admissible for rehabilitation purposes even if it is not admissible under the hearsay exemption. See, e.g., *United States v. Brennan,* 798 F.2d 581, 587 (2nd Cir. 1986) (prior consistent statement was not admissible to rebut a charge of improper motive, but it was admissible to clarify an apparent inconsistency that had been brought out by defense counsel on cross-examination: "prior consistent statements may be admissible for rehabilitation even if not admissible under Rule 801(d)(1)(B)."). Accord *United States v. Parodi,* 703 F.2d 768 (4th Cir. 1983).

9. Rule 803(3): The Rule provides a hearsay exception for statements of a declarant's state of mind. The Rule is silent, however, on whether a declarant's statement of intent can be used to prove the subsequent conduct of someone other than the declarant. When the victim says, "I am going to meet Frank tonight", is the statement admissible to prove that Frank and the victim actually met? Or is the statement admissible only to prove the future conduct of the declarant? The Advisory Committee Note refers to the Rule as allowing "evidence of intention as tending to prove the act intended." The case law is conflicted. Some courts have refused to admit a statement that the declarant intended to meet with a third party as proof that they actually did meet. See, e.g., *Gual Morales v. Hernandez Vega*, 579 F.2d 677 (1st Cir. 1978); *United States v. Jenkins,* 579 F.2d 840 (4th Cir. 1978) (statements of intent can prove only the declarant's subsequent conduct). Other courts hold such statements admissible if the proponent provides corroborating evidence that the meeting took place. See, e.g., *United States v. Delvecchio,* 816 F.2d 59 (2nd Cir. 1987). See C. Mueller and L. Kirkpatrick, *Evidence* at 938 (1st ed. 1995) ("Some modern cases take the clearly correct position that the exception in its present form cannot justify use of statements of intent by themselves as proof of what others did. And yet a growing number

of cases approve use of a statement to prove what the speaker and another did together if other evidence confirms what the statement suggests the other did.").

10. Rule 803(18): Rule 803(18) provides a hearsay exception for "statements contained in published treatises, periodicals, or pamphlets" if they are "established as a reliable authority" by the testimony or admission of an expert witness or by judicial notice. The Rule does not mention whether the learned treatise exception covers evidence presented in demonstrative form, such as a chart or film. But the Second Circuit has upheld the admission of an authoritative videotape under the learned treatise exception. See *Costantino v. Herzog,* 203 F.3d 164, 171 (2d Cir.2000) (reasoning that it is "overly artificial to say that information that is sufficiently trustworthy to overcome the hearsay bar when presented in a printed learned treatise loses the badge of trustworthiness when presented in a videotape").

11. Rule 1101. Rule 1101 states that the Federal Rules of Evidence are generally applicable to all federal proceedings. Rule 1101(d) lists certain proceedings to which the Rules are inapplicable, including grand jury and bail proceedings. Courts have found that the Federal Rules are inapplicable to a number of proceedings that are not specifically mentioned as exempt in Rule 1101(d). Examples include suppression hearings, proceedings to obtain a temporary restraining order, and proceedings seeking release from psychiatric commitment. See, e.g., *United States v. Frazier,* 26 F.3d 110 (11th Cir. 1994) (Evidence Rules inapplicable in supervised release revocation proceedings); *United States v. Schaefer,* 87 F.3d 562 (1st Cir. 1996) (evidence rules inapplicable at suppression hearings); *United States v. Palesky,* 855 F.2d 34 (1st Cir. 1988) (Evidence Rules are not applicable in hearings held to determine whether a person will be committed to or released from a psychiatric facility). The courts establish these exemptions because they are within the spirit of Rule 1101(d)–exempting from the Rules those proceedings that are less formal than a trial and in which the judge is the finder of fact. See e.g., *Government of Virgin Islands in Interest of A.M.*, 34 F.3d 153, 161 (3rd Cir. 1994) (Evidence Rules do not apply in juvenile transfer proceedings, even though such proceedings are not specifically exempted in Rule 1101(d)(1); a juvenile transfer proceeding "is of a preliminary nature and is consequently not comparable to a civil or criminal trial.").

Item 11B

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

March 8, 2000
Via Fax

MEMORANDUM TO RULES COMMITTEE CHAIRS

SUBJECT: *Financial Disclosure*

Judge Scirica asked me to send to you a copy of his January 11, 2000, letter to Judge Carol Amon, chair of the Committee on Codes of Conduct. Judge Amon referred to parts of the letter in her committee's March 8 response, which was sent to you directly by her committee.

John K. Rabiej

Attachment

cc: Honorable Anthony J. Scirica (without attach.)
Reporters, Rules Committees (with attach. and copy of March 8 response)

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

ANTHONY J. SCIRICA
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

WILL L. GARWOOD
APPELLATE RULES

ADRIAN G. DUPLANTIER
BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

W. EUGENE DAVIS
CRIMINAL RULES

MILTON I. SHADUR
EVIDENCE RULES

January 11, 2000

Honorable Carol Bagley Amon
United States District Court
United States Courthouse
225 Cadman Plaza East
Brooklyn, NY 11201

Dear Judge Amon:

Thank you again for taking the time last Friday to provide the Committee on Rules of Practice and Procedure with your input on the financial disclosure issue. Your insights were most helpful to the Committee. Attached is a first draft of the proposed disclosure rule (including Committee and Reporter's Notes) that we discussed with you.

The Standing Rules Committee agreed in principle with the approach of this draft rule, which will now be considered by the Advisory Committees on Appellate, Civil, and Criminal Rules at their meetings in April 2000. Although the Advisory Committee on Bankruptcy Rules will consider a parallel approach, it recognizes that pursuing a similar rule in the bankruptcy context raises many difficulties, given the sheer number of parties and interests that may be involved.

As to the specific disclosure form to be required, it seems to us that the Codes of Conduct Committee would best be able to devise the appropriate document, assisted by the Administrative Office. We also thought that implementation should not await the lengthy process of rule-making, but could be accomplished under direction of the Judicial Conference. The Judicial Conference could urge adoption of a national form long before a national rule could become effective, and might even find authority to direct adoption. Given the nature of the subject matter, we thought your Committee might properly play the lead role on this front. We would assist in any way you deem appropriate.

As we discussed, there remains the issue whether district and appellate courts would be allowed to supplement national disclosure requirements via local rule. In reviewing the report of the Federal Judicial Center, Informing Judicial Recusal Decisions: Party Disclosure of Financial Interests Information, we were struck by the

current variance in disclosure rules among several district and circuit courts. The local rules issue touches deeply-rooted sensitivities. It seems to us premature to attempt to resolve the local rules question before a form is developed. If it proves possible to develop a form which commands a consensus, preemption may be wise. If the choices made in developing the form prove difficult, it may be better to allow variation in local rules, at least initially. Accordingly, we believe that the local rules matter is best taken up after a proposed disclosure form is circulated for review.

I look forward to hearing from you after your Codes of Conduct Committee meeting.

Sincerely,

Anthony J. Scirica

Attach.
cc: Marilyn J. Holmes

Rule 26.1 Combined with Judicial Conference Form

7.1 Disclosure Form

(a) Required Form. A party to [that appears in] an action or proceeding in a district court must file two copies of a form that:

(1) identifies all parent corporations of a nongovernmental corporate party and also identifies any publicly held company that owns 10% or more of the nongovernmental corporate party's stock; and

(2) provides all additional information required by the Judicial Conference of the United States.

(b) Time for Filing. A party must file the Rule 7.1(a) statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court. A supplemental statement must be filed promptly upon any change in the circumstances that Rule 7.1(a) requires the party to identify.

Committee Note

Rule 7.1(a)(1) adopts the minimum disclosure requirement now embodied in Appellate Rule 26.1. Space for providing this information will be included in the form developed by the Judicial Conference of the United States. In addition, the Judicial Conference – working on the advice of relevant committees and the Administrative Office of the United States Courts – will prescribe additional disclosures in developing the form. The Judicial Conference will be able to adapt disclosure requirements to developing experience with the need for disclosure and with emerging technological capabilities. There is little reason to expect that it will be possible to require complete disclosure of every possible bit of information that might bear on disqualification of a judge. It will be important, however, to exact as much information as seems feasible in relation to all common bases for disqualification. Developing technology should make it easier for litigants to provide information and for a court to match the information with individual disqualification profiles for each of the court's judges. The first screening, based on

information provided by the plaintiff or petitioner, might be accomplished automatically as part of a random assignment process. Even when technology is fully developed, it will remain important that the court clerk transmit the disclosure form to any judge called upon to perform any function in the case.

Rule 7.1 requires every party to file a disclosure form. In adopting forms, the Judicial Conference will determine the contents of the required disclosures. It seems likely that many parties, and particularly individual parties, will not have any information that falls within the required categories. The Rule 7.1(a) requirement is satisfied by filing a form that indicates that there is nothing to disclose as to any of the required categories.

Reporter's Notes

The bracketed alternative at the beginning of Rule 7.1(a) is designed to flag the question whether disclosure should be required as to a party who defaults. It may be better not to undertake a clear answer to this difficult question; referring vaguely to "a party to an action or proceeding" may be the better course.

The subdivision (b) provision is simply one of the several versions provided in these drafts. Mix-or-match is easy.

This draft does not include the provision found in some drafts that allows the Judicial Conference to excuse filing in designated categories of actions or proceedings. If we believe the power to exempt is desirable, the power could be stated in the rule. It also would be possible to state in the Committee Note that the form can include directions identifying cases that do not require filing, but that might not provide sufficient guidance to court clerks.

There has not been much interest in filing by attorneys or amici curiae. The rule could easily be changed to include them if that seems desirable.

COMMITTEE ON CODES OF CONDUCT
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
UNITED STATES DISTRICT COURT
225 CADMAN PLAZA EAST
BROOKLYN, N.Y. 11201

JUDGE WILLIAM H. BARBOUR, JR.
JUDGE PETER W. BOWIE
JUDGE MARY BECK BRISCOE
JUDGE WILLIAM C. BRYSON
JUDGE GERALD B. COHN
JUDGE JOSEPH A. DICLERICO
JUDGE J.L. EDMONDSON
JUDGE JAMES H. JARVIS
JUDGE STEPHEN N. LIMBAUGH
JUDGE DANIEL A. MANION
JUDGE THOMAS N. O'NEILL, JR.
JUDGE WILLIAM L. OSTEEN
JUDGE JUDITH W. ROGERS
JUDGE MARY M. SCHROEDER

JUDGE CAROL BAGLEY AMON
CHAIRMAN

TELEPHONE
(718) 260-2410

MARILYN J. HOLMES
COUNSEL
(202) 502-1100

March 8, 2000

Honorable Anthony J. Scirica
Chair, Committee on Rules of Practice
and Procedure of the Judicial Conference
of the United States
22614 U.S. Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106

Dear Judge Scirica:

I am writing to report to you on the Codes of Conduct Committee's discussion of the corporate disclosure reporting provisions under consideration by the Committee on Rules of Practice and Procedure. At our meeting January 13 to 15, the Committee generally endorsed the views I provided to you in my letter of December 29, 1999. My letter had commented on the three proposals then under consideration by the Rules Committees. Following receipt of your letter of January 11, the Codes of Conduct Committee focused on the single revised draft proposal, labeled Rule 7.1, which was developed at the January meeting of the standing Rules Committee.

The Codes of Conduct Committee's report to the March 2000 Judicial Conference contains a summary of the committee's views, which I enclose for your information (Enclosure A). I have set forth below more detailed information about the committee's views. We have attempted to identify all of the issues that we believe need to be addressed. To more fully convey our views, I enclose some tentative language that reflects approaches we believe would be usefully adopted. Were time constraints less pressing, we would have attempted to provide you with more fully developed proposals. We actively solicit a continuing exchange of views to refine and enhance these proposals.

Content of the corporate disclosure requirement.

The Codes Committee recommends that the proposed corporate disclosure rule be patterned substantially after Rule 26.1 of the Federal Rules of Appellate Procedure, with the addition of an updating provision requiring the parties to supplement their disclosures upon a change in the information disclosed. Draft Rule 7.1 contains these essential elements in sections 7.1(a)(1) and 7.1(b).

We note that the language of the proposed draft may be read to suggest that the parties must file disclosures identifying not only their own corporate parents, but the corporate parents of other parties as well. We assume it was not your intention to impose on plaintiffs the burden of identifying the corporate parents of all defendants, and vice versa. Information of this nature may be difficult for others to obtain, rendering the resulting disclosures of doubtful accuracy. We recommend rephrasing the disclosure requirement to clarify that parties must identify only their own corporate parents.

We understand that the advisory rules committees are considering adding disclosure requirements to the civil, criminal and bankruptcy rules. We support adoption of rules for all three types of proceedings. Some variations will be necessary in these differing rules. I enclose for your review some tentative proposals for provisions to be added to the civil, criminal and bankruptcy rules. See Enclosures B, C, and D. Some special considerations relating to the proposed bankruptcy rule are discussed below.

The draft committee notes following proposed Rule 7.1 indicate that the parties should file a negative report. The Codes of Conduct Committee endorses this provision but recommends that it be incorporated into the text of the rule.

We also commend to you for consideration an issue that may be useful to include in the commentary to each rule. That is, the commentary should indicate that the disclosure requirement does not compel identification of all entities whose participation in a matter might disqualify the judge due to the judge's financial interest. As a practical matter, it is simply impossible to guarantee this result. We believe the disclosures will identify most such entities and will be of great value. However, judges must remain vigilant to other possible disqualifying situations not covered by the disclosure requirement.

The bankruptcy rule disclosure requirement.

A bankruptcy corporate disclosure requirement presents special challenges because of the number of participating creditors in many bankruptcy proceedings and the difficulty of determining which creditors and other participants should be considered parties for these purposes and at what point their party status should trigger the disclosure requirement. Bankruptcy judges are subject to the statutory and Code of Conduct recusal provisions, which

require judges to disqualify themselves when they have a financial interest in a party. This Committee's advice for these purposes is as follows:

> For purposes of recusal decisions in bankruptcy proceedings, the following are deemed to be parties: the debtor, all members of a creditors committee, and all active participants in the proceeding; but merely being a scheduled creditor, or voting on a reorganization plan, does not suffice to constitute an entity a "party." Bankruptcy judges are expected to keep informed as to their investments in firms which are active participants in the proceeding, but ordinarily need not familiarize themselves with the scheduled creditors.

Compendium of Selected Opinions § 3.1-6[5](a) (1999).

The enclosed draft bankruptcy rule includes language addressing two issues I want to highlight: the identity of parties required to file disclosures (subsection (a)) and the events that trigger this obligation (subsection (b)). As to the identity of parties, we incorporated language drawn from our previous advice, set out above. In addition, we made a preliminary effort in the draft to address the treatment of active participants in contested matters, whose presence in a case may disqualify the judge. We did so by including within the definition of party for these purposes three specific groups of participants: those participants actively involved in litigation arising from opposition to (i) a petition for relief from the automatic stay, (ii) an objection to a proof of claim, or (iii) a motion for avoidance of a lien. Please note that this definition will not capture the entire universe of active litigants in contested matters whose participation in a case may be disqualifying. We see no obvious way to do so without appearing to include participants who do no more than file a proof of claim or request relief from an automatic stay, where the relief is uncontested. If your Committee is likewise unable to devise a universal approach that is appropriately limited, we suggest extending the disclosure requirement to defined groups, as we have done. This approach will reach many if not most disqualifying situations, and it does have the virtue of clearly defining the parties obligated to file a disclosure form.

As to the triggering event for bankruptcy parties, we added language indicating that designation as a member of a creditors committee is a triggering event. We also added a specific provision for filings by active litigants in contested matters. The triggering event here is filing of an opposition; participants that file an opposition must make the disclosure form simultaneously, while other participants in the contested matter (i.e., those adverse to the opposition filer) must file the disclosure form promptly after the opposition is filed.

We did not add anything to subsection (b) to exclude filing of proofs of claims, petitions for relief from the automatic stay, or similar routine filings from the triggering events. Participants who make such filings – but play no greater role in the proceeding –

should not be required to make the disclosures required by the proposed rule, because they do not fit the definition of party in subsection (a). We believe this is clear from the format of the enclosed proposed rule but commend the issue to you for consideration.

We also note an issue that may be appropriate for inclusion in the commentary to the bankruptcy rule. In our view, a judge's financial interest in a creditor that is actively litigating a contested matter may not disqualify the judge from the entire bankruptcy proceeding but only from the contested matter. Judges should be encouraged to examine the disclosures made pursuant to this rule to determine the extent to which disqualification is necessary.

Use of a disclosure form.

Draft Rule 7.1(a)(2) requires the parties to use a disclosure form. This requirement has two apparent purposes: to ensure national uniformity of the disclosures and to permit the Judicial Conference to expand the information to be disclosed outside of the formal (and lengthy) rulemaking process.

The Codes of Conduct Committee supports the first of these goals. We believe it would be useful to develop a national disclosure form for use in all federal courts and we enclose a draft for your consideration (Enclosure E). Indeed, if we omitted references to the proposed rules, such a form could be distributed to the courts even before adoption of any national rules in order to encourage the courts to begin seeking corporate parentage disclosures from the parties. The Codes of Conduct Committee tentatively agreed to contact chief district and bankruptcy judges in each circuit to provide them with the corporate disclosure form, should our committees agree to this approach. In our view, use of a uniform disclosure form could be mandatory or voluntary. Of course, if use of the form is to be mandatory, the rule should so indicate and should also either incorporate the form or advise parties and their counsel where it can be obtained.

As to the second aspect of the disclosure form – a requirement that parties disclose whatever additional information is mandated on the form – we believe it is unnecessary and recommend against including it. On several occasions our Committee has examined the scope of information to be disclosed under Fed. R. App. R. 26.1 and corresponding local rules. The Federal Judicial Center examined this same question in their recent studies on court disclosure requirements. Neither our examination nor the FJC studies identified any additional information necessary for judges to determine when they are automatically disqualified due to a financial interest in a party, beyond the information about corporate parents and 10% owners already addressed in Rule 26.1 and proposed Rule 7.1. (I refer below to other disclosures that might assist judges in making certain recusal determinations, but they differ from the question of corporate parentage).

In our view, the additional flexibility that is the hallmark of this provision is simply not needed. We surmise that there may be some risk that use of this unconventional approach would affect Congressional approval of these provisions.

Local rule variations.

We share your observation that there has been a striking proliferation of local rules on this subject. In our assessment, much of the information requested in these rules is not needed for judges to determine whether they must recuse due to a financial interest in a party. The draft committee notes following proposed Rule 7.1 seem to reflect the view that additional disclosures may be needed, and this may be read as encouraging courts to adopt local rules expanding the information required to be disclosed. For the reasons discussed above, the Codes of Conduct Committee believes that courts should be discouraged from adopting broadened local disclosure requirements. However, we defer to your expertise on the question of preemption of local rules.

Other issues.

In considering the issue of corporate parents, our Committee noted other areas in which disclosures might be useful to judges in determining their recusal obligations. These include the identity of corporate criminal victims who may be entitled to restitution (the Committee advises judges to recuse if they own stock in a criminal victim that may be entitled to restitution) and the composition of partnerships, joint ventures, and other unincorporated associations, which may be composed of corporations in which a judge owns stock. The disclosure requirements under consideration do not address all possible recusal scenarios that may arise. This is, in our assessment, an appropriate way to proceed. We recommend adoption of a straightforward rule addressing the most serious and substantial problems with due recognition of the fact that the rule does not and cannot cover all potential recusal concerns.

I hope the foregoing observations and our enclosed drafts are of assistance to the standing and advisory Rules Committees. Please let me know if you would like to discuss any of these issues.

For the Committee,

Carol Bagley Amon

Carol Bagley Amon
Chairman

cc: Honorable Will L. Garwood
Honorable Adrian G. Duplantier
Honorable Paul V. Niemeyer
Honorable W. Eugene Davis
John K. Rabiej

REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON CODES OF CONDUCT

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Codes of Conduct met from January 13 to 15, 2000. All members were present. The Administrative Office was represented by Marilyn J. Holmes, Associate General Counsel, and Barbara Denham, Staff Assistant. Ms. Jody George of the Federal Judicial Center's Judicial Education Division also attended a portion of the meeting.

JUDGES' RECUSAL OBLIGATIONS

The Committee on Codes of Conduct reviewed a number of initiatives to assist judges in meeting their recusal obligations, continuing efforts begun in previous years.

Recent Efforts

The Committee received a report summarizing the following recent accomplishments. In September 1999, the Administrative Office released conflicts screening software for use in district and bankruptcy courts using the ICMS database system. The Director of the Administrative Office sent a memorandum to all judges announcing the software's availability and established a web site on the judiciary's J-Net containing extensive information about the software and permitting courts to download it directly. Over 40 district and bankruptcy courts

NOTICE
NO RECOMMENDATION PRESENTED HEREIN REPRESENTS THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.

check for conflicts themselves. The Chairman appointed a subcommittee to consult with Administrative Office staff on the development of the CM/ECF conflicts screening function.

Corporate Disclosure Requirements

Last year, the Codes of Conduct Committee asked the Committee on Rules of Practice and Procedure to consider amending the federal rules to require parties in district and bankruptcy courts to identify their corporate parents, much as Fed. R. App. P. 26.1 now requires in the courts of appeals. Judge Scirica, Chair of the standing Rules Committee, provided the Codes of Conduct Committee with progress reports on the Rules Committees' consideration of this subject and requested further guidance.

In December 1999, the standing Rules Committee requested the Codes Committee's views on several alternative disclosure provisions under consideration. Judge Arnon provided her initial views on behalf of the Codes Committee. She expressed a preference for a narrowly tailored rule, patterned after Fed. R. App. P. 26.1 and incorporating a provision requiring the parties to update information that changes. The Codes Committee subsequently endorsed Judge Arnon's initial response.

At the Codes Committee meeting, members focused on the Rules Committee's request for comments on another alternative under consideration. This alternative would require the parties to disclose the information required by Fed. R. App. P. 26.1 and any additional information required by the Judicial Conference pursuant to a disclosure form, which would be developed with the assistance of the Codes Committee. The Codes Committee discussed this option and agreed that it would be useful to develop a national disclosure form for use in the federal courts. However, the Committee was unable to identify additional information, disclosure of which might be useful for purposes of financial interest recusal determinations.

A report of the Federal Judicial Center prepared for the Rules Committee confirmed this assessment, in the view of the Codes Committee. The FJC report examined several local rules requiring more extensive disclosures and determined that the information was requested by courts for asserted prophylactic reasons although it did not appear to be necessary for financial interest recusal purposes. The Committee recommended that courts be discouraged from mandating broadened local disclosure requirements.

The Codes Committee agreed to draft a model disclosure form and provide it, with additional comments, to the Rules Committee for review at the advisory committees' spring 2000 meetings. The Codes Committee also agreed to examine further the possibly differing imperatives for corporate disclosure in civil, criminal, and bankruptcy proceedings and to continue reviewing these issues with the Rules Committee.

Financial Disclosure

The Codes Committee received a report on recent developments pertaining to release of judges' financial disclosure reports, including the Financial Disclosure Committee's recent denial of reports to a news organization that had expressed the intention of publishing the reports on the Internet. Although financial disclosure reports are widely assumed in the media to be useful in assessing judges' conflicts of interest, the Committee expressed the view that much of the information required on the reports is irrelevant to recusal determinations. The Committee also noted its continuing concern that judges are burdened with tracking their financial interests in two separate environments: for disclosure reporting and for recusal purposes. It was generally agreed that, should legislation be proposed as a result of these developments, the Codes Committee should consider recommending legislative revisions pertaining to recusal.

Enclosure B – Civil Rule Language

DRAFT – March 3, 2000

Federal Rules of Civil Procedure

____. Disclosure Form.

(a) Required Form. In a civil proceeding, any nongovernmental corporate party must file two copies of a form identifying all its parent companies or stating that it has no parent companies. For purposes of this rule, a parent company means a publicly held corporation that controls the party (directly or through others) or owns 10% or more of the party's stock.

(b) Time for filing. A party must file the disclosure form with its first appearance, pleading, petition, motion, response, or other request addressed to the court. A party must promptly file two copies of a supplemental disclosure form upon any change in the information required by Rule ____.

Enclosure C - Bankruptcy Rule Language

DRAFT - March 3, 2000

Federal Rules of Bankruptcy Procedure

_____. Disclosure Form.

(a) **Required Form.** In a bankruptcy proceeding, any nongovernmental corporate party must file two copies of a form identifying all its parent companies or stating that it has no parent companies. For purposes of this rule, a party means the debtor, a member of a creditors committee, a party to an adversary proceeding, and a participant actively involved in litigation arising from opposition to (i) a petition for relief from the automatic stay, (ii) an objection to a proof of claim, or (iii) a motion for avoidance of a lien; and a parent company means a publicly held corporation that controls the party (directly or through others) or owns 10% or more of the party's stock.

(b) **Time for filing.** A party must file the disclosure form with its first appearance, designation as a member of the creditors committee, pleading, petition, motion, response, or other request addressed to the court; in the case of a participant actively involved in litigation arising from opposition to a petition, objection, or motion described in subsection (a), the participant must file the disclosure form with the opposition or promptly thereafter. A party must promptly file two copies of a supplemental disclosure form upon any change in the information required by Rule ____ .

Enclosure D – Criminal Rule Language

DRAFT – March 3, 2000

Federal Rules of Criminal Procedure

_____. Disclosure Form.

(a) **Required Form.** In a criminal proceeding, any nongovernmental corporate defendant must file two copies of a form identifying all its parent companies or stating that it has no parent companies. For purposes of this rule, a parent company means a publicly held corporation that controls the party (directly or through others) or owns 10% or more of the party's stock.

(b) **Time for filing.** The defendant must file the disclosure form at arraignment. The defendant must promptly file two copies of a supplemental disclosure form upon any change in the information required by Rule ____.

Enclosure E – Disclosure Form

DRAFT – March 3, 2000

Form 36. Corporate Disclosure Under Rule ___

[Caption and names of parties]

This form is to be filed only by nongovernmental corporate parties. Check the appropriate box:

[__] The filing party, a nongovernmental corporation, identifies the following parent companies:

[Here list the names and addresses of each publicly held corporation that controls the filing party (directly or through others) or owns 10% or more of the party's stock.]

_____ _____
_____ _____
_____ _____
_____ _____
_____ _____
_____ _____

[__] The filing party has no parent companies.

Signed: _____
Filing Party's Representative

Address: _____

Informing Judicial Recusal Decisions: Party Disclosure of Financial Interests Information

Report to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States

Project Director
Carol Krafka

Project Team
Marie Leary, Naomi Medvin, and Joe Cecil

FEDERAL JUDICIAL CENTER
1999

This report was undertaken in furtherance of the Center's statutory missions to conduct and stimulate research on the operation of the federal courts and to assist the committees of the Judicial Conference of the United States. This report has been reviewed within the Center to ensure that its analysis is responsible and objective. The views expressed are those of the authors and not necessarily those of the Federal Judicial Center.

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Executive Summary

Federal Rule of Appellate Procedure 26.1 is intended to assist appellate judges in identifying financial conflicts of interest for recusal purposes. This rule requires non-governmental corporate parties to file a statement identifying parent corporations and companies owning 10 percent or more of the party's stock.

No corresponding national rule governs the proceedings in the federal district and bankruptcy courts. In the absence of a national rule, a number of district and bankruptcy courts have enacted local rules on financial disclosure. Most local rules go beyond the disclosure requirements of FRAP 26.1—either by expanding the range of parties required to file information, or by requiring additional information from parties, or both. More than half of the courts of appeals have likewise expanded on the disclosure requirements of FRAP 26.1, by enacting supplemental local rules.

The local rules vary widely, and we detect no consensus approach. Drafters of any proposed disclosure rule may find it useful, though, to address the following questions raised by local rule variations:

- What parties should be subject to the disclosure requirements?
  - Should specific party types be exempt (e.g., amici curiae, intervenors)?
  - Should parties to specific categories of actions or proceedings (such as habeas corpus petitions) be exempt?
- What types of cases should be covered by disclosure requirements?
  - Should disclosure requirements cover civil cases only?
  - If criminal and/or bankruptcy cases are covered by disclosure, is the relevant "interests" information different from what is required in a civil case?
- What information should parties file?
  - Should disclosure be limited to identification of parent corporations and companies owning 10 percent or more of a party's stock?
  - Should disclosure include identification of subsidiaries? Affiliates? Will the rule define "affiliate"? If so, how?
  - Should disclosure extend to other specified legal entities? What are they?
  - Should disclosure extend to entities with a "general" interest in the outcome of litigation?
  - Should parties identify attorneys and law firms representing them?
- When must information be filed?
- How many copies of the disclosure statement must be filed?
- Should a negative report be required from parties with nothing to disclose?
- Should the parties have an affirmative obligation to update disclosure?
- Should sanctions for the failure to file disclosure be stated?
  - What sanctions will the court impose?
  - When will the party be delinquent in filing?
  - How will notice be handled?
- Should the format of the disclosure statement be specified in the rule?

Introduction

Federal Rule of Appellate Procedure 26.1 provides for disclosure of financial information from corporate parties in the courts of appeals. The purpose of the rule is to assist appellate judges in identifying if they have financial conflicts of interest for recusal purposes. There is no corresponding national rule governing civil, criminal, and bankruptcy proceedings in the district and bankruptcy courts.

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States is evaluating whether a national rule requiring financial interests disclosure in district and bankruptcy courts is necessary, and if so, how the rule should be structured. To inform its work, the Committee asked the Federal Judicial Center to study the practices and variations in methods used in appellate, district, and bankruptcy courts where financial information from parties is currently being filed. The study includes the courts of appeals, because many of them have local rules on disclosure that supplement the requirements set forth in FRAP 26.1.

We searched published and electronic database collections, and surveyed the clerk of court in each of the courts of appeals, district courts, and bankruptcy courts to compile local rules and other court-fashioned financial disclosure procedures. We analyzed key dimensions of the rules and procedures, and we organized the information into summary tables. The bulk of the report is made up of these tables.

In addition to the tables, the report contains information from district court personnel on the usefulness of disclosure rules in effect. To learn whether local filing requirements meet the needs of the individual district courts, and to learn about the efficacy of FRAP 26.1 filing requirements, we wrote to chief judges in district courts where financial disclosure is routine. In district courts where filing requirements are more extensive than those of FRAP 26.1, we asked whether judges found the additional information useful in detecting conflicts of interest and whether the judges were aware of instances in which limiting disclosure to FRAP 26.1 requirements would have failed to signal a conflict of interest. In district courts with filing requirements equivalent to FRAP 26.1, we asked whether the judges found the local rule sufficient to identify conflicts of interest and whether the information provided under the local rule had ever failed to signal a conflict of interest. We also conducted a brief case study of a court that adopted and then repealed a local rule on financial disclosure, after it found that the rule created more problems than it addressed. This report summarizes our findings.[1]

The report has five parts. Part I reproduces FRAP 26.1 for reference. Part II analyzes local rules on the disclosure of financial information in the courts of appeals and summarizes rule provisions in comparative tables. Part III offers corresponding information on local rules and other mandates in the district courts. Part III additionally describes district court views on the utility of the local rules in effect and provides a synopsis of one court's unsatisfactory experience with its local rule on disclosure. Part IV covers local rules found in the bankruptcy courts and rules applicable to bankruptcy appellate panels. Part V offers conclusions and a recapitulation of the main findings of the study.

[1] Much of the material included in the report was provided in preliminary form to members of the Advisory Committees on Appellate, Bankruptcy, Civil and Criminal Rules for their respective Fall 1999 meetings. The preliminary materials were supplemented and reorganized for this report.

Part I. Federal Rule of Appellate Procedure 26.1

FRAP 26.1 requires non-governmental corporate parties to identify their parents and major stockholders. The rule reads as follows:

> Rule 26.1 Corporate Disclosure Statement
>
> (a) Who must file. Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement identifying all its parent corporations and listing any publicly held company that owns 10 percent or more of the party's stock.
>
> (b) Time for Filing. A party must file the statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents.
>
> (c) Number of copies. If the statement is filed before the principal brief, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.

FRAP 26.1 was added to the federal rules in 1989 to assist judges in making a determination of whether they have any interests in any of a party's related corporate entities that would disqualify the judges from hearing the appeal. Until recently, FRAP 26.1 required corporate parties to identify, in addition to parent corporations, all subsidiaries and affiliates of the party with shares issued to the public. Amendments that took effect in December 1998 deleted the requirement for identifying subsidiaries and affiliates, and added the requirement that corporate parties list publicly held companies owning 10 percent or more of the party's stock.[2] FRAP 29(c) indicates that a brief filed by a corporate amicus curiae must include a disclosure statement conforming to these requirements.

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[2] The portion of the Advisory Committee Note accompanying the 1998 amendments to FRAP 26.1 that explains substantive changes is reproduced below:

"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 lists all its stockholders that are publicly held companies owning 10 percent or more of the stock of the party. A judgement 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 percent or more of the stock in the

Part II. Analysis of Financial Disclosure Filing Requirements in the Courts of Appeals

FRAP 26.1 represents minimum disclosure requirements. When the rule was added to the Federal Rules of Practice and Procedure in 1989, the accompanying Advisory Committee Note stated "If a Court of Appeals wishes to require additional information, a court is free to do so by local rule." Ten of the thirteen courts of appeals currently require additional information, and the mechanism for doing so is through local rule provisions.[3] Table 1 identifies the ten courts of appeals and their respective local rules below.

Table 1. U.S. Circuit Courts of Appeals Expanding the Requirements of FRAP 26.1

Court	Local Rule	Rule Title
Third Circuit	LR 26.1.1	Disclosure of Corporate Affiliations and Financial Interest
Fourth Circuit	LR 26.1	Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation
Fifth Circuit	LR 28.2.1	Certificate of Interested Parties
Sixth Circuit	LR 26.1	Corporate Disclosure Statement
Seventh Circuit	LR 26.1	Disclosure Statement
Ninth Circuit	LR 21-3	Certificate of Interested Persons
Tenth Circuit	LR 46.1(c)	Certification of Interested Parties
Eleventh Circuit	LR 26.1-1, 2, 3	Certificate of Interested Persons and Corporate Disclosure Statement
D.C. Circuit	LR 26.1	Disclosure Statement
Federal Circuit	LR 26.1; LR 47.4	Corporate Disclosure Statement, Certificate of Interest

Analysis of the Rules

The local rules in the courts of appeals differ from one another and from the national rule on several dimensions, the most significant being: (1) who must file the information and (2) what type of information is required. These dimensions determine the scope of the additional information sought.

Who must file

FRAP 26.1 requires only non-governmental corporate parties to file financial information. Each of the courts listed in Table 1 has extended the range of parties required to file.

---

party, the judge may have sufficient interest in the litigation to require recusal. The 10 percent 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.

[3] Three courts of appeals do not require additional information. The First and Second circuits have no relevant local rule. The Eighth Circuit has a local rule titled L.R.26.1.A., Corporate Disclosure Statement, which modifies the timing of the filing of the disclosure statement, but does not require additional information from parties.

The Ninth Circuit and District of Columbia Circuit have the least expanded range. The former requires petitioners for writs of mandamus, prohibition, and other extraordinary writs to adhere to FRAP 26.1; the latter requires filings from every party that is "a corporation, association, joint venture, partnership, syndicate, or other similar entity appearing as a party or amicus in any proceeding." Several courts with otherwise expansive rules exempt governmental parties from filing (Fourth, Fifth, Sixth, Seventh, and Federal circuits).[4] Two courts limit disclosure in criminal cases to corporate defendants only (Fourth and Sixth circuits).

The Tenth and Eleventh circuits impose disclosure on the widest range of litigants. The Tenth Circuit requires information from all parties. The Eleventh Circuit requires information from all "appellants, appellees, intervenors and amicus curiae, including governmental parties."

The Third Circuit has a two-tiered set of filing requirements. The court requires all parties to determine whether public corporations with a financial interest in the outcome of litigation exist, and if so, to identify the corporations. For corporate parties and parties to an appeal in a bankruptcy case, there are then additional disclosure requirements specific to case type.

Type of Information

FRAP 26.1 requires corporate parties to identify parent corporations and publicly held companies owning 10 percent or more of the party's stock. The Seventh, Ninth, and Federal circuits have expanded filing requirements by imposing disclosure on parties that FRAP 26.1 does not reach, but these courts do not otherwise require additional information.[5]

The other seven courts vary as to the additional information parties must disclose. The scope of departure from FRAP 26.1 information requirements is quite broad in some courts of appeals. The differences from court to court are also considerable.

The District of Columbia Circuit represents a comparatively modest departure from FRAP 26.1. This court requires parties (which are corporations, associations, joint ventures, partnerships, syndicates or similar entities) to disclose their general nature and, if they are unincorporated entities with no ownership interests, to disclose the names of any members that have issued shares or debt securities to the public.

Broader disclosure is in effect in other courts. The additional information essentially involves having a party identify one or both of the following:

(1) publicly owned entities with a specific *financial connection* to the party;

(2) entities with a more general *financial interest* in the outcome of the litigation.

---

[4] In the Federal Circuit, the exemption is limited to the US government. The Fourth Circuit exempts the US government, but state and local governments are exempt only when the opposing party is proceeding without counsel. The Seventh Circuit requires disclosure if a governmental party is represented by a private attorney.

[5] The Seventh Circuit procedure does, however, demand a listing of law firms appearing for the party or amicus in the case on appeal, or involved in proceedings in the district court or before an administrative agency.

In practice, the distinction between *connection* and *interest* is often blurred. The blurring results from requirements for *financial interest* information that depend on an awareness of the *financial connections* between entities.

The Third, Fourth, and Sixth circuits require *financial connections* information. Corporate parties in the Third and Sixth circuits respond to disclosure demands by listing publicly owned corporate affiliates. Parties in the Fourth Circuit respond by listing publicly held corporations with direct financial interests in the outcome of the litigation by reason of a franchise, lease, other profit sharing agreement, insurance or indemnity agreement. Where disclosure applies to public corporations, parties in the Fourth Circuit must list similarly situated master limited partnerships, real estate investment trusts, and other legal entities whose shares are publicly held or traded. Trade associations in the Fourth Circuit must identify all members of the association, their parent corporations, and any publicly held companies that own 10 percent or more of a member's stock. The Fourth Circuit's requirement for financial connections information is conditioned on the disclosed entities' financial interests in the outcome of litigation.

The Third, Fourth, and Sixth circuits require *financial interests* information in addition to *financial connections* information. The Fifth, Tenth, and Eleventh circuits likewise require *financial interests* information. The Third Circuit requires parties to identify "every publicly owned corporation...that has a financial interest in the outcome of the litigation and the nature of that interest." The Fifth, Tenth, and Eleventh circuits require parties to identify persons, associations (or associations of persons), firms, partnerships, and corporations with an interest in the outcome of litigation. The list of entities further includes guarantors, insurers, affiliates and other financially interested legal entities in the Fifth and Tenth circuits, and subsidiaries, conglomerates, trial judges, and attorneys interested in the outcome in the Eleventh Circuit. The Sixth Circuit requires parties to list publicly held corporations and affiliates which have a substantial interest in the outcome of the litigation that is aligned with the interests of the party by reason of insurance, a franchise agreement, or an indemnity agreement.

The Fourth Circuit, as earlier noted, requires parties to identify entities with a direct *financial interest* in the outcome of litigation by reason of specific *financial connection* to the party. The rule in this circuit demonstrates how intertwined can be entities' financial interests and connections to the parties.

Additional disclosure provisions appear in some local rules. The Third, Fourth, and Sixth circuits require parties to specify the "nature of the interest" of entities with an interest in the outcome of the litigation. The Fifth, Seventh and Federal circuits require parties to identify past and/or present attorneys and law firms representing a party to a proceeding. The Eleventh Circuit requires government disclosure of victims in criminal appeals and disclosure of specific information related to bankruptcy appeals (the name of the debtor, the members of the creditor's committee, any entity which is an active participant in the proceedings, and other entities whose stock or equity value may be substantially affected by the outcome of the proceedings).

Financial Disclosure Requirements in the Courts of Appeals

To frame the variations in financial disclosure rules used in circuit courts of appeals, we analyzed key dimensions of the rules and organized the information into summary tables.

The tables permit analysis of individual rule departures from FRAP 26.1, and also permit intercircuit comparison of local rules. The following dimensions are listed:

(1) the types of parties required to file financial interests information, beyond the requirement for non-governmental corporate parties to file (Extension of the FRAP 26.1 Requirements on Who must file);
(2) the type of information required, beyond the requirements for identifying corporate party parents and listing publicly held companies owning 10 percent or more of the corporate party's stock (Extension of the FRAP 26.1 Requirements for Disclosure of Financial Interest Information);
(3) the time for filing the information (Time of initial filing);
(4) the existence of any requirement for parties with nothing to disclose to submit a negative report so stating (Negative report);
(5) the form of the disclosure (Disclosure form);
(6) the number of copies required to be filed (Number of copies);
(7) the applicability of the rule to various case types and proceedings (Scope of applicability);
(8) the existence of a stated duty for parties to update disclosed information (Obligation to update); and
(9) additional relevant information (Note).

Notes on table entries:

(a) Where a local rule refers to "counsel for the parties" or uses a similar phrase to identify who must file disclosure, we have substituted "parties" for the sake of brevity (see Extension of the FRAP 26.1 Requirements on Who must file).
(b) We use the phrase "identification of (e.g., parent companies, subsidiaries, and affiliates)" to summarize the type of information required of parties (see Extension of the FRAP 26.1 Requirements for Disclosure of Financial Interest Information). Local rules may use more precise phrasing; counsel may be required, for example, to "certify" a list of the names of interested parties.
(c) Some courts require identification of law firms, partners, etc., which currently or previously represented the party in the issue before the court. These requirements are noted in the tables even though they are not directly related to the report (see entries titled Extension of the FRAP 26.1 Requirements for Disclosure of Financial Interest Information and Note).

U.S. Court of Appeals for the Third Circuit

Local Rule 26.1.1, Disclosure of Corporate Affiliations and Financial Interest

Extension of the FRAP 26.1 requirements on who must file
Every party to an appeal, unless the party has nothing to report

Extension of the FRAP 26.1 requirements for disclosure of financial interest information
From all parties (unless the party has nothing to report): identification of every publicly owned corporation not a party to the appeal that has a financial interest in the outcome of the litigation and the nature of that interest (financial interests information);

If the party is a corporation: identification of every publicly owned corporation not named in the appeal with which the party is affiliated (financial connections information);

If the appeal is from a bankruptcy case, the debtor or trustee of the bankruptcy estate or, if the debtor or trustee is not a party, the appellant, must additionally identify (1) the debtor, if not named in the caption, (2) the members of the creditors' committees or the top 20 unsecured creditors, and (3) any entity not named in the caption which is an active participant in the proceeding

Time of initial filing
Financial interests information: with the FRAP 26.1 disclosure statement

Financial connections information: promptly after the notice of appeal is filed

Bankruptcy appeals supplemental information: a list is to be provided "promptly" to the clerk

Negative report
Financial interests information: a negative report should *not* be filed

Financial connections information: a negative report is required

Disclosure form
Financial interests information: should be provided on the FRAP 26.1 disclosure statement

Financial connections information: should be filed on a form provided by the clerk; detail of the form is not prescribed by rule

Number of copies
The local rule is silent.

Scope of applicability
Civil, bankruptcy, and criminal cases

Obligation to update
The local rule is silent.

Note
Local Rule 26.1.2, Notice of Possible Judicial Disqualification, requires appellant to notify the Clerk if any judge of the Court participated at any stage of the case, in the trial court or in related state court proceedings. If appellant fails to notify the Clerk, the appellee is responsible for doing so.

U.S. Court of Appeals for the Fourth Circuit

Local Rule 26.1, Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation

Extension of the FRAP 26.1 requirements on who must file
All parties to a civil or bankruptcy case, and all corporate defendants in a criminal case; the rule does not apply to the United States, or to state or local government in cases where the opposing party is proceeding without counsel, or to parties proceeding in forma pauperis

Extension of the FRAP 26.1 requirements for disclosure of financial interest information
Identification of any publicly held corporation, whether or not a party to the litigation, that has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement (Rule 26.1(b)(2)); identification of similarly situated master limited partnerships, real estate investment trusts, or other legal entities that have issued public shares (Rule 26.1(b)(3)); identification by a trade association of association members, their parent corporations, and any publicly held companies that own 10 percent or more of a member's stock (Rule 26.1(b)(1))

Time of initial filing
Within 10 days of receiving the notice of docketing and the disclosure form; if earlier pleadings are submitted to the Court, the disclosure shall be filed at that time

Negative report
Required

Disclosure form
Form A. Disclosure of Corporate Affiliations and Other Entities With a Direct Financial Interest in Litigation

Number of copies
One (see directions to Form A)

Scope of applicability
Civil, bankruptcy, and criminal cases

Obligation to update
Stated

Note
Form A provides for the disclosure of information prescribed in the local rule, *and additionally,* instructs parties to state the nature of each named entity's financial interests

U.S. Court of Appeals for the Fifth Circuit

Local Rule 28.2.1, Certificate of Interested Persons

Extension of the FRAP 26.1 requirements on who must file
All non-governmental parties, including unrepresented parties.

Extension of the FRAP 26.1 requirements for disclosure of financial interest information
Identification of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent corporations, or other legal entities financially interested in the outcome of the litigation; if a large group of persons or firms can be specified by a generic description, individual listing is not required; identification of the opposing law firms and/or counsel in the case; counsel is obliged to disclose known information on all sides of the case, not merely for the represented party.

Time of initial filing
The local rule is silent.

Negative report
The local rule is silent.

Disclosure form
Certificate of Interested Persons; the form is prescribed in the local rule.

Number of copies
The local rule is silent.

Scope of applicability
Not explicitly specified, although the rule is intended to be broad in scope.

Obligation to update
The local rule is silent.

U.S. Court of Appeals for the Sixth Circuit

Local Rule 26.1, Corporate Disclosure Statement

Extension of the FRAP 26.1 requirements on who must file
All parties and amici curiae to a civil case or bankruptcy case, agency review proceeding, or original proceeding, and all corporate defendants in a criminal case, *unless* the party is the United States or an agency thereof, or is a state government or an agency or political subdivision thereof.

Extension of the FRAP 26.1 requirements for disclosure of financial interest information
From a corporate party or corporate amicus curiae that is a subsidiary or affiliate of any publicly owned corporation not named in the appeal: identification of the publicly owned parent corporation or affiliate, and the nature of the corporate relationship (a corporation is deemed an affiliate of a publicly owned corporation for purposes of the rule if it controls, is controlled by, or is under common control with a publicly owned corporation).

From parties and amicus curiae generally: identification of any publicly owned corporation or its affiliate, not a party or an amicus to the appeal, which has a substantial financial interest in the outcome of the litigation that is aligned with the financial interest of the party or amicus by reason of insurance, a franchise agreement, or indemnity agreement, and additionally, identification of the nature of the substantial financial interest held by the corporation or its affiliate.

Time of initial filing
Whichever occurs first among possibilities that include the filing of a brief, motion, response, petition, or answer.

Negative report
Required, except of individual criminal defendants.

Disclosure form
Form 6 CA-1, Disclosure of Corporate Affiliations and Financial Interest, is provided by the clerk.

Number of copies
The local rule is silent.

Scope of applicability
Civil cases, bankruptcy cases, criminal cases, agency review cases, and original proceedings.

Obligation to update
The local rule is silent.

U.S. Court of Appeals for the Seventh Circuit

Local Rule 26.1, Disclosure Statement

Extension of the FRAP 26.1 requirements on who must file
All non-governmental parties or amicus curiae and every private attorney representing a governmental party.

Extension of the FRAP 26.1 requirements for disclosure of financial interest information
Identification of the names of all law firms whose partners or associates have appeared for the party or amicus in the case (including proceedings in the district court or before an administrative agency) or who are expected to appear.

Time of initial filing
With the principal brief or upon filing a motion, response, petition, or answer in the court, whichever occurs first.

Negative report
The Disclosure Statement form directs counsel to indicate when requested information is not applicable (but use of the form is not mandatory and the local rule is silent on whether a negative report is required).

Disclosure form
A form titled Disclosure Statement is available and its use is encouraged.

Number of copies
The local rule is silent.

Scope of applicability
The local rule is silent.

Obligation to update
The Disclosure Statement form advises that "(t)he attorney furnishing the statement must file an amended statement to reflect any material changes in the required information"; use of the form is encouraged but not required by the court.

U.S. Court of Appeals for the Ninth Circuit

Local Rule 21-3, Certificate of Interested Persons

The rule reads: "Petitions for writs of mandamus or prohibition, and for other extraordinary writs, shall include the corporate disclosure statement required by FRAP 26.1 and the statement of related cases required by Circuit Rule 28-2.6."

U.S. Court of Appeals for the Tenth Circuit

Local Rule 46.1(c), Certification of Interested Parties

Extension of the FRAP 26.1 Requirements on Who must file
All parties.

Extension of the FRAP 26.1 requirements for disclosure of financial interest information
Identification of all persons, associations, firms, partnerships, corporations, guarantors, insurers, affiliates, and other legal entities that are financially interested in the outcome of the litigation; additionally, identification of attorneys not entering an appearance if they have appeared for any party in a proceeding where review is sought, or in related proceedings that preceded the original action pursued in the court; if a large group of persons or firms can be specified by a generic description, an individual listing is unnecessary.

Time of initial filing
Filed with each entry of appearance (entry of appearance must be filed within ten days of the filing of an appeal or other proceeding).

Negative report
Required.

Disclosure form
Appendix A, Form 2. Entry of Appearance and Certificate of Interested Parties.

Number of copies
The original and three copies (specified in the instructions for Form 2).

Scope of applicability
Not explicitly specified, but court staff indicated in private communication that the rule applies to all case types and proceedings.

Obligation to update
Stated.

U.S. Court of Appeals for the Eleventh Circuit

Certificate of Interested Persons and Corporate Disclosure Statement
Local Rule 26.1-1, Contents; Local Rule 26.1-2, Time for Filing;
Local Rule 26.1-3, Format

Extension of the FRAP 26.1 requirements on who must file
Appellants, appellees, intervenors and amicus curiae, including governmental parties.

Extension of the FRAP 26.1 requirements for disclosure of financial interest information
Identification of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held company that owns 10 percent or more of the party's stock, and other identifiable legal entities related to a party; in criminal or criminal-related appeals, identification of the victim(s); in a bankruptcy appeal, identification of the debtor, the members of the creditor's committee, any entity which is an active participant in the proceedings, and other entities whose stock or equity value may be substantially affected by the outcome of the proceedings.

Time of initial filing
Included within the principal brief filed by any party and included within any petition, answer, motion or response filed by an party (except for unopposed motions for procedural orders described in Local Rule 27-1(c)).

Negative report
The local rule is silent.

Disclosure form
The format of the Certificate of Interested Persons and Corporate Disclosure Statement, which is an alphabetical list of persons and entities, is described with particularity in Local Rule 26.1-3.

Number of copies
The local rule is silent.

Scope of applicability
Criminal and bankruptcy cases (these case types receive specific mention in the rule); applicability is inferred for civil cases, agency review, and original proceedings.

Obligation to update
The local rule is silent.

Note
Local Rule 26.1-2 states: "The clerk is not authorized to submit to the court any brief (except the reply brief of an appellant or cross-appellant), petition, answer, motion or response which does not contain the certificate, but may receive and retain the papers pending supplementation of the papers with the required certificate." The court's internal operating procedures manual states that the court will not act on any papers requiring the disclosure form, including emergency filings, until the form is filed, except to prevent injustice.

U.S. Court of Appeals for the District of Columbia Circuit

Circuit Rule 26.1, Disclosure Statement

Extension of the FRAP 26.1 requirements on who must file
Every party that is a corporation, association, joint venture, partnership, syndicate, or other similar entity appearing as a party or amicus in any proceeding

Extension of the FRAP 26.1 requirements for disclosure of financial interest information
Identification of the general nature and purpose of the entity (party) insofar as relevant to the litigation; if the entity (party) is an unincorporated entity whose members have no ownership interests, the disclosure statement must list the names of the members of the entity that have issued shares or debt securities to the public.

No identification of members of a trade association or professional association is required.

Time of initial filing
As specified in FRAP 26.1, or within seven days of service of the docketing statement or granting of an intervention motion (if the party is a respondent, appellee, or intervenor) (Circuit Rule 12(f) and Circuit Rule 15(c)(6)), or as otherwise ordered by the court.

Negative report
The local rule is silent.

Disclosure form
The local rule is silent.

Number of copies
The local rule is silent.

Scope of applicability
All proceedings.

Obligation to update
The local rule is silent.

Note
The rule defines "parent companies" for FRAP 26.1 disclosure purposes as including all companies controlling the specified entity directly, or indirectly through intermediaries.

The rule defines a "trade association" as a continuing association of numerous organizations or individuals operated for the purpose of promoting the general commercial, professional, legislative, or other interests of the membership.

U.S. Court of Appeals for the Federal Circuit

Local Rule 26.1, Corporate Disclosure Statement
Local Rule 47.4, Certificate of Interest
Federal Circuit Rule 26.1 directs parties to provide FRAP 26.1 information in the Certificate of Interest required by Federal Circuit Rule 47.4. Federal Circuit Rule 47.4 prescribes the entries in the table below.

Extension of the FRAP 26.1 Requirements on Who must file
All parties, intervenors, and amicus curiae other than the United States.

Extension of the FRAP 26.1 Requirements for Disclosure of Financial Interest Information
The local rule is silent.

Time of initial filing
Filed with the entry of appearance, and also filed with any motion, petition, or response, and in each principal brief and brief amicus curiae (L.R. 47.4).

Negative report
Required.

Disclosure form
Appendix of Federal Circuit Forms, Form 6. Certificate of Interest.

Number of copies
The local rule is silent.

Scope of applicability
Applicability is inferred for civil cases and agency review proceedings; the court has no jurisdiction over criminal or bankruptcy matters.

Obligation to update
Stated; party must file an amended certificate within seven days of the change.

Note
The requirements of FRAP 26.1 are satisfied by filing a certificate of interest under Federal Circuit Rule 47.4.

Local Rule 47.4 requires identification of law firms and partners and associates who have appeared for the party in the lower tribunal or who are expected to appear for the party in a circuit proceeding; the rule requires additional information as well, but the specifics are not relevant to this inquiry.

Part III. Analysis of Financial Disclosure Filing Requirements in the District Courts

No national counterpart to FRAP 26.1 exists for the federal district and bankruptcy courts. Through standard legal research methods and a national survey of all district clerk's offices, we identified twenty-five federal district courts which have some type of filing requirement. Twenty district courts have a local rule on point, and in five other district courts, either the court or individual judges within the court have fashioned alternative procedures for obtaining financial interests information from parties.[6] We identified, in addition, two district courts with local rules in the proposal stage, and a district court that enacted, and recently repealed, a local rule on disclosure. Table 2 identifies the twenty-eight district courts with relevant rules or procedures revealed by our search; the listing is alphabetical by state.

This part of the report analyzes local rules and other directives relating to disclosure of financial information in the district courts. There are four sections. The first discusses some of the variations in local rules and practices. The second summarizes the results in comparative tables. The third reports on a limited inquiry we made into chief judge impressions of the need for expanded disclosure requirements. The fourth provides information on the experience of the District of Kansas, which implemented and then repealed a local rule on disclosure of financial interests information.

Table 2. U.S. District Courts Requiring Party Disclosure of Financial Interests Information

Court	Local Rule or Directive	Rule Title or Explanation of Directive
S.D. Ala.	LR 3.2	Disclosure Statement
E.D.Ark.	other directives	Some judges require pending acquisitions and mergers information from parties in their scheduling order. One judge directs counsel to check a list of his financial holdings placed on file with the clerk's office; counsel must alert the judge to possible financial conflicts of interest.
C.D. Cal.	LCvR 4.6	Certification as to Interested Parties
	Ch.VI Rule 2.2	Local Bankruptcy Rules, Filing the Notice of Appeal
	Ch.VI. Rule 6.1	Local Bankruptcy Rules, Withdrawal of Reference from the Bankruptcy Court
D.D.C.	LCvR 26.1	Disclosure of Corporate Affiliations and Financial Interests

[6] The number of courts with filing requirements may change before this report is issued, as staff in several district courts reported that their court is considering adoption of a relevant local rule. Indeed, we learned that one court adopted a local rule a few months after the clerk informed us that the court had no rule, and we located another new local rule (included in the tables) as this report went to press.

We completed our search for local rules in database collections in June 1999. We surveyed clerks of courts in all district and bankruptcy courts in July, asking them to check the search results for accuracy. Responses came to us over a period of several months. With follow-up mailings, all but seven district courts and six bankruptcy courts responded to the request for information by November.

M.D.Fla.	orders	One judge requires disclosure by standing order; another requires disclosure through use of orders and case management tools.
N.D. Ga.	LCvR 3.3	Certificate of Interested Parties
S.D.Ga.	LCvR 3.2	Disqualification of Judges Local Rules for the Administration of Criminal Cases
N.D. Ill.	GenR 2.23	Notification as to Affiliates
S.D. Ill.	LR 11.1.b	Disclosure of Interested Parties/Affiliates
C.D. Ill.	GenR 11.3	Certificate of Interest
D. Kan.	*repealed* LR 3.2; orders; public access to lists of financial holdings	LR 3.2, Required Certification of Interested Parties, has been repealed. Some judges continue to collect financial interests information from parties; some judges instruct counsel to check a list of financial holdings placed on file with the clerk and notify them if there is a potential financial conflict of interest.
D.Me.	LCvR 83.7 LBankR 1002-1(b)(3)	Corporate Disclosure Statement Disclosure Statement
D.Md.	LCvR 103.3	Disclosure of Affiliations and Financial Interest
E.D.Mi.	L.R. 83.4	Disclosure of Corporate Affiliations and Financial Interest
N.D. Miss.[a]	*proposed* L.R. 3.1(D)	Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation
S.D.Miss.[a]	*proposed* L.R. 3.1(D)	Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation
E.D. Mo.	LR 2.09	Disclosure of Corporation Interests
W.D. Mo.	LCvR 3.1	Disclosure of Corporation Interests
D. Nev.	LR 10-6	Certificate as to Interested Parties
D.N.H.	LCvR 3.6(a)(4)	Appearances
E.D.N.Y.[a]	LCvR 1.9	Disclosure of Interested Parties
S.D.N.Y.[a]	LCvR 1.9	Disclosure of Interested Parties
W.D. Pa.	LR 3.2	Disclosure Statement
D.S.C.	LR 26.01; 26.03(I); 26.04; 26.06(J); 26.07	General Provisions Governing Discovery; Duty of Disclosure
S.D. Tex.	pretrial order	Individual judges mandate financial disclosure using a standing order served on parties during the initial pretrial and scheduling conference.
D. Vt.	general order	General Order No. 45, In Re: Disclosure of Corporate Interests
E.D. Wis.	LR 5.05	Certificate of Interest
W.D.Wis.	operating procedure	Private parties that are businesses, companies, or corporations are expected to disclose financial interests information on a form provided by the clerk; there is no local rule or court-wide standing order in effect to compel disclosure.

[a] The district courts listed from the same state operate under uniform local rules provisions.

Analysis of the Rules

Most of the district courts appearing in Table 2 have broader filing requirements than the current requirements of FRAP 26.1. Not surprisingly, a number of them have disclosure provisions modeled on the precursor requirements of FRAP 26.1, which required identification of affiliates and subsidiaries that are not wholly owned (e.g., D.Me., W.D.Mo, D.N.H., D.Vt.).

The 1998 amendment eliminating the need to identify subsidiaries and affiliates is too recent to have had widespread impact as a model in the district courts. Nonetheless, the current version of FRAP 26.1 has been the model for a few recently enacted district court local rules. Two courts have filing requirements equivalent to the current FRAP 26.1 requirements (C.D.Ill. and E.D.Wis.).[7] One court has filing requirements incorporating elements from both the current and precusor versions of FRAP 26.1 (E.D.Mo.). Our search also revealed that one court arguably has filing requirements that are narrower than FRAP 26.1 (W.D.Pa.).[8]

Variations in rules and procedures are as plentiful among the district courts as they are among the circuit courts of appeals. The rules differ from each other and from FRAP 26.1 on a number of dimensions, the most significant being: (1) who must file the information; (2) the types of cases subject to the rule; and (3) what type of information is required. We highlight some of the differences on these dimensions, including in the discussion not only active, but also proposed and repealed rules.[9]

Who must file

Among the district court local rules, there is considerable variation in who must disclose information. At one end of the range is the narrow requirement borrowed from FRAP 26.1 obliging "non-governmental corporate parties" to file disclosure statements (e.g., D. Me., E.D. Mo., W.D. Mo., D. Vt.). The requirement expands only slightly to encompass "corporate parties and corporate intervenors" in another court (D.D.C.).

The type of party required to file disclosure statements is more widely drawn in other courts. Several apply the requirement to other parties with an obvious business connection (e.g., N.D.Ill., where a party that is an affiliate of a public company is required to file information; W.D.Pa., with filing requirements for any "corporation, association, joint

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[7] The Central District of Illinois and Eastern District of Wisconsin local rules conform with FRAP 26.1, except that they require disclosure from amicus curiae in addition to corporate parties.

[8] FRAP 26.1 requires disclosure of any publicly held company that holds 10 percent or more of the party's stock. The disclosure mandated by Local Rule 3.2 in the Western District of Pennsylvania is limited to a publicly held company which is an "affiliate" of the party, where "affiliate" is defined as "a person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, the specified entity." One of the court's judges has pointed out that unless a 10 percent ownership would be a controlling interest, disclosure would not be mandated under the local rule, making the requirements less broad than those of FRAP 26.1.

[9] Some courts have the same rule provisions. Citations made in this report to the rule in the Northern District of Mississippi or the Eastern District of New York incorporate by reference the complementary court with uniform local rules (S.D.Miss. and S.D.N.Y, respectively). Citation to the local rule in the Western District of Pennsylvania incorporates by reference the rule in the Southern District of Alabama, which is identical. The local rule in the Central District of Illinois is identical to the rule in the Eastern District of Wisconsin, except for minor word changes.

venture, partnership, syndicate, or other similar entity appearing as a party or amicus in any proceeding"; and D.S.C., with filing requirements for "any party (plaintiff or defendant) that is either a publicly owned entity, or is a partner, parent, subsidiary or affiliate of a publicly owned entity"). In two courts, filing is required of parties completing the pretrial phase of litigation, without regard to whether the party is a business (E.D.Ark., S.D.Tex.).

The broadest filing requirements compel early disclosure in civil cases from "all parties" (e.g., C.D.Cal., D.Kan., N.D.Miss.), "all non-governmental parties and amicus curiae unless the party is a pro se litigant" (C.D. Ill.), and "all private non-governmental parties" (e.g., N.D. Ga., S.D. Ill., E.D.N.Y). Broad filing requirements are more common than narrow filing requirements.

In a few instances, courts have specified particular exemptions or inclusions in the party types expected to disclose information. Three courts exempt individuals filing habeas corpus (D.Nev., D.S.C., S.D.Tex.). Two courts exempt pro se litigants (C.D.Ill, D.S.C.). Other courts exempt parties in bankruptcy proceedings (D.S.C.) or parties filing bankruptcy appeals (S.D.Tex.). The District of South Carolina and the Southern District of Texas list additional parties exempt from filing.

Amicus curiae parties are specifically noted as *inclusions* in a few of the courts' requirements to file (S.D.Ala., C.D.Ill., W.D.Pa., E.D.Wis.).

Types of Cases

Some district courts limit the disclosure to civil litigants only. Some require disclosure in criminal cases, from either corporate defendants or the government. Bankruptcy proceedings are explicitly covered by the disclosure requirement in some of the district courts. Applicability of disclosure requirements to bankruptcy proceedings in other district courts is ambiguous. The local rules in a few of the district courts note applicability to special case categories involving agency review and maritime proceedings.

Types of Information

The scope of information that parties are required to disclose varies greatly among the district courts. Essentially, however, each court requires parties to identify one or both of the following: (1) entities having specific *financial connections* with the party and (2) entities with a *financial interest* in the outcome of the litigation (and, additionally, the nature of the interest). These categories are not mutually exclusive and, as we noted in the discussion of the appellate court local rules, the distinction is blurred in practice.

Information on financial connections typically involves a listing of parent corporations, subsidiaries not wholly owned, and affiliates that are publicly held (e.g., D.Me., E.D.Mi., W.D.Mo., D.N.H., D.Vt.). A few courts specify what is meant by the term "affiliate" (e.g., N.D.Ill., E.D.Mi., W.D.Pa.). Typically, a corporation is considered an affiliate of a publicly owned corporation if it controls, is controlled by, or is under common control with the publicly owned corporation. Other financial connections information can include identification of entities such as similarly situated master limited partnerships, real estate investment trusts, joint ventures, and syndicates (N.D.Miss.).

Information on financial interests involves either listing entities with "a substantial financial interest", or simply "an interest" in the outcome of the litigation. Many courts il-

lustrate the kind of entities that may have financial interests in the case. These lists include subgroups of entities such as associations of persons, firms, partnerships and corporations, unincorporated associations, and officers, directors, or trustees of parties. Some local rules also provide for the identification of insurers (e.g., C.D.Cal., D.Kan., D.Md., E.D.Mi.).

One local rule simply requires parties to identify all public corporations with a financial interest in the outcome of the case (S.D.Ill.). Another shows the crossover of *financial connections* and *financial interests* information by requiring a list of persons, associations of persons, firms, partnerships, or corporations having a financial or other interest which could be substantially affected by the outcome of the case, specifically to include all subsidiaries, conglomerates, affiliates, and parent corporations, and any other identifiable legal entity related to a party (N.D.Ga.).

In addition to requiring information on financial connections and interests, local rules in the Northern District of Georgia and the Eastern District of Wisconsin require parties to identify attorneys and law firms representing them in the proceeding. The Eastern District of Missouri has incorporated elements from both the current and precursor versions of FRAP 26.1 by requiring corporate parties to report both publicly held companies owning 10 percent or more of the party's stock and subsidiaries not wholly owned.

The two judges in the Middle District of Florida who use individual forms for collecting disclosure information require parties in criminal matter to identify victims of the conduct alleged in the indictment, if the victims might be entitled to restitution. A similar provision appears in the local rule for the Eleventh Circuit Court of Appeals.

Financial Disclosure Requirements in the District Courts

We have organized the district court local rules and other procedures into tables in alphabetical order by state. The tables summarize the following information:

(1) the types of parties required to file (Who must file);
(2) the type of information required (Required information);
(3) the time for filing the information (Time of initial filing);
(4) the existence of a requirement that parties with nothing to disclose submit a negative report (Negative report);
(5) the form of the disclosure (Disclosure form);
(6) the number of copies required to be filed (Number of copies);
(7) the applicability of the rule to various case types and proceedings (Scope of applicability);
(8) the existence of a stated duty for parties to update disclosed information (Obligation to update); and
(9) additional relevant information (Note).

Notes on table entries:

(a) Where a local rule refers to "counsel for the parties" or uses a similar phrase to identify who must file disclosure, we have substituted "parties" for the sake of brevity (see Who must file).
(b) We use the phrase "identification of [e.g., parent companies, subsidiaries, and affiliates]" to summarize the type of information required of parties (see Required

information). Local rules may use more precise phrasing; counsel may be required, for example, to "certify" a list of the names of interested parties.

(c) Some courts require identification of law firms, partners, etc., that currently or previously represented the party in the issue before the court. These requirements are noted in the tables even though they are not directly related to the report (see Required information).

U.S. District Court for the Southern District of Alabama

Local Rule 3.2, Disclosure Statement

Who must file
A corporation, association, joint venture, partnership, syndicate, or other similar entity appearing as a party or amicus in any proceeding.

Required information
Identification of all parent companies, subsidiaries, and affiliates that have issued shares or debt securities to the public, where: (1) "affiliate" means a person that directly or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, the specified entity, (2) "parent" means an affiliate controlling such entity directly, or indirectly through intermediaries, and (3) "subsidiary" means an affiliate controlled by such entity directly or indirectly through one or more intermediaries.

Identification of the represented entity's general nature and purpose; if the entity is unincorporated, identification of any members of the entity that have issued shares or debt securities to the public.

No listing is required, however, of the names of members of a trade association or professional association, where "trade association" is defined as a continuing association of numerous organizations or individuals operated for the purpose of promoting the general commercial, professional, legislative, or other interests of the membership.

Time of initial filing
At the time of the filing of the initial pleading or other court paper on behalf of the party, or as otherwise ordered by the court; if an emergency or other situation makes filing the disclosure statement impossible or impracticable, the statement shall be filed within seven days of the date of the original filing, or such other time as the court may direct.

Negative report
Disclosure Statement, but not the local rule, indicates that a negative report should be filed.

Disclosure form
Disclosure Statement Pursuant to Local Rule 3.2, located in Appendix A of the local rules.

Number of copies
The local rule is silent.

Scope of applicability
All proceedings.

Obligation to update
Stated.

Note
LR 3.2 of S.D. Ala. is identical to LR 3.2 of W.D. Pa.

U.S. District Court for the Eastern District of Arkansas

The court has no local rule on party disclosure of financial interests information. Several judges require publicly traded corporate parties to advise the court of pending acquisitions and actual mergers. The directive is issued with the scheduling order for trial.

One judge, however, uses the Scheduling Order to issue a different directive. This judge instructs counsel to check a list of financial holdings that he has placed on file with the clerk's office. Counsel is responsible for alerting the judge to possible financial conflicts of interest.

U.S. District Court for the Central District of California

Local Civil Rule 4.6, Certification as to Interested Parties
Rule 2.2 of Ch.VI, Local Bankruptcy Rules, Filing the Notice of Appeal
Rule 6.1 of Ch.VI, Local Bankruptcy Rules, Withdrawal of Reference from the Bankruptcy Court

Local Civil Rule 4.6

Who must file
All parties.

Required information
Identification of all persons, association of persons, firms, partnerships and corporations (including parent corporations) which have a direct, pecuniary interest in the outcome of the case, including any insurance carrier which may be liable in whole or in part (directly or indirectly) for a judgment that may be entered in the action or for the cost of defense.

Time of initial filing
Party's first appearance.

Negative report
The local rule is silent.

Disclosure form
Notice of Interested Parties; (form prescribed in the local rule).

Number of copies
Original and two copies.

Scope of applicability
All civil actions and proceedings in the district court (by Local Rule 1.1) or matters of a civil nature (by Local Rule 1.3(c)).

Obligation to update
The local rule is silent.

Rule 2.2 of Chapter VI (applies to bankruptcy appeals taken to the district court)

Who must file
Parties appealing to the district court from the bankruptcy court.

Required information
Identification of interested parties (to be provided to the bankruptcy court clerk).

Time of initial filing
At the time the notice of appeal is filed.

Negative report
The local rule is silent.

Disclosure form
The local rule is silent.

Number of copies
The local rule is silent.

Scope of applicability
Bankruptcy appeals to the district court.

Obligation to update
The local rule is silent.

Rule 6.1 of Chapter VI (applies to pending bankruptcy cases and proceedings where a motion has been made to withdraw reference from the bankruptcy court to the district court)

Who must file
Parties moving to withdraw reference of matters pending in the bankruptcy court and parties opposing such a motion.

Required information
Identification of interested parties (to be provided to the district court clerk and to the presiding bankruptcy judge).

Time of initial filing
With the motion to withdraw or with reply papers in opposition.

Negative report
The local rule is silent.

Disclosure form
The local rule is silent.

Number of copies
The local rule is silent.

Scope of applicability
Pending bankruptcy cases and proceedings.

Obligation to update
The local rule is silent.

U.S. District Court for the District of Columbia

Local Civil Rule 26.1Disclosure of Corporate Affiliations and Financial Interests

Who must file
Corporate parties and corporate intervenors.

Required information
Identification of any parent, subsidiary or affiliate of the party or intervenor which has any outstanding securities in the hands of the public.

Time of initial filing
At the time the party's first pleading is filed.

Negative report
The local rule is silent.

Disclosure form
Form prescribed in the local rule.

Number of copies
The local rule is silent.

Scope of applicability
Civil, agency, and criminal cases (General Rule 109); all other proceedings in the district court (General Rule 101(a)) (including, by inference, bankruptcy cases and other proceedings in the district court).

Obligation to update
Stated.

U.S. District Court for the Middle District of Florida

One Middle District of Florida judge requires disclosure of financial interest information by standing order.

Who must file
Civil: all non-government corporate parties; criminal: the government.

Required information
Civil: identification of all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public.

Criminal: identification of victims of the conduct alleged in the Indictment who are entitled to restitution; and for any non-government corporate victims, identification of all parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates that have issued shares to the public.

Time of initial filing
Within eleven days of the date of the Standing Order

Negative report
The order is silent.

Disclosure form
The order is silent.

Number of copies
The order is silent.

Scope of applicability
Civil and criminal cases.

Obligation to update
Stated.

A second Middle District of Florida judge obtains disclosure of financial interest information through use of several case management tools. These include a Case Management Report (civil cases), Order Requiring [the] Government to File a Certificate of Interested Parties (criminal cases) and [Order titled] Notice to Counsel or Any Pro Se Party to Review and to Certify Compliance (bankruptcy cases).

Who must file
Civil: parties

Criminal: the government; bankruptcy: parties, including pro se parties.

Required information
Civil: identification of all attorneys, persons, associations of persons, firms, partnerships and corporations, including subsidiaries, conglomerates, affiliates, parent corporations, and other identifiable legal entities related to a party, or as to which such party has a controlling interest, that have an interest in the outcome of the case.

Criminal: identification of all persons, associations of persons, firms, partnerships, corporations, including subsidiaries, conglomerates, affiliates, and parent corporations and other identifiable legal entities related to each Defendant, or over which Defendant exercises a controlling interest and who or which may have a financial or monetary interest in the outcome of the case or whose stock or equity value may be substantially affected by the outcome of the case proceedings; identification of known victims, including those to whom restitution may be owed.

Bankruptcy: identification of any person, associations of persons, attorneys, firms, partnerships, corporations, or entities whose stock or equity value may be substantially affected by the outcome of the proceedings, including subsidiaries, conglomerates, affiliates, parent corporations and other identifiable legal entities related to a party.

Time of initial filing
Criminal and bankruptcy: within thirty days of the date of the order.

Negative report
The judge's case management report and orders are silent on this issue.

Disclosure form
The judge's case management report and orders are silent on this issue.

Number of copies
The judge's case management report and orders are silent on this issue.

Scope of applicability
Civil, criminal, and bankruptcy cases.

Obligation to update
Stated.

U.S. District Court for the Northern District of Georgia

Civil Local Rule 3.3, Certificate of Interested Persons

Who must file
All private (non-governmental) parties.

Required information
Identification of persons, associations of persons, firms, partnerships, or corporations having either a financial interest in or other interest which could be substantially affected by the outcome of this particular case (the listing shall specifically include all subsidiaries, conglomerates, affiliates, and parent corporations, and any other identifiable legal entity related to a party); identification of each person serving as a lawyer in the proceedings.

Time of initial filing
Within fifteen days after the first pleading is filed by any defendant or defendants.

Negative report
The local rule is silent.

Disclosure form
Certificate of Interested Persons; form of the certificate prescribed in the local rule.

Number of copies
The local rule is silent.

Scope of applicability
Civil cases.

Obligation to update
Stated.

Note
Counsel for all cases submit joint-certification; if the government is a party, however, certification is submitted only by the private party or parties; in cases of default, the moving party shall submit the required information before seeking any court action on the case.

U.S. District Court for the Southern District of Georgia

Civil Local Rule 3.2, Disqualification of Judges
Local Rules for the Administration of Criminal Cases

Who must file
All private (non-government) parties, both plaintiffs and defendants.

Required information
Identification of all parties; officers, directors, or trustees of parties; and all other persons, associations of persons, firms, partnerships, corporations, or organizations which have a financial interest in, or another interest which could be substantially affected by, the outcome of the particular case.

Time of initial filing
With the first filing (and any subsequent filing) of a complaint and answer.

Negative report
The local rule is silent.

Disclosure form
Certificate of Interested Parties Form, located in the Appendix of Forms to the Local Rules.

Number of copies
The local rule is silent.

Scope of applicability
Civil cases (L.R. 3.2); criminal cases ("These Local Rules . . . are to be construed consistently with the generally applicable (Civil) Local Rules, *supra*."); bankruptcy proceedings in the district court are presumed covered.

Obligation to update
The local rule is silent.

U.S. District Court for the Northern District of Illinois

General Rule 2.23, Notification as to Affiliates

The court expects to renumber General Rule 2.23 as General Rule 3.2 soon, if it has not already done so. The provisions of the original rules are expected to remain intact. A form titled "Disclosure of Affiliates Pursuant to Local Rule 3.2" will be provided to counsel for reporting. This form includes space for counsel to furnish stock ticker symbols.

Who must file

Any party that is an affiliate of a public company.

Required information

Identification of any public company of which the party is an affiliate, where

(1) The term "public company" means a corporation any of whose securities are listed on a stock exchange or are the subject of quotations collected and reported by the National Association of Securities Dealers Automated Quotations Systems (NASDAQ).

(2) The term "affiliate of a public company" means another corporation that controls, is controlled by or is under common control with the public company. The term includes but is not limited to a corporation 10 percent percent or more of whose voting stock is owned by the public company.

(3) The term "control" of a corporation means possession, direct or indirect, of the power to direct or cause the direction of the management and policies of that corporation through the ownership of voting securities or otherwise.

Time of initial filing

A plaintiff files notification with the complaint; a defendant files notification with the answer or with a motion in lieu of answer; if a party becomes a party after the filing of the complaint, the notification is filed with the first pleading filed on behalf of the party.

Negative report

The local rule is silent.

Disclosure form

The local rule is silent.

Number of copies

The local rule is silent.

Scope of applicability

Civil and criminal cases are presumed from the wording of the local rule, applicability to bankruptcy cases and other matters is not known.

Obligation to update

The local rule is silent.

U.S. District Court for the Southern District of Illinois

Rule 11.1.b, Disclosure of Interested Parties/Affiliates

Who must file
Private (non-governmental) parties.

Required information
Identification of any publicly owned corporation, not a party to the case, that has a financial interest in the outcome of the case.

Time of initial filing
At the time of the initial pleading.

Negative report
The local rule is silent.

Disclosure form
The local rule is silent.

Number of copies
The local rule is silent.

Scope of applicability
Civil.

Obligation to update
The local rule is silent.

U.S. District Court for the Central District of Illinois

General Rule 11.3, Certificate of Interest

Who must file
All non-governmental parties and amicus curiae, unless the party is a pro se litigant (but only corporate parties and amici provide financial information).

Required information
If the party or amicus is a corporation: identification of a parent corporation, if any, and identification of corporate stockholders that are publicly held companies owning 10 percent or more of the stock of the party or amicus.

Time of initial filing
With the complaint or upon the first appearance of counsel in the case.

Negative report
The local rule is silent.

Disclosure form
Form prescribed in the local rule.

Number of copies
The local rule is silent.

Scope of applicability
Applicable in all proceedings in all of the courts in the district (CD-IL 1.1).

Obligation to update
The local rule is silent.

Note
Gen R 11.3 is similar to LR 5.05 of E.D.Wis. However, the pro se exception for filing parties does not exist in the E.D.Wis. rule.

U.S. District Court for the District of Kansas

Local Rule 3.2, Required Certification of Interested Parties

Adopted January 1999
Repealed April 1999

Local Rule 3.2 was adapted from Tenth Circuit Rule 46.1.3 entitled "Certification of Interested Parties and Rule 42.1 "Dismissal for Failure to Prosecute." The court adopted its local rule effective January 1, 1999, and repealed it in April 1999. Repeal was based on a finding that problems with the rule's enforcement outweighed any advantage the new procedure potentially offered over existing automated procedures for identifying conflicts of interest. See the Part III section titled "A District Court's Decision to Repeal Its Local Rule on Financial Disclosure" for more information about the court's decision to abandon Local Rule 3.2.

The structure of the repealed rule is summarized below.

Who must file
All parties.

Required information
Identification of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, or other legal entities who are financially interested in the outcome of the litigation (if a large group of persons or firms can be specified by a generic description, no individual listing is required); identification of all parties not named in the caption of the initial pleading or paper; for corporate parties and interested entities, identification of all parent and subsidiary corporations; identification of attorneys not entering an appearance in the court who have appeared for any party in any administrative proceedings sought to be reviewed, or in any related proceedings that preceded the action being pursued in the court.

Time of initial filing
With the initial pleading or other paper filed for a party.

Negative report
The local rule is silent.

Disclosure form
Form provided by the clerk and outlined in the local rule.

Number of copies
The local rule is silent.

Scope of applicability
All civil proceedings.

Obligation to update
Stated.

Note 1

The repealed rule established the following consequences for failure to comply: "If a party fails to comply with the provisions of this rule, the clerk shall notify the party that unless the failure of compliance is remedied within 10 days from the date of the notice the following action will be taken: (a) If the party is a plaintiff, that the action will be dismissed as to that party plaintiff for lack of prosecution; (b) if the party is other than a plaintiff, that default will be entered against that party for lack of prosecution." No cases ever had these sanctions applied under the local rule.

Note 2

Excerpt from a July 2, 1999 letter from Clerk of the Court Ralph L. DeLoach to Abel Mattos of the Administrative Office of the United States Courts, describing enforcement difficulties with the repealed rule:

"[The rule] required *all* parties to attach a certificate of Interested Parties to *every* initial pleading filed in *every* civil case. An issue quickly developed regarding what constituted an 'initial pleading.' An example would be whether a Motion for Extension of Time (to answer a Complaint) filed by a defendant would be considered an initial pleading. The docket clerks were overwhelmed with this issue as pleadings come with many different titles. If a party failed to attach the required Certificate, a notice was sent from the Clerk's Office to the assigned judge indicating non-compliance with the rule. The judge would then determine whether further action was necessary. When a Certificate was filed in compliance with the Rule it was then sent to the assigned judge for a determination of a possible conflict of interest.

"Needless to say, the amount of paperwork generated by this Rule was voluminous. It greatly impacted the workload of both Clerk's Office staff and chambers staff. A great deal of time was spent following up on non-compliance with the Rule. Special codes were created to enable reports to be generated from ICMS tracking delinquent Certificates filing status. The court determined that a lot of work was being done to find the one 'needle in a haystack.'"

U.S. District Court for the District of Maine

Civil Rule 83.7, Corporate Disclosure Statement
Local Bankruptcy Rule 1002-1(b)(3), Disclosure Statement

Who must file
Civil cases: non-governmental corporate parties.
Bankruptcy cases: non-governmental non-individual debtors.

Required information
Civil cases: identification of all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public.
Bankruptcy cases: identification of "affiliates" and "insiders" as defined in 11 U.S.C. § 101(2), (31).

Time of initial filing
Civil cases: with the party's first appearance.
Bankruptcy cases: with the petition commencing the case, or within fifteen days of filing the petition.

Negative report
The local rule is silent.

Disclosure form
The local rule is silent.

Number of copies
The local rule is silent.

Scope of applicability
Civil cases, bankruptcy cases.

Obligation to update
The local rule is silent.

Note
Bankruptcy cases and proceedings pending in the district court are subject to disclosure provisions under Maine Bankruptcy Rule 1001-1.

U.S. District Court for the District of Maryland

Civil Rule 103.3, Disclosure of Affiliations and Financial Interest

Who must file
Parties.

Required information
The identity of any parent or other affiliate, if the party is a corporation, and a description of the relationship between the party and such affiliates; the identity of any corporation, unincorporated association, partnership or other business entity, not a party to the case, which may have any financial interest whatsoever in the outcome of litigation, and the nature of the financial interest; the term "financial interest in the outcome of the litigation" includes a potential obligation of an insurance company or other person to represent or to indemnify any party to the case; information to be provided to the district court clerk.

Time of initial filing
When filing an initial pleading or promptly after learning of the information to be disclosed.

Negative report
The local rule is silent.

Disclosure form
The local rule is silent.

Number of copies
Two.

Scope of applicability
Civil cases.

Obligation to update
The local rule is silent.

U.S. District Court for the Eastern District of Michigan

Civil Rule 103.3, Disclosure of Affiliations and Financial Interest

Who must file
All corporate parties to a civil case and all corporate defendants in a criminal case, *unless* the party is the United States or an agency thereof, or is a state government or an agency or political subdivision thereof

Required information
From a corporate party that is a subsidiary or affiliate of any publicly owned corporation not named in the case: identification of the publicly owned parent corporation or affiliate, and the nature of the corporate relationship (a corporation is considered an affiliate of a publicly owned corporation for purposes of the rule if it controls, is controlled by, or is under common control with a publicly owned corporation).

From parties generally: identification of any publicly owned corporation or its affiliate, not a party to the case, which has a substantial financial interest in the outcome of the litigation that is aligned with the financial interest of the party by reason of insurance, a franchise agreement, or indemnity agreement, and additionally, identification of the nature of the substantial financial interest held by the corporation or its affiliate.

Time of initial filing
With the filing of the first pleading or paper, or as soon as the party becomes aware of the corporate affiliation or financial interests, or as otherwise ordered by the judge to whom the case is assigned.

Negative report
Required.

Disclosure form
Provided by the clerk.

Number of copies
The local rule is silent.

Scope of applicability
Civil and criminal cases.

Obligation to update
Stated.

U.S. District Court for the Northern and Southern Districts of Mississippi

(operating under uniform local rules)

(proposed) Local Rule 3.1(D), Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation

Who must file
All parties (including amici) to a civil action, a maritime proceeding, or a bankruptcy proceeding filed in the district court, and all corporate defendants in a criminal prosecution; the rule does not apply to the United States, to state and local governments in cases in which the opposing party is proceeding without counsel, or to parties proceeding in forma pauperis.

Required information
A non-governmental corporate party must identify parent corporations, publicly held companies owning 10 percent or more of the party's stock, similarly situated master limited partnerships, real estate investment trusts, joint ventures, syndicates, or other legal entities whose shares are publicly held or traded.

The disclosure form, but not the proposed rule, asks that grandparent and great-grandparent corporations be identified.

The disclosure form, but not the proposed rule, asks that publicly held corporations or other publicly held entities that have a direct financial interest in the outcome of the litigation be identified, along with the nature of the interest.

Time of initial filing
The clerk will deliver the disclosure form to parties with the notice of a case's having been assigned to a district judge; return filing is required within ten days of receipt.

Negative report
Required.

Disclosure form
Disclosure of Corporate Affiliations and Other Entities With a Direct Financial Interest in Litigation; the form is provided by the clerk.

Number of copies
The local rule is silent.

Scope of applicability
Civil actions, maritime proceedings, bankruptcy proceedings, and criminal cases.

Obligation to update
Stated.

Note
Proposed local rule.

U.S. District Court for the Eastern District of Missouri

Local Rule 2.09, Disclosure of Corporation Interests

Who must file
Non-governmental corporate parties.

Required information
Identification of all parent companies of the corporation, subsidiaries not wholly owned, and any publicly held company that owns 10 percent or more of the corporation's stock.

Time of initial filing
With the party's first pleading or entry of appearance.

Negative report
Required.

Disclosure form
The local rule is silent.

Number of copies
The local rule is silent.

Scope of applicability
Civil and criminal cases.

Obligation to update
Stated; amendment to be filed within seven days of the change.

U.S. District Court for the Western District of Missouri

Local Rule 3.1, Disclosure of Corporation Interests

Who must file
Non-governmental corporate parties.

Required information
Identification of all parent companies of the corporation, subsidiaries (except wholly owned subsidiaries), and affiliates that have issued shares to the public.

Time of initial filing
With the party's first pleading or entry of appearance.

Negative report
Required.

Disclosure form
The local rule is silent.

Number of copies
The local rule is silent.

Scope of applicability
Civil and criminal cases.

Obligation to update
Stated; amendment to be filed within seven days of the change.

U.S. District Court for the District of Nevada

Local Rule 10-6, Certificate as to Interested Parties

Who must file
All private (non-governmental) parties in cases other than habeas corpus cases.

Required information
Identification of all persons, associations of persons, firms, partnerships or corporations known to have an interest in the outcome of the case.

Time of initial filing
At the time counsel enter the case.

Negative report
Required.

Disclosure form
Form prescribed in the local rule.

Number of copies
The local rule is silent.

Scope of applicability
All cases except habeas corpus cases.

Obligation to update
The local rule is silent.

Note
The court finds the current rule insufficient, and has asked the Standing Committee on Local Rules to consider a proposal modifying the rule to provide that "concurrent with the filing of a complaint or a responsive pleading the party shall be required to file a list of the names of any publicly traded subsidiary and/or parent companies and/or corporation of the party" (August 6, 1999, letter from District Court Executive/Clerk of the Court Lance S. Wilson).

U.S. District Court for the District of New Hampshire

Local Civil Rule 83.6(a)(4), Appearances

Who must file
Non-governmental corporate parties and non-governmental corporate defendants.

Required information
Identification of all parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates that have issued shares to the public.

Time of initial filing
At the time an appearance is filed.

Negative report
The local rule is silent.

Disclosure form
The local rule is silent.

Number of copies
The local rule is silent.

Scope of applicability
Civil cases, bankruptcy cases, agency review proceedings, and criminal cases.

Obligation to update
Stated.

U.S. District Court for the Southern and Eastern Districts of New York

(operating under uniform local rules)
Civil Rule 1.9, Disclosure of Interested Parties

Who must file
Private (non-governmental) parties.

Required information
Identification of any corporate or other parents, subsidiaries, or affiliates of the party, securities or other interests that are publicly held.

Time of initial filing
Filing of the initial pleading or other court paper on behalf of the party.

Negative report
The local rule is silent.

Disclosure form
The reverse side of the civil cover sheet used in the Eastern District of New York has a section directing corporate parties to identify corporate parents, subsidiaries and affiliates

Number of copies
The local rule is silent.

Scope of applicability
Civil actions.

Obligation to update
The local rule is silent.

U.S. District Court for the Western District of Pennsylvania

Local Rule 3.2, Disclosure Statement

Who must file
A corporation, association, joint venture, partnership, syndicate, or other similar entity appearing as a party or amicus in any proceeding.

Required information
Identification of all parent companies, subsidiaries, and affiliates that have issued shares or debt securities to the public, where: (1) "affiliate" means a person that directly or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, the specified entity, (2) "parent" means an affiliate controlling such entity directly, or indirectly through intermediaries, and (3) "subsidiary" means an affiliate controlled by such entity directly or indirectly through one or more intermediaries.

Identification of the represented entity's general nature and purpose.

If the entity is unincorporated, identification of any members of the entity that have issued shares or debt securities to the public.

No listing is required, however, of the names of members of a trade association or professional association, where "trade association" is defined as a continuing association of numerous organizations or individuals operated for the purpose of promoting the general commercial, professional, legislative, or other interests of the membership.

Time of initial filing
At the time of the filing of the initial pleading or other court paper on behalf of the party, or as otherwise ordered by the court; if an emergency or other situation makes filing the disclosure statement impossible or impracticable, the statement shall be filed within seven days of the date of the original filing, or such other time as the court may direct.

Negative report
Disclosure Statement, but not the local rule, indicates that a negative report should be filed.

Disclosure form
Form titled Disclosure Statement, located in Appendix A of the local rules.

Number of copies
The local rule is silent.

Scope of applicability
All proceedings.

Obligation to update
Stated.

Note
LR 3.2 of W.D.Pa. is identical to LR 3.2 of S.D.Ala.

U.S. District Court for the District of South Carolina

Local Rules 26.01; 26.03(I); 26.04; 26.06(J); 26.07, General Provisions Governing Discovery; Duty of Disclosure.

Who must file
Any party (plaintiff or defendant) that is either a publicly owned entity, or is a partner, parent, subsidiary or affiliate of a publicly owned entity (except for parties in bankruptcy proceedings and other specifically exempted case types listed in Local Rule 26.01).

Required information
Identification of the publicly owned entity and its relationship to the disclosing party; identification of any publicly owned entity not a party to the case that has a significant financial interest in the outcome of litigation and the nature of the interest

Time of initial filing
A plaintiff files disclosure with the initial pleading.

A defendant files within thirty days of the later of (1) defendant's responsive pleading or (2) the date on which the person asserting a claim against the defendant serves answers to interrogatories and produces documents pursuant to the local rule.

Negative report
The local rule is silent.

Disclosure form
The local rule is silent.

Number of copies
The local rule is silent.

Scope of applicability
Civil cases, except for the following case types which are exempted under Local Rule 26.01: (a) habeas corpus cases; (b) all government foreclosure cases; (c) all government forfeiture cases; (d) three judge court cases; (e) petitions to quash IRS summons; (f) review of administrative rulings; (g) social security cases; (h) bankruptcy proceedings; (i) veterans administration recovery cases; (j) cases in which there is any pro se litigant; (k) all cases assigned as multi-district litigation pursuant to 28 U.S.C. 1407; (l) condemnation cases; and (m) claims for relief within the admiralty and maritime jurisdiction act set forth in Rule 9(h) of the F.R.Civ.P. and the Supplemental Rules for Certain Admiralty and Maritime Claims.

Applicability may also extend, by inference, to criminal cases (see references to defendants in Local Rules 26.06(J) and 26.07).

Obligation to update
The local rule is silent.

U.S. District Court for the Southern District of Texas

Standing Order, Order for Conference and Disclosure of Interested Parties
The order is served on parties during the initial pretrial conference.

Who must file
Parties appearing for an initial pretrial and scheduling conference.

Required information
Identification of all persons, associations of persons, firms, partnerships, corporations, affiliates, parent corporations, or other entities that are financially interested in the outcome of the litigation; if a group can be specified by a general description, individual listing is not necessary.

Time of initial filing
Within fifteen days of receipt of the order.

Negative report
The standing order is silent.

Disclosure form
The standing order is silent.

Number of copies
The standing order is silent.

Scope of applicability
Civil cases, including cases litigated pro se, except for the following case types which are exempted under Local Rule 8: (a) prisoner civil rights; (b) state and federal habeas corpus; (c) student and veteran loan; (d) Social Security appeals; (e) bankruptcy appeals; and (f) forfeiture of seized assets.

Obligation to update
Stated.

Note
The standing order states, "Failure to comply with this order may result in sanctions, including dismissal of the action and assessment of fees and costs."

U.S. District Court for the District of Vermont

General Order No. 45, In Re: Disclosure of Corporate Interests
The court expects to convert the standing order into a formal local rule when local rules revision is next undertaken.

Who must file
All non-governmental corporate parties.

Required information
Identification of parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates that have issued shares of ownership to the public.

Time of initial filing
With a party's first appearance.

Negative report
The order is silent.

Disclosure form
The order is silent.

Number of copies
The order is silent.

Scope of applicability
All proceedings.

Obligation to update
The order is silent.

U.S. District Court for the Eastern District of Wisconsin

Local Rule 5.05, Certificate of Interest

Who must file
All non-governmental parties and amicus curiae (but only corporate parties and amici provide financial information).

Required information
If the party or amicus is a corporation: identification of a parent corporation, if any, and identification of corporate stockholders which are publicly held companies owning 10 percent or more of the stock of the party or amicus.

Time of initial filing
With the appearance of the party or upon the first filing of a paper on behalf of the party, whichever occurs first.

Negative report
The local rule is silent.

Disclosure form
Form prescribed in the local rule.

Number of copies
The local rule is silent.

Scope of applicability
As a practical matter, the rule is applied only to civil cases, although nothing stated in LR 5.05 or other local rules of the court specifically limits the scope of disclosure to civil cases.

Obligation to update
The local rule is silent.

Note
The rule requires the following additional information: the full name of every party or amicus represented in the case and the name of all law firms whose partners or associates appear for a party or are expected to appear for the party.

The court is currently revising the local rules and expects to renumber Local Rule 5.05 and move it to a section titled "General Local Rules"; such a move would make the requirement for disclosure applicable to "all proceedings."

LR 5.05 is very similar to GenR 11.3 of C.D. Ill.

U.S. District Court for the Western District of Wisconsin

The court has no local rule, court-wide standing order, or individual standing orders on the subject of party disclosure of financial interests information. Private parties that are businesses, companies, or corporations are expected, however, to provide such information at the outset of a case on a form provided by the clerk.

Who must file
Private (non-governmental) parties that are businesses, companies, or corporations.

Required information
If a party is a subsidiary or affiliate of a publicly owned corporation, the party is required to identify the parent corporation or affiliate and the relationship between such and the party; the party is also to identify any publicly owned corporation not a party to the case that has a financial interest in the outcome of litigation and the nature of the financial interest.

Time of initial filing
At the time of initial pleading.

Negative report
No written procedure indicates whether a negative report is required.

Disclosure form
A form titled Disclosure of Corporate Affiliations and Financial Interest is provided by the clerk.

Number of copies
Not known.

Scope of applicability
Civil cases.

Obligation to update
No written procedure indicates whether parties have an obligation to update the disclosure form.

District Judge Views on the Utility of Financial Interests Information

To learn whether local filing requirements meet the needs of the district courts, and to learn about the efficacy of FRAP 26.1 filing requirements, we wrote to chief judges (in some instances, individual judges) in district courts where financial disclosure is routine. In district courts with filing requirements equivalent to FRAP 26.1, we asked whether the judges found the local rule sufficient to identify conflicts of interest and whether the information provided under the local rule had ever failed to signal a conflict of interest. In district courts where filing requirements are more extensive than those of FRAP 26.1, we asked whether judges found the additional information useful in detecting conflicts of interest and whether the judges were aware of instances in which limiting disclosure to FRAP 26.1 requirements would have failed to signal a conflict of interest.

Filing Requirements Equivalent to FRAP 26.1

Two courts have financial disclosure requirements that are essentially equivalent to the limited requirements of FRAP 26.1. We asked the chief judge the following questions:

(1) Have the judges in your district found that Local Rule [number] permits them to identify potential financial conflicts of interest?

(2) Are you aware of circumstances in your court where Local Rule [number of the relevant local rule] failed to provide sufficient information to alert a judge to a conflict of interest requiring recusal?

Both judges responded affirmatively to the first question and negatively to the second question. The requirements have been in effect only a short time, but both courts report that limited financial disclosure requirements have been satisfactory.

Filing Requirements That Go Beyond FRAP 26.1

Courts broaden their disclosure requirements by extending the range of filing parties or the type of information to be filed, or both. We posed the following questions to chief judges (and modified questions to two M.D.Fla. judges) in courts with broadened disclosure requirements:

(1) Have the judges in your district found collected information that goes beyond what is required by FRAP 26.1 useful in detecting potential conflicts of interest?

(2) Are you aware of circumstances where limiting the requested information to that required by FRAP 26.1 would have failed to alert a judge to a conflict of interest requiring recusal?[10]

Nineteen of twenty-two judges contacted responded.[11] Thirteen judges responded by letter and six responded by telephone. Two of the letter responses were drafted by individuals to whom the chief judge had referred the matter (one a judge, the other the clerk of court). One of the telephone responses came from the clerk of court acting on behalf of

[10] We also asked a third question, "Does the court's collection of financial interests information that goes beyond what is required by FRAP 26.1 serve a function other than assisting judges in determining their recusal obligations?" There were no affirmative responses to this question.

[11] We located a new district court local rule as we finalized the report and did not solicit a response from the court's chief judge.

the chief judge. In the discussion that follows, we do not distinguish between local court rules and other directives. We refer to them collectively as "rules."

The responses to the questions are summarized in Table 3. One chief judge reported having polled the judges of the court; the responses of the individual judges were consistent and they are reported as a single count in the table below. A second chief judge forwarded the questions to the judges in his district and heard back from one colleague, who responded to both questions in the negative. We have eliminated the response of the second judge as well as the response offered by that court's Vice Chair of the Advisory Committee on Local Rules in support of the need for broad disclosure. The response of the court that wrote to say its local rule requires less disclosure than FRAP 26.1 is omitted from the totals for the first question.

Table 3. District Judge Reports on the Usefulness of More Information

Question	Yes	No	Difficult to say	No response
Have the judges in your district found collected information that goes beyond what is required by FRAP 26.1 useful in detecting potential conflicts of interest?	11	1	2	4
Are you aware of circumstances where limiting the requested information to that required by FRAP 26.1 would have failed to alert a judge to a conflict of interest requiring recusal?	2	7	3	6

When asked about the utility of collecting information that goes beyond FRAP 26.1 requirements, eleven of the twelve judges who framed a response to the question said that broader information is useful. Respondents tended to support this assessment with additional comment. Two judges described their court's rule as having "prophylactic" value. Two other judges stated that it is best to provide judges with as much information, as early as possible, to avoid later conflicts. Two more judges cited the need to be sensitive to the appearance of a conflict of interest as well as any actual conflict of interest.

When asked whether they were aware of circumstances in which the limited FRAP 26.1 reporting requirements would have permitted a conflict of interest to go undetected, only two of nine judges responding to the question answered affirmatively. Five respondents qualified their answers to our questions by noting that the court's local rule had not been in effect very long.[12]

The reports on these two related, but distinct, questions may appear to present a contradiction. In courts where broader disclosure is routine, there is strong support for information that goes beyond what is required by FRAP 26.1. In those same courts, however, there is only limited evidence favoring the utility of the additional information. The following observation by one of the respondents explains the apparent contradiction:

> Having answered your specific questions, I would like to add my personal view of the utility of our Local Rule, in contrast to that of F.R.A.P. 26.1. I believe we intended that the certificate serve a pro-

[12] In contrast, two respondents indicated that their rule had a long history. An additional respondent volunteered that the court's rule had been in effect two years, but the need to act on the information disclosed occurred rarely.

phylactic function. No matter how careful a judge may be in reviewing cases for possible recusal, there will always be some possibility of an unforeseen circumstance. I think we intended our Local Rule to place the burden on the parties of informing us of any circumstance which could possibly trigger a recusal. Thus, if a judge relies on information in the certificate, but later the necessity for recusal becomes apparent, it will be clear from the public record that the parties did not adequately advise the judge of the relevant facts. While this would not insulate the judge's failure to recuse from judicial scrutiny, it would be helpful in explaining the judge's predicament to the parties and the public.

A District Court's Decision to Repeal Its Local Rule on Financial Disclosure

In the course of our research, we became aware that the District of Kansas recently adopted and then abandoned a local rule on disclosure, finding it excessively burdensome. The circumstances leading to the adoption and repeal were unusual, and we did not find a similar situation in other district courts, but we felt it was important to speak with personnel in that court to learn whether their experience might inform general considerations of whether, and how, to draft such rules. This section summarizes our understanding of the court's experience.[13]

Newspaper articles appearing in May 1998 reported that some federal judges in the Kansas City area had presided over suits involving companies in which the judges owned stock. Judges in the District of Kansas responded to the articles by adopting a local rule requiring counsel to disclose financial information in civil cases. The rule, which was intended to help inform judicial disqualification and recusal decisions, went into effect on January 1, 1999.[14]

Local Rule 3.2 required every party in every civil case to attach a Certificate of Interested Parties to the party's initial pleading. The rule stated that sanctions of dismissal or default judgment would be imposed on parties failing to comply with the rule.[15] Attorneys complied by identifying, as applicable:

(1) all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, or other legal entities financially interested in the outcome of the litigation;

(2) all parent and subsidiary corporations for corporate parties and interested entities;

(3) all parties not named in the caption of the initial pleading or paper; and

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[13] Honorable John W. Lungstrum (U.S. District Court Judge), Sheryl Loesch (chief deputy clerk), Ingrid Campbell (office supervisor), and Lee Kinzer (operations manager) spoke candidly and were especially helpful in describing the court's experience. In addition to their reports, we have also relied on information in a letter written by and provided to us by the clerk of the court, Ralph De Loach. This letter described several problems encountered with the rule, and was addressed to Abel Mattos, an Administrative Office employee who staffs the Judicial Conference Committee on Court Administration and Case Management.

[14] The court also developed an education program to raise awareness of the issue with judges and chambers staff, and installed software in the clerk's office to automatically screen for conflicts of interest.

[15] Only one other district court, the Southern District of Texas, explicitly states that failure to comply with disclosure requirements may result in sanctions, including dismissal of the action and assessment of fees and costs. The timing of the disclosure statement and the parties to whom the rule applies differ substantially from the timing and parties covered by the District of Kansas rule. The Southern District of Texas requires disclosure from parties that have proceeded to the pretrial conference stage.

(4) attorneys not entering an appearance in the court who have appeared for any party in any administrative proceedings sought to be reviewed, or in any related proceedings that preceded the action being pursued in the court.

Court sources reported that problems with the rule arose soon after it was enacted. One set of problems derived from how the rule was implemented and administered. To safeguard against early, inadvertent rulings in cases presenting a conflict of interest, the court required compliance with the rule before a case was allowed to go forward. Clerk's office staff were charged with determining initially whether parties had complied. Resolution of compliance questions required considerable staff time; special docketing codes had to be created to enable the court to track delinquent filing status on certificates; paper generated by various tracking procedures was voluminous. Clerks found aspects of the rule ambiguous and often referred decisions on compliance to chambers staff and the assigned judge for final determination. Many cases were stayed pending resolution of compliance issues and few conflicts were identified.

A few examples of the reported problems may be illustrative. Local Rule 3.2 required every party to attach a Certificate of Interested Parties to its initial pleading or paper. The absence of an attachment might signal either that parties had no information to disclose or, alternatively, might present an instance of noncompliance. Paperwork would go to chambers with a label indicating that the party was "possibly" non-compliant. The interpretation of "initial pleading or paper" as a trigger for the filing requirement was also grounds for confusion, since initial pleadings may appear under various titles, and many filings fail to conform to the traditional complaint-answer sequence. If a complaint were followed by a respondent's motion to extend time, for example, docket clerks had to seek clarification on whether to consider the motion as the initial pleading.

Another set of problems followed from differences in how vigorously the court's judges pursued compliance. Some judges were strict about compliance, and would stay proceedings until statements were filed. Other judges allowed cases to proceed, because the disclosure statements were not needed for their own recusal determinations. The latter group of judges included those with few or no assets presenting possible conflicts of interest, and those who, after publication of the newspaper articles, took the initiative of providing the clerk's office with a list of their corporate holdings. Judges who made their holdings publicly available held counsel responsible for consulting the lists and bringing potential conflicts of interest to their attention. The ambiguities complicated the work of clerk's office staff, who were responsible for seeking compliance and notifying parties that their failure to comply would result in sanctions if compliance was not forthcoming.

Counsel, we were told by court sources, often found compliance burdensome, owing to the volume and detail of information required. This was true particularly in cases where legal relationships between various entities were complex. We were told that parties found the reach of the disclosure requirement confusing, and the effort to compile and cross-check lists expensive and time-consuming. Court staff reportedly spent a lot of time advising counsel on the filing requirements.

The judges of the court repealed Rule 3.2 in April 1999, a few months after enactment. The vote to repeal was unanimous, and no alternative local rule was adopted. The court now leaves it to individual judges to decide whether disclosure is required in cases before

them. Two of the court's judges still require parties to file financial interests information. The three judges who made the names of portfolio-held companies publicly available continue to do so and provide the clerk's office with monthly updates. All judges with a potential need to recuse for financial reasons provide the Clerk's office with information compatible with the court's automated screening software.

Many of the problems experienced with Rule 3.2 were administrative in nature. The problems and inefficiencies of the newly instated procedure placed obvious burdens on court staff, but several factors make conclusions about the shortcomings of the procedure risky. First, the procedure was in effect for only a short a period of time. With increasing experience, it is reasonable to expect that staff would develop operating procedures to address questions they struggled with initially. Increasing experience and education efforts should also reduce confusion experienced by the bar. Second, minor changes to the rule's provisions might greatly reduce procedural and administrative ambiguity. Amending the rule to require (negative) disclosure statements from parties with nothing to disclose, for example, would clarify whether compliance was reached in individual cases. Third, the court appears to have operated with parallel systems in place for potential financial conflicts of interest. Some judges provided financial interests information to parties, while others collected such information from parties. The commitment to seeing parties comply with the rule would likely depend on which custom the judge favored.

Because of these circumstances, lessons that the Rules Committee or other district courts might take away from the District of Kansas experience are somewhat limited. Our interviewees advocated the practice of making judicial financial information available for party inspection in lieu of having parties file disclosure under local rule provisions. Many federal judges are likely to resist public posting of assets, however, and the events in Kansas suggest the potential for problems arising when a local rule is in tension with the practices of individual judges. On balance, the Kansas experience may be most informative as a demonstration of what can, but need not, go amiss when a court implements requirements for parties to file financial interests information.

Part IV. Analysis of Financial Disclosure Filing Requirements in the Bankruptcy Courts and Bankruptcy Appellate Panels

The district court in which a bankruptcy case commences has jurisdiction over the case, and a district court judge may handle first-level bankruptcy adjudication. The district courts additionally hear appeals from final judgments, orders, and decrees of the bankruptcy court. Typically, however, a district court will refer a bankruptcy matter to the bankruptcy judges in the district's associated bankruptcy court. Most of the bankruptcy courts have local rules governing procedural aspects of bankruptcy cases referred from the district court. Consequently, requirements for financial disclosure in bankruptcy matters may be found in both the district courts and the bankruptcy courts. Our search for bankruptcy courts with local rule requirements for financial disclosure turned up four such courts. Table 4 identifies the bankruptcy courts and their provisions.[16]

Table 4. U.S. Bankruptcy Courts Requiring Party Disclosure of Financial Interests Information

Court	Local Rule or Directive	Rule Title
Bankruptcy Court for the District of Columbia	LBankrR 5004-1	Disclosure of Corporate Affiliations and Financial Matters
Bankruptcy Court for the S.D. Georgia	Uniformity of Practice Statement	Local Rules for Bankruptcy Cases; Uniformity of Practice Statement
Bankruptcy Court for the C.D. Illinois	District Court General Rule 1.1	The general and civil rules of the district court apply in all of the courts in the district.
Bankruptcy Court for the D. Maine	LBankrR 1002-1(b)(3)	Disclosure Statement

Each of the bankruptcy courts listed in Table 4 is in a district where the district court has a financial disclosure rule in effect. With the exception of the bankruptcy court in the District of Maine, the bankruptcy courts follow the disclosure rule of the district court. Local Rule 5004-1 of the bankruptcy court for the District of Columbia states that the applicable rule from the district court applies to adversary proceedings and contested matters in the bankruptcy court. The Uniformity of Practice Statement in the local rules of the bankruptcy court for the S.D Georgia directs that the relevant rule of the district court applies by incorporation to bankruptcy cases and proceedings. General Rule 1.1 of the district court for the C.D. Illinois directs that the general and civil rules of the court apply in all of the courts in the district, including the bankruptcy court.

Parties appealing a final judgment from the bankruptcy court to the district court in the Central District of California are subject to filing requirements under local bankruptcy rules of the district court (see Table 2). Parties moving to withdraw reference from the bankruptcy court to the district court must meet the same filing requirements. The bankruptcy court for the Central District of California does not, however, require disclosure in cases referred from the district court.

[16] Standard Bankruptcy Form 7, Statement of Financial Affairs, is completed by debtors and provides the court some, albeit limited, financial information.

Pursuant to 28 U.S.C. §158(b), appeals from bankruptcy court judgments, orders, and decrees may be heard by a bankruptcy appellate panel instead of a district court. The panels consist of three sitting bankruptcy judges designated by the circuit council. Six circuit judicial councils have established such bankruptcy appellate panels.[17] Four of the courts of appeals in those six circuits have a local rule requiring disclosure of financial interests information. Table 5 lists the courts and their rules.

Table 5. Bankruptcy Appellate Panel Rules Requiring Party Disclosure of Financial Interests Information

Bankruptcy Appellate Panel	Local Rule	Rule Title
Second Circuit	BAP LR 8009.1(c)	Disclosure of Interested Parties
Eighth Circuit	BAP LR 8009.A(1)	Certification of Interested Parties
Ninth Circuit	BAP LR 5(c)	Certification as to Interested Parties
Tenth Circuit	BAP LR 8001-2(b)	Certificate of Interested Parties

Financial Disclosure Requirements in the Bankruptcy Courts and Bankruptcy Appellate Panels

Tables summarizing bankruptcy court local rules and provisions for handling appeals by bankruptcy appellate panels follow. The format is identical to tables summarizing the district court provisions.

[17] Circuit court of appeals with BAP programs are the First, Second, Sixth, Eighth, Ninth, and Tenth circuits. The district courts within a circuit are not required to participate. Only the Ninth Circuit has full participation by all district courts within the circuit.

U.S. Bankruptcy Court for the District of Columbia

Local Bankruptcy Rule 5004-1, Disclosure of Corporate Affiliations and Financial Matters

Local Bankruptcy Rule 5004-1 does not yet reflect recently completed revisions to the District Court Local Rules. Local Bankruptcy Rule 5004-1 should reference Local Civil Rule 26.1 in lieu of Local District Rule 109. Local Bankruptcy Rule 5004-1 currently reads: "Local District Rule 109 applies to adversary proceedings and contested matters in the Bankruptcy Court, with the required certificate to be filed in contested matters with a party's paper commencing the contested matter or a party's paper opposing the relief sought in the contested matter."

Who must file
Corporate parties and corporate intervenors to adversary proceedings and contested matters in the bankruptcy court.

Required information
In conformance with Local District Rule 109 (now Local Civil Rule 26.1) of the District Court for the District of Columbia, a party or intervenor must identify any parent, subsidiary, or affiliate of that party or intervenor which has any outstanding securities in the hands of the public.

Time of initial filing
With a party's paper commencing the contested matter or a party's paper opposing the relief sought in the contested matter.

Negative report
The local rule is silent.

Disclosure form
The form prescribed is the same as for the district court.

Number of copies
The local rule is silent.

Scope of applicability
Bankruptcy cases.

Obligation to update
Stated in the district court local rule, so applicable in bankruptcy matters as well.

Note
Local Bankruptcy Rule 5004-1 makes parties to adversary proceedings and contested matters in the bankruptcy court subject to the same disclosure provisions required by the district court.

U.S. Bankruptcy Court for the Southern District of Georgia

Local Rules for Bankruptcy Cases: Uniformity of Practice
The Uniformity of Practice Statement directs that Civil Local Rule 3.2 of the U.S. District Court for the Southern District of Georgia applies by incorporation to bankruptcy cases and proceedings.

Who must file
All private (non-government) parties.

Required information
In conformance with Local Rule 3.2 of the district court, parties identify all parties; officers, directors, or trustees of parties; and all other persons, associations of persons, firms, partnerships, corporations, or organizations which have a financial interest in, or another interest which could be substantially affected by, the outcome of the particular case.

Time of initial filing
The local rule is silent.

Negative report
The local rule is silent.

Disclosure form
Certificate of Interested Parties, located in the Appendix of Forms to the Local Rules.

Number of copies
The local rule is silent.

Scope of applicability
Bankruptcy cases in bankruptcy court.

Obligation to update
The local rule is silent.

U.S. Bankruptcy Court for the Central District of Illinois

General Rule 1.1 of the U.S. District Court for the Central District of Illinois directs that the general and civil rules of the court apply in all of the courts in the district.

U.S. Bankruptcy Court for the District of Maine

Bankruptcy Rule 1002-1(b)(3), Disclosure Statement

Who must file
Non-governmental, non-individual debtors.

Required information
Identification of all "affiliates" and "insiders", as defined in 11 U.S.C. §101(2),(31).4

Under 11 U.S.C. §101(2) "affiliate" means—

(A) entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities (i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or (ii) solely to secure a debt, if such entity has not in fact exercised such power to vote;

(B) corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor, or by an entity that directly or indirectly owns, controls, or holds with power to vote 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities (i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or (ii) solely to secure a debt, if such entity has not in fact exercised such power to vote;

(C) person whose business is operated under a lease or operating agreement by a debtor, or person substantially all of whose property is operated under an operating agreement with the debtor; or

(D) entity that operates the business or substantially all of the property of the debtor under a lease or operating agreement.

Under 11 U.S.C. §101(31) an "insider" includes—

(A) if the debtor is an individual: (i) relative of the debtor or of a general partner of the debtor; (ii) partnership in which the debtor is a general partner; (iii) general partner of the debtor; or (iv) corporation of which the debtor is a director, officer, or person in control;

(B) if the debtor is a corporation: (i) director of the debtor; (ii) officer of the debtor); (iii) person in control of the debtor; (iv) partnership in which the debtor is a general partner; (v) general partner of the debtor; or (vi) relative of a general partner, director, officer, or person in control of the debtor;

(C) if the debtor is a partnership: (i) general partner of the debtor; (ii) relative of a general partner in, general partner of, or person in control of the debtor; (iii) partnership in which the debtor is a general partner; (iv) general partner of the debtor; or (v) person in control of the debtor;

(D) if the debtor is a municipality, elected official of the debtor or relative of an elected official of the debtor;

(E) affiliate, or insider of an affiliate as if such affiliate were the debtor; and

(F) managing agent of the debtor.

Time of Filing
With the petition or within fifteen days thereafter.

Negative report
The local rule is silent.

Disclosure form
The local rule is silent.

Number of copies
The local rule is silent.

Scope of applicability
Bankruptcy cases and proceedings under Title 11 pending in the district court and in the bankruptcy court (Local Bankruptcy Rule 1001-1).

Obligation to update
The local rule is silent.

Bankruptcy Appellate Panels in the Second Circuit Court of Appeals

BAP Local Rule 8009.1(c), Disclosure of Interested Parties

Who must file
Private (non-governmental) parties.

Required information
Identification of persons, associations of persons, firms, partnerships and corporations which may have an interest in the outcome of the case; identification of the connection and interest in the appeal.

Time of Filing
With the initial brief.

Negative report
The local rule is silent.

Disclosure form
The general form of the disclosure certificate is prescribed in the BAP rule.

Number of copies
The local rule is silent.

Scope of applicability
Bankruptcy appeals before a bankruptcy appellate panel.

Obligation to update
The local rule is silent.

Note
The information is provided on the inside cover of the initial brief.

Bankruptcy Appellate Panels in the Eighth Circuit Court of Appeals

BAP Local Rule 8009.A(1), Certification of Interested Parties

Who must file
Appellant (and appellee if the appellee exercises the option to prepare and file a separate appendix with its brief, Internal Operating Procedures Manual at IOP III.B.2).

Required information
Identification of parties that have an interest in the outcome of the appeal; identification of the connection and interest in the appeal.

Time of Filing
At the same time as a party's brief (Internal Operating Procedures Manual at IOP III.B.2).

Negative report
The local rule is silent.

Disclosure form
The general form of the disclosure certificate is prescribed in the BAP rule.

Number of copies
The local rule is silent.

Scope of applicability
Bankruptcy appeals before a bankruptcy appellate panel.

Obligation to update
The local rule is silent.

Note
The information is provided in an appendix to the appellant's brief.

Bankruptcy Appellate Panels in the Ninth Circuit Court of Appeals

BAP Local Rule 5(c), Certification as to Interested Parties

Who must file
Parties.

Required information
Identification of all persons, associations of persons, firms, partnerships and corporations which have an interest in the outcome of the case.

Time of Filing
The local rule is silent.

Negative report
The local rule is silent.

Disclosure form
The general form of the disclosure certificate is prescribed in the BAP rule.

Number of copies
The local rule is silent.

Scope of applicability
Bankruptcy appeals before a bankruptcy appellate panel.

Obligation to update
The local rule is silent.

Note
The information is provided on the inside cover of the initial brief.

Bankruptcy Appellate Panels in the Tenth Circuit Court of Appeals

BAP Local Rule 8001-2(b), Certificate of Interested Parties

Who must file
Parties, including pro se parties (BAP Rule 8001-2(a)).

Required information
Identification of all parties to the litigation not revealed by the caption of the notice of appeal; identification of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, or other legal entities that are financially interested in the outcome of the litigation; for corporations, identification of all parent corporations and identification of any publicly held company that owns 10 percent or more of the corporation's stock; an individual listing is not necessary if a large group of persons or firms can be specified by a generic description; identification of attorneys not entering an appearance in the court who have appeared for any party in the bankruptcy court case or proceeding sought to be reviewed, or in related proceedings that preceded the original action being pursued in this court.

Time of Filing
With each entry of appearance; first entry of appearance should be filed within ten days after service of notice that the appeal has been docketed with the court (BAP Rule 8001-2(a)).

Negative report
Required.

Disclosure form
Form 3. Entry of Appearance, Certificate of Interested Parties, and Oral Argument Statement, located in BAP L.R. Appendix A.

Number of copies
The local rule is silent.

Scope of applicability
Bankruptcy appeals before a bankruptcy appellate panel.

Obligation to update
Stated.

Part V. Summary and Conclusions

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States is evaluating whether a national rule requiring party disclosure of financial interests information in district and bankruptcy courts is necessary, and if so, how the rule should be structured. To assist the committee with its work, the Federal Judicial Center studied practices and variations in methods that are in use in courts where financial information from parties is collected. Our study revealed the following: (1) more than half of the circuit courts of appeals require broader disclosure than the disclosure provided by FRAP 26.1; (2) a significant number of district courts have rules or procedures requiring disclosure; and (3) few bankruptcy courts require disclosure. The variations in the practices of the appellate, district, and bankruptcy courts are numerous. In a review of current practices, we found no consensus approach.

Courts of Appeals

Federal Rule of Appellate Procedure 26.1 is currently the only federal rule that requires disclosure of financial interests information. The rule obligates non-governmental corporate parties to file a statement identifying parent corporations and companies owning 10 percent or more of the party's stock. The disclosure required by FRAP 26.1 is limited, both in terms of who must file (corporate parties only) and what they must file (the identification of parent corporations and publicly held companies owning 10 percent or more stock in the party).

The First, Second, and Eighth circuits make no additional provisions for collecting disclosure information. In contrast to these courts of appeals, the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, District of Columbia, and Federal circuits require additional information from parties by local rule.

The appellate courts expand disclosure required under FRAP 26.1 in two ways. They either broaden the range of parties subject to disclosure and/or they expand the scope of information to be filed. All ten appellate courts with local rules broaden the range of parties who must file information. All except the Seventh and Federal circuits additionally expand the scope of information to be filed.[18]

The additional filing requirements involve two types of information. The first is information that identifies groups of entities with a financial or business connection to the party, over and above the connection that exists by reason of being a parent corporation or company owning 10 percent or more of the party's stock. Parties are usually guided by a listing of entities considered applicable to the requirement; if such disclosure is required, the listing is specified in the local rule of the court.

The second type of information is information that identifies entities with a general financial interest in the outcome of the litigation. Again, the local rule will normally provide guidance by providing a listing of types of entities that must be disclosed.

The appellate court local rules vary substantially. The two most important differences involve who must file disclosure information and what must be filed. These differences

[18] The Seventh Circuit rule requires a listing of law firms and lawyers who have appeared, or will appear, for the party, but for the purpose of this report, this information is not considered an extension of the FRAP 26.1 requirements on financial disclosure.

define the extent to which the courts collect more information than what FRAP 26.1 requires. Other dimensions defining differences among the rules include the time frame for filing disclosure, whether a statement is required if a party has nothing to report, the number of copies required for submission, the scope of applicability to different appeal types such as civil, bankruptcy, and criminal proceedings, and whether the local rule imposes a continuing obligation on parties to keep financial disclosures updated.

District Courts

There is no national rule corresponding to FRAP 26.1 in the district and bankruptcy courts. Nineteen district courts currently have a similar local rule, however, and several other district courts (or individual judges within a court) have fashioned general orders or alternative procedures for collecting responsive information. In addition to the district courts with active disclosure requirements, two courts that operate under a uniform rules agreement have a proposed rule under consideration.

The local rules from two district courts—the Central District of Illinois and the Eastern District of Wisconsin—conform closely to the disclosure requirements specified in FRAP 26.1. The remaining district courts oblige parties to provide more disclosure.

Local rules in a number of these courts are modeled on the precursor to current FRAP 26.1, which required parties to disclose any subsidiaries and affiliates that issued stock to the public. The local rules in other courts require broader disclosure. Like the appellate courts, the district courts provide for the additional information in two ways. They either broaden the range of parties subject to disclosure or they expand the scope of information to be filed. Expanding the scope of information entails identifying groups of entities with various financial or business connections to the party, or identifying, more generally, entities with an interest in the outcome of the litigation. Often, the local rules are quite specific as to what types of entities must be disclosed. These entities may include not only parent corporations, subsidiaries, and affiliates, but also trade associations, partnerships, conglomerates, insurers, and others.

Variations in the district court rules and procedures are numerous. The important variations reflect differences in who must file disclosure information, the types of cases covered by the local rule (some courts limit the application to civil litigants only, others apply the rule more widely), and the type of information that must be filed. Other dimensions that produce differences among the rules include the time frame for filing disclosure, whether a statement is required if a party has nothing to report, the number of copies required for submission, and whether the local rule imposes a continuing obligation on parties to keep financial disclosures updated.

To assess the effectiveness of the disclosure requirements in the district courts, we wrote to chief judges (or in some instances, individual judges) in courts with local rules or procedures for collecting broad financial information. We asked whether the judges in the district found their local rule's requirement for "additional" information useful in detecting conflicts of interest. Eleven of the twelve judges who answered the question indicated that the information was useful. We went on to ask whether the judge was aware of circumstances where limiting the disclosure to FRAP 26.1 requirements would have failed to alert a judicial officer to a conflict of interest. Only two of the seven judges answering the question answered affirmatively. Judges in courts with broader disclosure

requirements than FRAP 26.1 favor those broader requirements, even though empirical support for their effectiveness cannot be demonstrated.

We also solicited views from the chief judges of two courts requiring limited disclosure. Both indicated that the local rule in their court, modeled after the current version of FRAP 26.1, permitted judges to identify potential financial conflicts of interest. Neither was aware of circumstances in their courts where the local rule had failed to provide sufficient information to detect a conflict of interest.

In the course of our research, we learned that judges in the District of Kansas recently enacted, and then repealed, a local rule requiring parties to disclose substantial amounts of financial interest information. Unlike other district court rules, Rule 3.2 of the District of Kansas anticipated that dismissal or default sanctions would be imposed on parties failing to comply with its provisions. Court sources told us that problems with the rule arose soon after the rule was enacted, and that these problems threatened to overwhelm staff in the clerk's office. The problems described to us involved drafting, administration, and enforcement issues. The court abandoned the procedure after finding that the burden of enforcing the rule outweighed the value of the information collected.

Bankruptcy Courts and Bankruptcy Appellate Panels

Our research indicated that only four bankruptcy courts, those in the District of Columbia, Southern District of Georgia, Central District of Illinois, and the District of Maine, have rules or procedures for collecting financial disclosure information. With the exception of the bankruptcy court in the District of Maine, the bankruptcy courts follow the disclosure rule in effect in the district court. The bankruptcy court in the District of Maine has a local rule tailored to bankruptcy practice.

Appeals taken to bankruptcy appellate panels are covered by disclosure requirements in four circuits.



Item 12

FORDHAM

UniversitySchool of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. CapraPhone: 212-636-6855
Philip Reed Professor of Lawe-mail:dcapra@mail.lawnet.fordham.edu
Fax: 212-636-6899

Memorandum To: Standing Committee
From: Daniel Capra
Re: Privacy Issues Arising From Electronic Case Filing
Date: May 11, 2000

As you know, the Administrative Office is developing the Case Management/Electronic Case Files system, a web-based system that permits access to case files through the court's network or through the Internet. Nine courts are currently using the prototype system, and national implementation is to begin this year.

At the direction of the Judicial Conference, a subcommittee of the Committee on Court Administration and Case Management (CACM) is investigating the privacy issues attendant to Internet access of information contained in case files. Gene Lafitte is the Standing Committee's representative on that subcommittee, and I am assisting Gene in his efforts.

Information in a case file that is not sealed has always been accessible to the public–but the difficulty of obtaining that information rendered it largely private as a practical matter. The question being addressed by the subcommittee is whether access to information in electronic case files should be limited, given the ease of obtaining that information. For example, should financial information in a bankruptcy case file be placed online? What about pre-indictment materials in a criminal case?

Attached are two memoranda providing helpful background discussions of the privacy issues arising from electronic access to case files. One is a memorandum of "Talking Points", which sets out the policy issues that the subcommittee has identified. The other memorandum discusses pertinent case law, the potential privacy implications of electronic case filing, and approaches that might be taken.

The CACM subcommittee has identified several possible policy alternatives for dealing with privacy concerns attendant to electronic case filing. Broadly speaking, these alternatives are:

1. **Do nothing** – Privacy interests would be protected by relying on litigants to seek protections by way of motions to seal.

2. **"Public is public"**– Electronic case files would be publicly available to the same extent that paper files are currently available to the public.

3. **"Public is Public", But Limiting What Is Public** – This alternative would treat electronic and paper access the same, but it would exclude from the public record some information that is currently accessible (e.g., sensitive financial or medical information).

4. **Limited Remote Electronic Access** – This alternative would permit electronic access to all public information *at the courthouse*, but would identify categories of information that could not be accessed remotely.

5. **Waiting Period** – This alternative would implement a waiting period between electronic filing and posting on the Internet. This period would be used to permit objections to electronic access to be resolved on a case-by-case basis.

6. **Case File Archiving** – An archiving policy might be developed that would address privacy interests by, for example, limiting the lifespan of a case file on the Internet.

The CACM subcommittee is also exploring special considerations that might arise in criminal cases, bankruptcy cases, and administrative agency cases.

The CACM subcommittee is seeking input from the Standing Committee (as well as other Judicial Conference Committees), on the merits of the broad alternatives set forth above. A memorandum from the Administrative Office discussing these alternatives in greater detail will be distributed at the Standing Committee meeting. The subcommittee is particularly interested in the Standing Committee's views as to whether any of the above alternatives are clearly objectionable or unworkable.

TO: Judges Speaking on Privacy and Electronic Filings

FROM: The Court Administration and Case Management Subcommittee on Privacy and Access to Electronic Case Files

RE: Materials on Privacy and Electronic Filings

The Court Administration and Case Management Subcommittee on Privacy and Access to Electronic Case Files welcomes any opportunity you may have to discuss the issues it is currently exploring with interested parties. To assist you in these discussions please find enclosed the following: 1) a brief outline of talking points on Electronic Case Filing and Privacy; and, 2) a 10-page paper entitled *Privacy and Access to Electronic Case Files in the Federal Courts.*

The outline of talking points was originally drafted by Chief Judge D. Brock Hornby, Chair of the Judicial Conference Committee on Court Administration and Case Management, for remarks he made at a Conference for Chief Districts Judges in April 2000. You are welcome to use this outline as the basis for your own remarks. If you are addressing an audience composed of court-related personnel, you may duplicate the document and hand it out to your audience. Please do not distribute this document to an "external" audience. The 10-page document on privacy and access to electronic case files was prepared by Robert Deyling, attorney-advisor in the Article III Judge's Division at the Administrative Office. This paper is available on the federal judiciary public website and may be accessed at http://www.uscourts.gov/privacyn.htm. You may duplicate this paper and hand it out to your audience. It provides an excellent summary of the issues and may stimulate further discussion.

We hope that these materials are helpful in making others within the courts, the bar and the general public aware of the privacy issues generated by electronic case filings. Please let Katie Simon, attorney-advisor with the Court Administration Policy Staff at the Administrative Office know if you have the opportunity to speak on these issues. She can be reached at (202)502-1563 or Katie_Simon@ao.uscourts.gov. Please also feel free to contact Katie with any questions, comments or concerns about these materials.

REMARKS BY CHIEF JUDGE D. BROCK HORNBY
AT CONFERENCE FOR CHIEF DISTRICT JUDGES
SEATTLE, WASHINGTON
APRIL 14, 2000

Topic: Electronic Case Filing and Privacy

Electronic case filing ("ECF") presents significant technological and procedural opportunities and challenges. But ***privacy*** may be the most complex issue that has yet to be addressed in implementing ECF. Privacy in general has become a matter of great concern with the rise of the Internet. As a result, there have been scores of pieces of legislation introduced in Congress and state legislatures, and a host of conferences and studies on the privacy issue. Recently the President has announced a plan targeted at consumer privacy which recognizes some of the very issues facing the courts.

In the ECF courts, pleadings are generally available on the Internet as soon as they are filed. Remote access to court files is also available in the 70 or so courts that right now are imaging pleadings. There is currently no fee for access. Anyone can view the information in the electronic file. The ultimate goal of ECF is to provide remote access through the Internet to all court dockets and pleadings. This is designed to save lawyers time, save litigants money, and save the court from having to respond to numerous requests for information from court files, both at the court and by phone–arguably not just from parties and their lawyers, but from the news media, and from proprietary interests who collect court data.

When the Judicial Conference Committee on Court Administration and Case Management ("CACM"), first discussed the privacy issue last June, the members saw a very

concrete example of the privacy problems raised by Internet access. By simply logging on to a bankruptcy court Internet site, a bankruptcy judge showed them a debtor's social security, credit card and bank account numbers as well as detailed personal information on the debtor and his family, including their clothes and the contents of their bedrooms. We learned that the privacy question is not one that will confront us some time in the distant future–it is here now and must be addressed.

We have a long tradition of public access to case files in the federal courts with constitutional overtones. Public access is a statutory requirement in bankruptcy courts. But, as the Supreme Court noted in *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), paper files in court record rooms previously have enjoyed a "practical obscurity." This "practical obscurity" ends when they become easily accessible and searchable electronically from remote locations—anywhere in the world and at any time of the day or night. This end of "practical obscurity" for court records raises a number of policy issues that were referred by the Judicial Conference to CACM.

"Privacy" is actually too narrow a term for what we are talking about. Other interests also may be in conflict with unlimited electronic access. A few of the more obvious are law enforcement; physical security of cooperating defendants or victims; trade secrets of companies in commercial litigation; and keeping jurors free of access to the contents of pleadings during trial and deliberation.

CACM determined that the topic needs careful study as well as the insights of other Judicial Conference committees. We therefore established a Privacy and Public Access Subcommittee with liaisons from the Criminal Law, Civil and Criminal Rules, Bankruptcy and Automation Committees to make policy recommendations for their Committees and the Judicial Conference to consider.

The Subcommittee has held two formal meetings and three telephone conferences. It has reviewed the policies of the electronic case file prototype courts, as well as of a number of the courts that employ imaging technology. It has also heard presentations from privacy experts, academics, government agencies, and attorneys.[1] Finally, the Subcommittee has requested staff from various divisions of the Administrative Office to prepare papers on particular issues that relate to the privacy/electronic access issue. One such paper is entitled *Privacy and Access to Electronic Case Files in the Federal Courts* and can be accessed on the federal judiciary public website at http://www.uscourts.gov/privacyn.htm.[2]

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[1] The Subcommittee has received presentations from the following individuals: Professor Peter Swire, Chief Counselor for Privacy, Office of Management and Budget; Larry Webster, Administrator, Delaware State Courts; Professor Stephen Saltzburg, George Washington University Law School; Professor Jeffrey Rosen, George Washington University Law School; Professor Karen Gross, New York Law School; Andrew Marks, Esq., former President of the District of Columbia Bar; Arthur Fried, General Counsel, Social Security Administration; Joseph Guzinski, Assistant Director, Executive Office for United States Trustees; and Ivan Fong, Deputy Associate Attorney General.

[2] This paper was written by Robert Deyling, attorney-advisor in the Article III Judge's Division of the Administrative Office of the United States Courts. He may be contacted by telephone at 202.502.1858 or by e-mail at Robert_Deyling@ao.uscourts.gov.

The Subcommittee has not yet reached any policy conclusions, but we believe that the privacy and access concerns are most pressing in the following categories of cases:

1. Bankruptcy
   - financial information
   - identity theft (social security number, credit card numbers)
   - personal information about creditors that can reveal things like types of medical treatment
2. Social Security Disability Appeals
   - identity theft
   - medical records

   It is also worthy of note that in Eastern District of New York, a district which currently utilizes electronic filing, the Social Security Administration requested and was granted a standing protective order prohibiting the electronic filing of administrative hearing transcripts and litigants' briefs due to concerns about identity theft and claimants' privacy interests.[3] The Social Security Administration also supports legislation prohibiting the ready availability of social security numbers via electronic access.
3. Criminal
   - plea and cooperation agreements or Rule 35 motions that can reveal who is cooperating, or even the distinct signal sent by the docket entry "sealed"
   - pre-indictment materials like warrants, issued and unissued

[3] See, Administrative Order 99-2, United States District Court for the Eastern District of New York filed June 9, 1999.

- presentence reports improperly included in the case file or in lawyers' memoranda

4. Employment Discrimination Cases
   - salacious accusations included in the complaint, motions, etc.
5. Commercial Cases
   - trade secrets, proprietary information, intellectual property
6. Administrative Appeals
   - We are still studying what materials are included in these direct appeals to the courts of appeals, but it appears preliminarily that information protected from public access at the agency level may lose that protection in court.

The full implementation of the PACER Internet fee may present a partial solution to the "privacy" issue, because Internet users seeking access to court files will then have to register with the PACER center and pay a fee for usage. This may discourage the casual Internet surfer, but the issue of limiting access to data remains because commercial interests such as data resellers[4] and the media may register to use PACER to download information and then make case file documents available to anyone at their Web sites. (This has occurred already with judges' financial disclosure statements.)

Here are the policy issues as the Subcommittee has identified them to date:

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[4] We recently had a concrete lesson in the problems created by the Internet. A data reseller who subscribes to PACER learned that a case it had downloaded was later sealed by the court. The paper file was no longer available at the court but the electronic file was still on the Internet. This particular data reseller agreed to remove the case documents from its website when it received notification of the later sealing of the case. But there may well be others who will not be so willing to cooperate—plus, the information may already be circulating on the web.

1. Should we have different policies for electronic access than for paper access, or should all access be the same ("public is public")?

2. Should we have a single, uniform policy? Or should access be case-dependent, with motions to seal, etc.?

3. Should we exclude specified categories (*e.g.,* criminal) from electronic access altogether?

4. Should the judiciary take no action, but consider the whole matter a political question and leave it to Congress and popular culture to deal with?

5. Should we re-define what is public information in court records across-the-board for paper and electronic records?

6. Should we have a waiting period before electronically-filed information is generally accessible, so that someone can object?

7. What about the archiving issue? What is the record? Alternatively, how do you take it off the Internet?

8. What shall we do about electronic trial records and electronic records of exhibits?

9. Can we/should we reduce the amount of information filed in bankruptcy cases? Might it be directed to an administrative file for the United States Trustee, since the court itself ordinarily does not use much of it?

10. What shall we do about jurors surfing the Web in the evenings during trial and deliberations and reviewing the pleadings in the case they are deciding?

The Subcommittee plans to address these questions. It will hold several additional meetings to obtain as much information on privacy issues as possible and we will seek input from the liaison Judicial Conference Committees at their summer meetings.

The Subcommittee is also considering the possibility of having a public comment forum.

As I said at the outset, this is a complex issue. There are strong arguments on all sides, the technology is ever changing, public sentiment is not yet well-defined, and strong Congressional interest seems likely.

If you have any thoughts or suggestions on the privacy issues as they relate to Internet access to court files, please direct your ideas to Katie Simon, attorney-advisor with the Court Administration Policy Staff at the Administrative Office who will be assisting in the work of the Subcommittee. You may telephone her at 202.502.1563 or reach her via e-mail at Katie_Simon@ao.uscourts.gov. The Subcommittee welcomes your comments and insights.

Link to HTML version

December 15, 1999

PRIVACY AND ACCESS TO ELECTRONIC CASE FILES IN THE FEDERAL COURTS

Distribution Note:

The attached paper was produced by staff in the Office of Judges Programs of the Administrative Office of the United States Courts to provide information and analysis of privacy and access issues relating to electronic case files. **The paper does not represent the policy of the Administrative Office, the Judicial Conference of the United States, or its committees.** Some of these issues currently are under review by Judicial Conference committees.

Please direct comments or questions on this paper to Robert Deyling, attorney-advisor in the Administrative Office's Article III Judges Division (by e-mail at Robert_Deyling@ao.uscourts.gov, or by telephone at 202-502-1858).

PRIVACY AND ACCESS TO ELECTRONIC CASE FILES IN THE FEDERAL COURTS

The growing use of electronic filing and imaging technology makes it possible for courts to offer broader public access to case files, including electronic access from locations outside the courthouse. There is increasing awareness, however, of the personal privacy implications of electronic access to court case files, especially access through the Internet. In the court community, some have begun to suggest that case files — long presumed to be open for public inspection and copying unless sealed by court order — contain private or sensitive information that should be protected from unlimited public disclosure and dissemination in the new electronic environment. Others maintain that electronic case files should be treated the same as paper files in terms of public access, and that existing court practices are adequate to protect privacy interests.

Recognizing the need to review judiciary policies in the context of new technology, the Judicial Conference Committee on Court Administration and Case Management has formed a subcommittee to consider privacy and access issues and provide policy guidance to the courts. The subcommittee is reviewing these issues and has not reached any conclusions. **It is important to note, therefore, that this document is not a policy proposal, but rather is intended to contribute to the broader policy debate in the legal community about privacy and access to electronic case files.**

The Administrative Office of the United States Courts is developing the Case Management/Electronic Case Files ("CM/ECF") system to replace current federal court docketing and case management systems. As a web-based system, CM/ECF will allow access to electronic case files through the court's network, or as appropriate from outside the court via the Internet. The system, however, will permit a court to limit electronic access to case files and to individual documents within each file. Nine courts currently are using the prototype CM/ECF system, and national implementation is set to begin in mid-2000, continuing until late 2003. In addition, many courts currently create electronic case files by imaging filed documents.

This paper includes four main sections:

I. An overview of the law on access and privacy as it relates to case files.

II. A review of current judiciary policies on access to case files.

III. A discussion of the potential privacy implications of electronic access to case files.

IV. An initial outline of policy assumptions and alternatives.

I. THE LAW ON ACCESS TO CASE FILES AND RELATED PRIVACY INTERESTS

A. Common law and constitutional right of access

In numerous cases the federal courts, including the Supreme Court, have held that there is a common law right "to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). The common law right, and the presumption of public access to court records in particular, "allows the citizenry to monitor the functioning of our courts, thereby insuring quality, honesty, and respect for our legal system." *In re Continental Illinois Securities Litigation*, 732 F.2d 1303, 1308 (7th Cir. 1984).

Federal courts have applied the common law right in disputes over access to case files in a variety of judicial proceedings. *See, e.g., Republic of the Philippines v. Westinghouse Electric Corp,* 949 F.2d 653, 660 (3d Cir. 1991) (citing earlier cases and history of common law right).

The courts of appeals generally have recognized a "strong presumption" in favor of access, holding that only compelling reasons justify denying access to information in the case file. *See, e.g., United States v. Beckham*, 789 F.2d 401, 409-15 (6th Cir. 1986) (trial court "must set forth substantial reasons for denying" access to its records); and *F.T.C. v. Standard Financial Management Corp.*, 830 F.2d 404, 408-10 (1st Cir. 1987) (the burden of overcoming the presumption of open judicial records is on the party seeking to maintain the court records in camera). Some courts of appeals, however, view the presumption simply as one factor for the trial judge to balance in considering access issues. *See, e.g., Securities and Exchange Commission v. Van Waeyenberghe*, 990 F.2d 845, 848 (5th Cir. 1993) (noting that "while other circuits have held that there is a strong presumption in favor of the public's common law right of access to judicial records, we have refused to assign a particular weight to the right"); and *United States v. Webbe*, 791 F.2d 103, 106 (8th Cir. 1986) (declining to "adopt in toto" the holdings of several other circuits that recognize a "strong presumption" in favor of access).

Several courts of appeals have held that the common law presumption attaches to the broad array of *filed* documents. *See, e.g., Pansy v. Borough of Stroudsburg,* 23 F.3d 772, 782 (3rd Cir. 1994) (holding that a settlement agreement that was *not filed* with the court is not a judicial record accessible under the common law doctrine); *F.T.C. v. Standard Fin. Mgmt. Corp.*, 830 F.2d at 409 ("documents which are submitted to, and accepted by, a court of competent jurisdiction in the course of adjudicatory proceedings, become documents to which the presumption of public access applies").

There is some tension, however, among the courts of appeals with respect to whether the presumption of access attaches to *all* filed documents, or only to filed documents that the court relies on to make certain substantive decisions. The Second Circuit, in *United States v. Amodeo*, 44 F.3d at 145, summarized that approach:

> We think that the mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access. We think that the item filed must be relevant to the performance of the judicial function and useful in the judicial process in order for it to be designated a judicial document.

The First and D.C. Circuits have articulated a similar approach to the common law right. *See Anderson v. Cryovac, Inc.*, 805 F.2d 1, 12-13 (1st Cir. 1986) (applying the common law right only to "materials on which a court relies in determining the litigants' substantive rights"); and *United States v. El-Sayegh*, 131 F.3d 158 (D.C. Cir. 1997) (concluding that a plea agreement filed solely to allow the district court to rule on the government's motion to seal the agreement, and later withdrawn when the plea agreement fell through, was not subject to public access).

A related issue is the scope of the common law right of access to discovery documents. The Supreme Court has held that *non-filed discovery documents* do not shed light on the performance of the judicial function and therefore are not subject to common law access rights. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). A request for access to *filed* discovery material may require different legal analysis. Such information generally is held to be subject to the common law right, but the access determination may depend on how the discovery documents are used in the judicial process. In general, filed discovery documents that are attached to *non-discovery* motions and briefs are subject to the common law access right. But some courts of appeals have denied access to discovery documents that are filed with motions concerning the discovery process itself (e.g., documents filed in connection with motions to compel discovery). *See Leucadia, Inc. v. Applied Extrusion Technology Inc.*, 998 F.2d 157, 164 (3rd Cir. 1993) (holding that there is a "presumptive right of public access to all of the material filed in connection with nondiscovery pretrial motions, whether those motions are case dispositive or not, but no such right as to discovery motions and their supporting documents"); and *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986) (no access to discovery documents submitted in connection with discovery motions).

In addition to the common law right of public access to judicial records, the Supreme Court has recognized a limited First Amendment right of access to judicial proceedings. In *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 575-78 (1980), the Court held that "in guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees." Since *Richmond Newspapers*, the Court has revisited the First Amendment right of access only in the context of criminal proceedings.

There is not yet a definitive Supreme Court ruling on whether there is a First Amendment right of access to court documents (in addition to the common law right discussed above). Nonetheless, several courts of appeals have extended the scope of *Richmond Newspapers* to grant a limited First Amendment right to various types of judicial records, both criminal and civil. *See, e.g., In re Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984) (extending

First Amendment access right to a "special litigation report" filed in support of a motion to dismiss a shareholder derivative suit); and *Publicker Industries v. Cohen*, 733 F.2d 1059, 1067-70 (3d Cir. 1984) (holding that the reasons supporting a First Amendment right of access to criminal proceedings apply with equal force to civil trials and case file documents). The Tenth Circuit, however, declined to decide whether there is a First Amendment right to judicial documents, noting the lack of explicit Supreme Court holdings on the issue since *Press Enterprise II. See United States v. McVeigh*, 119 F.3d 806 (10th Cir. 1997) (denying press requests for access to sealed documents in Oklahoma City bombing trial).

B. Privacy-based limits on access

Despite the legal presumption that judicial records are open for public inspection, it is equally clear that access rights are not absolute. The Supreme Court in *Nixon v. Warner Communications* observed that:

> [E]very court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes.

435 U.S. at 596.

The decision to deny public access involves a balance between the presumption in favor of access, on the one hand, and the privacy or other interests that may justify restricting access. These interests include the possibility of prejudicial pretrial publicity, the danger of impairing law enforcement or judicial efficiency, and the privacy interests of litigants or third parties. *See United States v. McVeigh*, 119 F.3d 806, 811 (10th Cir. 1997); *United States v. Amodeo*, 71 F.3d. 1044, 1047-50 (2d Cir. 1995).

In *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), a case involving a database of information summarized in a criminal "rap sheet," the Supreme Court recognized a privacy interest in information that is publicly available through other means, but is "practically obscure." The Court specifically noted:

> the vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.

489 U.S. at 764.

In weighing the public interest in releasing personal information against the privacy interests of individuals, the Court defined the public's interest as "shedding light on the conduct of any Government agency or official," 489 U.S. at 773, rather than acquiring information about a particular private citizen. The Court also noted "the fact that an event is not wholly private does

not mean that an individual has no interest in limiting disclosure or dissemination of the information." 489 U.S. at 770.

C. Statutory and rule-based requirements on access to judicial records

Although public access to federal court case files is based largely on the common law and constitutional principles, statutes and the Federal Rules of Procedure also affect access to case files.

In the district courts, copies of transcripts of court proceedings (including the original notes or other original records of the court reporter) must be available in the clerk's office for public inspection without charge. *See* 28 U.S.C. § 753(b). In bankruptcy courts, any "paper filed ... and dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge." 11 U.S.C.§ 107(a).

The Freedom of Information Act (FOIA) and Privacy Act, which are the main statutes governing public access to executive branch records, do not apply to the judicial branch and do not govern access to case file documents. 5 U.S.C. §§ 551(1)(B) & 552(f). See also *United States v. Frank*, 864 F.2d 992,1013 (3d Cir. 1988); *Warth v. Department of Justice*, 595 F.2d 521, 522-23 (9th Cir. 1979).

The Federal Rules of Procedure define "the record" as the papers and exhibits filed in the district court, the transcript of any proceedings, and the docket. The Rules do not, however, specify how the courts should provide access to case files. *See* Fed. R. App. P. 10(a) (defining the record on appeal as the original exhibits and papers filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court).

Judges have broad discretion under the Federal Rules to issue orders that protect case-related information from unauthorized disclosure. *See* Fed. R. Civ. P. 26(c) (protective orders). The Federal Rules, however, do not articulate standards for deciding motions to seal or unseal case file documents.

II. JUDICIARY POLICY ON ACCESS TO CASE FILES

Case files are maintained by the clerk of court as the official record of litigation in the federal courts. As a general rule the public case file consists of all pleadings, orders, notices, exhibits, and transcripts filed with the clerk of court. It is standard practice that case files are open for inspection and copying during normal business hours. There is also a general presumption that court files are available to anyone upon request. Courts do not make access determinations based on the status of the requestor. The federal judiciary also offers various electronic public access ("EPA") services that allow the public to gain quick access to official

court information and records from outside the courthouse.

Disputes over access to case files are addressed on a case-by-case basis by individual judges. Judges address privacy interests in case files mainly through discretionary sealing of files or documents. Although judges may act *sua sponte*, sealing of case files usually occurs on a case-by-case, or document-by-document, basis in response to the filing of a motion to seal.

The nine courts that are currently using the CM/ECF system generally permit the public to view, print, and download any document filed in the system. The courts control access to the system, for filing purposes only, by issuing user identifications and passwords. The courts are not accepting sealed documents for electronic filing. Several courts have implemented programs to create electronic images of some or all filed documents. Like the electronic case file courts, those courts generally do not restrict access to the imaged case files. None of the courts has developed comprehensive policies to address privacy interests in electronic case files.

III. THE POTENTIAL PRIVACY IMPLICATIONS OF ELECTRONIC CASE FILES

Before the advent of electronic case files, the right to "inspect and copy" court files depended on physical presence at the courthouse. The inherent difficulty of obtaining and distributing paper case files effectively insulated litigants and third parties from the harm that could result from misuse of information provided in connection with a court proceeding. The Supreme Court in *Reporters Committee* referred to the relative difficulty of gathering paper files as "practical obscurity." *See United States Department of Justice v. Reporters Committee for Freedom of the Press,* 489 U.S. 749 (1989).

Case files may contain private or sensitive information such as medical records, employment records, detailed financial information, tax returns, Social Security numbers, and other personal identifying information. Allowing access to case files through the Internet, depending on how it is accomplished, can make such personal information available easily and almost instantly to anyone who seeks it out. Sensitive information in a case file, unless sealed or otherwise protected from disclosure, can be made available for downloading, storage, and printing.

These new circumstances place into conflict two important government obligations:

1) information held by government generally should be available to allow for effective public monitoring of government functions; and

2) certain private or sensitive information in government files may require protection from indiscriminate disclosure.

The rapid development of technology is challenging the courts to find ways to balance privacy interests and open access. Moreover, concern about privacy and access to public records is not limited to the judicial branch. There is a broader societal unease about the privacy implications of information technology, and Congress is considering legislative proposals to shield sensitive personal information from unwarranted disclosure.

Two primary positions appear to be emerging with respect to the privacy issues relating to electronic case files:

The first position is sometimes referred to by the shorthand expression "public is public." The essence of this position is the assumption that the *medium* in which case files are stored does not affect the *presumption* that there is a right of public access. By this analysis, current mechanisms for protecting privacy — primarily through protective orders and motions to seal — are adequate even in the new electronic environment. Some have also suggested that the focus for access policies should be on determining whether information should be deemed "public" in any format — electronic or paper — rather than on limiting access to electronic case files.

Advocates of this position suggest that litigants do not have the same expectation of privacy in court records that may apply to other information divulged to the government. The judicial process depends on the disclosure of all relevant facts, either voluntarily or involuntarily, to allow the judge or jury to make informed decisions. In bankruptcy cases, for example, a debtor must disclose a Social Security number or taxpayer ID and detailed financial information that the bankruptcy trustee needs to administer the case, and that creditors need to fully assert their rights. Similarly, in many types of civil and criminal cases — for example, those involving personal injuries, criminal allegations, or the right to certain public benefits — case files often must contain sensitive personal information. To a certain extent, then, litigants must expect to abandon a measure of their personal privacy at the courthouse door.

A second position on the privacy issue focuses on the relative "obscurity" of paper case files as compared to electronic files. Advocates of this position observe that unrestricted Internet access to case files undoubtedly would compromise privacy and, in some situations, it could increase the risk of personal harm to litigants or others whose private information appears in case files. Bankruptcy cases are often suggested as examples of this risk because they contain detailed personal financial information. It also has been noted that case files contain information on third parties who often are not able — or not aware how — to protect their privacy by seeking to seal sensitive information.

Advocates of the second position acknowledge that it is difficult to predict how often court files may be used for "improper purposes" in the new electronic environment. They suggest that the key to developing electronic access policies is not the ability to predict the frequency of abuse, but rather the assumption that even a few incidents of mischief with court files could cause great personal harm. Thus, although there is no "expectation of privacy" in case file information, there is an "expectation of practical obscurity" that will be eroded through the development of

electronic case files. Appropriate limits on electronic access to certain file information may allow the courts to balance these interests in the context of the new electronic environment.

IV. POLICY ANALYSIS AND ALTERNATIVES

A. Initial policy assumptions

This section of the paper is intended as a starting point for reviewing potential alternatives for development of judiciary policy on access to electronic case files. Some initial assumptions to guide policy development might include:

- There is a strong legal presumption that the documents in case files, unless sealed, are public records available for public inspection and copying. This presumption is rooted in both constitutional and common law principles.
- The presumption of unrestricted public access to case files promotes public understanding of and confidence in the federal court system, and is consistent with current law and judiciary policies.
- The transition to electronic case files systems raises important legal and policy issues that are not addressed explicitly in current law or judiciary access policies.
- The public should share the benefits of technology, including more efficient access to case files.
- Litigants and their attorneys should have full electronic access to the files in any case in which they are participating.
- Other individuals and entities (i.e., the public, the press) should have a level of access to case files that is consistent with protecting privacy and other legitimate interests in nondisclosure.
- The traditional reliance on litigants to protect their privacy interests through protective orders or motions to seal may be inadequate to protect privacy interests in the new electronic environment.
- Access rights, whether based on the common law or on the Constitution, are not absolute. The inherent authority of the judiciary to control the dissemination of case files may justify restrictions on access to electronic case files to protect privacy.

- Making case files available to the public on the Internet may lead to the dissemination of information that would harm the privacy interests of individuals. It also may deter litigants from using the federal courts to resolve their disputes. Even assuming a very low incidence of abuse, it would be prudent to consider fashioning an access policy that minimizes the risk of harm both to individuals and to the federal court system.

- The judiciary has a special custodial responsibility to balance access and privacy interests in making decisions about the disclosure and dissemination of case files. Like other government entities that collect and maintain sensitive personal information, the judiciary must balance the public interest in open court records against privacy and other legitimate interests in nondisclosure.

B. National policy alternatives on access to electronic case files

Three broad alternatives merit consideration in fashioning a national policy on access to electronic case files. Outlined below, they include:

1) providing the broadest possible access to electronic files;

2) taking a more narrow and cautious approach by excluding all, or most, sensitive information from case files altogether;

3) devising a "middle-ground" approach that would provide access to the complete public case file at the courthouse, but would limit remote electronic access to certain private or sensitive case file information.

Alternative 1: Extend current open access policies to cover electronic case files

This approach would implement the philosophy that the public case file should not be treated differently simply because it is in electronic rather than paper form. Electronic case files would be "open" for public access to the same extent as paper case files. There would be no restrictions on remote access. Litigants and others would be expected to assert their privacy interests through the regular motions process, and disputes over access would be addressed on a case-by-case basis.

Alternative 2: Review the elements of the "public" case file to better accommodate privacy interests

This alternative would focus on evaluating the need to include particular information or documents in the public case file, whether in paper or electronic format. The goal would be to

develop a new definition of the "public case file" that would better accommodate privacy interests. Like Alternative 1, this approach assumes that the entire public file would be made available electronically without restriction. It would recognize privacy interests by excluding certain private or sensitive information from the public case file. Many state court systems essentially follow this approach, even for paper files, by sealing all files in specific types of cases.

Alternative 3: Provide limited access to certain electronic case file information to address privacy concerns

Like Alternative 2, this alternative would focus on identifying categories of case file information or specific documents that may implicate privacy concerns. But rather than redefining the contents of the public case file, it would involve limiting *remote* electronic access to certain private or sensitive information. Remote electronic access to case files might be limited depending on the level of access granted to a particular individual. Several levels of access may be appropriate, including:

- Judges and court staff presumably would have unlimited remote access to all electronic case files.
- Similarly unlimited access might also be extended to certain other key participants in the judicial process, such as the U.S. Attorney, the U.S. Trustee, and bankruptcy case trustees.
- Litigants and their attorneys would be given unrestricted access to the files relevant to their own cases.
- The general public would have remote electronic access to a subset of the entire case file, including pleadings, briefs, orders, and opinions.

This approach assumes that the complete electronic case file would be available for public review *at the courthouse,* just as the entire paper file is available for inspection in person. Certain documents, however, would be excluded from unlimited remote electronic access. It is important to recognize that this approach would not limit how case files may be copied or disseminated once obtained at the courthouse. Documents that may be candidates for limited electronic access might include medical records, tax records, employment records, third-party sensitive information, or financial information in bankruptcy cases.

Item 13

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

ANTHONY J. SCIRICA
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

WILL L. GARWOOD
APPELLATE RULES

ADRIAN G. DUPLANTIER
BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

W. EUGENE DAVIS
CRIMINAL RULES

MILTON I. SHADUR
EVIDENCE RULES

Memorandum

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

FROM: Mary P. Squiers MPS

RE: Progress Report on the Local Rules Project

DATE: May 8, 2000

This document is intended to update you on my progress to date with the Local Rules Project. As you may be aware, I began working on the Project July 1, 1999. I spent some time at the beginning organizing my activities, generally, including my office space and computer, and also organizing my thoughts on how to proceed most effectively. The Local Rules Project will, again, evaluate the existing local rules of civil, criminal, and appellate practice with the goal of determining whether these rules comply with the Rules Enabling Act (28 U.S.C. §§2071 *et seq.*), whether the local rules highlight areas which may more appropriately be covered through the Federal Rules, and whether the local rules have successfully operated in particular fields which other courts may want to emulate. In addition, there will be an examination of whether and how the circuit councils review existing and proposed local district court rules. Lastly, there will be an examination of how the Civil Justice Reform Act has impacted local rule proliferation.

I am very interested in any thoughts or comments you may have on how to proceed. I will be at the Standing Committee meeting in June. I can also be reached at my office by telephone (781.444.2876) or by email (marysquiers@mediaone.net).

Evaluation of Existing Local Rules

As I mentioned to you at the Standing Committee meeting in January, the first step in examining the existing local rules is to develop an outline of all of them. To that end, I am reading each local rule, by topic, and coding it for entry onto a database. The topics are based on the Federal Rules of Civil Procedure. My goal is then to be able, for

each topic, to retrieve the rule numbers and a good understanding of the various rules' content from the coding so that I can easily write about them. The objective of this rather painstaking and detailed reading of the rules is to allow the analysis to proceed without the necessity of retrieving all of the rules multiple times. I have continued to read the rules throughout this winter. This activity is close to completion.

By the time I see you at the June meeting, I will have begun to write the actual report. I intend to write the report following the outline of the Federal Rules of Civil Procedure. During the first study of local rules, this Committee noted that there was no uniform numbering system for federal district court local rules relating to civil practice. Writing the discussion in this order will help to refine the numbering system for all of the districts. Each court can see where the particular rule was discussed and why it was placed there.

As before, repetitious rules will be highlighted since such repetition is superfluous and may be counterproductive. Similarly, rules that are inconsistent with existing law will be noted since the relevant Federal Rules and provisions in Title 28 mandate that there be no inconsistency in the local rules with existing law. Any local rules that may more appropriately be incorporated into the Federal Rules rather than remain as local rules will also be highlighted. There are many local rules that are useful in delineating certain procedures and practices in particular courts. These will be discussed so that other courts can consider whether they would be helpful in their respective jurisdictions. Lastly, model local rules that may be useful for all courts to consider adopting will be developed.

Circuit Council Review of Existing Local District Court Rules

In April, Judge Scirica wrote to the Chief Judges of the circuit courts informing them of the second phase of the Local Rules Project. He indicated in that letter that I would be contacting the Circuit Executives to obtain information about their respective Circuit Council's review of local district court rules. Over the past couple of weeks, I have communicated with each of the Circuit Executives to discuss this issue, among other issues. A few results deserve mention. All of the Circuit Councils have procedures to review new and amended local rules. There is, however, variation among the Circuit Councils with respect to their general attitude toward this process. It is quite unusual for any of the Circuit Councils to actually abrogate a local rule. A couple of the Circuit Executives expressed an interest in more discussion of how the rules should be renumbered; because the Project report will be organized according to the Federal Rules, it should help them in this regard. I have attached a memorandum discussing my findings in more detail. A list of the areas of discussion is appended to that memorandum.

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Memorandum

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

FROM: Mary P. Squiers MS

RE: Results of the Conversations with the Circuit Executives

DATE: May 8, 2000

As you may be aware, Judge Scirica wrote to all of the Chief Judges of the circuit courts by letter dated April 5, 2000 to inform them of the second phase of the Local Rules Project. He indicated in that letter that I would be contacting the Circuit Executives to obtain information about their respective Circuit Council's review of local rules. I spoke with the Circuit Executives of the First through Eleventh and the District of Columbia Circuits during the last two weeks of April and first week of May.

My conversations with the Circuit Executives focused on review of district court local rules but also involved discussions on the use of standing orders, the implementation of uniform numbering, and, to a limited extent, the rulemaking process used in the district courts. A copy of the eight general questions that directed our conversations is attached as Appendix A. The Circuit Executives were extremely helpful in providing me information. What follows is a brief discussion of my findings. I will also bring with me to the Standing Committee meeting the transcribed notes from each of my interviews for your review, if you are interested.

Rulemaking Procedure in the District Courts

The first area of discussion was whether the Circuit Executive or the Circuit Council was involved in the development of the rulemaking process for the district courts or in the actual promulgation of local district rules. There is no involvement by any Circuit Executive or Council in either the rulemaking process or the actual rulemaking in any of the circuits.

Six circuits are, however, involved in the rulemaking process at least as far as suggesting local rules for the districts to adopt. (Third Circuit, Fourth Circuit, Fifth Circuit, Seventh Circuit, Ninth Circuit, and Eleventh Circuit). For example, in three circuits, the Councils have urged particular local rules or local rule topics in death penalty cases. (Three, Fourth Circuit, Seventh Circuit). In the Fifth Circuit, the Council has asked that the district and bankruptcy rules contain a local rule indicating that there are rules governing judicial conduct. In another court, the Council has suggested particular procedures for review of attorney discipline. (Eleventh Circuit).

Review of Local Rules by the Circuit Council

All of the Circuit Council have a review process to examine new local rules and amendments to existing rules[1]. These procedures are generally the same among the circuits. The review begins in the Circuit Executive's office where the rule or amendment is originally provided by the district court. A staff person from that office makes an initial review of the rule, usually writing a memorandum explaining how the rule is or is not problematic. The rule and memorandum are then forwarded to another body for review. In some circuits, this material is provided to a committee of the Council (Third Circuit, Fifth Circuit, Eighth Circuit) and, in several other circuits, the material is provided to another body for its review (Fourth Circuit: Chief Judge of Circuit; Seventh Circuit: Original District Court; Ninth Circuit: Conference of District Judges). Either the reviewer's recommendation or the actual documentation concerning the rule or amendment is then transmitted to the Circuit Council for final action. This final action may be by paper ballot (*e.g.*, Second Circuit, Third Circuit) or vote at the actual meeting (*e.g.*, First Circuit, Seventh Circuit, Eighth Circuit). At any stage in this process, the reviewing person or entity may be communicating with the particular court to reach an accommodation of any rule or rule amendment that appears problematic. As one of the Circuit Executives stated: "The last thing we want to do is abrogate one of these rules forcefully." (Ninth Circuit.)

The review of local rules or amendments takes place in all of the circuits as needed. Whenever a rule or amendment is provided to the Circuit Executive, the process begins. In addition, the Ninth Circuit has established a biennial review of each district court's rules. The Eleventh Circuit also has undertaken a comprehensive review of the local rules on two occasions since 1988.

It is difficult to determine whether there is, in fact, an inconsistency or repetition of a local rule with existing law unless there is a definition of "inconsistency" or "repetition." For example, one using a narrow definition of "inconsistency" may conclude that only those local rules, which flatly contradict actual statements or requirements in other law, are inconsistent. If one uses a broader definition of "inconsistency," there is more opportunity for disagreement over whether a particular

[1] It should be noted that, although there is a process in the Sixth Circuit Circuit, there has been no systematic review in this Circuit for the past several years. The Circuit Executive reported that, when the Civil Justice Reform Act (CJRA) was in place, the Council concluded that there was no way to reconcile local rules and the CJRA. At that time, further review stopped. The Circuit Executive suggested that the Circuit needed to get back in the process.

local rule is, in fact, inconsistent. For example, one can argue that a local rule may be inconsistent with the intent or spirit of the Federal Rules. One can also argue that local rules that take away the court's discretion in an individual case are inconsistent with the intent and spirit of the Federal Rules that case management, generally, be addressed on an individual basis. One can also argue that local rules that add further requirements than those set forth in the Federal Rules conflict with the intent and spirit of the Federal Rules. Local rules may exist that, while not problematic on their face, may be inconsistent as applied in practice. One can argue that a local rule that is inconsistent with existing case law should be rescinded even though such an inconsistency is not prohibited in the Federal Rules or Section 2071 of Title 28. Case law will surely impact on counsel's activities and the court's decisions in much the same way as the Federal Rules and statutes.

None of the circuit courts has any written standards for determining whether a local rule is inconsistent with, or duplicative of, existing law. Instead, each of the reviewing entities makes a judgment call on a case-by-case basis. When there may be disagreement over a particular rule, deference is given to the district court. (*E.g.*, Second Circuit, Third Circuit.) One Circuit Executive indicated that a rule would be upheld unless it was clearly inconsistent with a federal rule. (Seventh Circuit.)

As mentioned above, there is significant opportunity to discuss potential problems during the review process. Such discussion may avert a negative vote at the Circuit Council. Each of the Circuit Executives was asked how frequently the Circuit Council abrogates local rules. Abrogation was clearly a rare event in all of the circuits.[2]

The Circuit Executives were also asked whether the rules had been reviewed to determine if they were in compliance with the uniform numbering system prescribed by the Judicial Conference. (*See* Fed.R.Civ.P 83(a). Approximately seven courts had specifically reviewed the rules to determine compliance. *See e.g.*, First Circuit, Third Circuit, Tenth Circuit).

The Circuit Executives were asked about the existence of standing orders, internal operating procedures, general orders, or other directives, regardless of name, that served the functional equivalent. All of the Executives indicated that there might very well be some of these directives in existence. In ten circuits, there is no review of these directives. *See e.g.*, Second Circuit, Tenth Circuit, Third Circuit.) Several Executives stressed that, since there was no enabling authority, review and any subsequent attempt at abrogation would violate the integrity of the district court or would consist only of stating

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[2] *E.g.*, First Circuit (Incredibly rare and, maybe, it has never been done. It has not been done in the eleven years since the Circuit Executive has been there.) Second Circuit (It has not been done in the two years since the Circuit Executive has been there.) Third Circuit (Circuit Executive cannot recall that a local rule has been abrogated.) Fifth Circuit (Three times in fifteen years.) Eighth Circuit (Since October 1997, a rule has not been abrogated.) Ninth Circuit (It happened during the first comprehensive review five or six years ago.) Tenth Circuit (No abrogation for at least six years.) Eleventh Circuit (The council has never abrogated or modified a rule ever.) District of Columbia Circuit (Never to the knowledge of the Circuit Executive.)

that it appeared the district court was attempting to avoid the local rulemaking process. (First Circuit, Ninth Circuit, Eleventh Circuit.)

In two of the circuits there is some type of review of standing orders, general orders, or internal operating procedures. One of the Circuit Councils assumes the district courts are treating these directives as local rules and, for the sake of the statute and procedure, they are treated exactly the same as local rules on the circuit level: "If it regulates practice in our courts, it goes to the Council." (Fifth Circuit.) There is some review in the other circuit of internal operating procedures but by a different committee. (Eighth Circuit.) The Circuit Executive of the Eighth Circuit explained that rulemaking was used in the correct way in the Eighth Circuit so there was no abuse of the use of standing orders necessitating any other review.

Other Comments

At the end of each conversation, I asked the Circuit Executives if they had any other comments about rulemaking and the review process. I also asked them what features of another Local Rules Project Report they like to see added or enhanced. What follows are some brief comments, paraphrased.

In two circuits, the Executives indicated that their respective Councils were reactive as opposed to proactive in reviewing rules. (Second Circuit, Third Circuit.) "The Council has traditionally not been too 'hands on.' It does what it is supposed to do but nothing more." (Second Circuit.) "Rulemaking is not a hot button issue in this circuit." (Third Circuit.) On the other end of the spectrum, another Circuit Executive explained that rulemaking and review of those rules were taken very seriously in the circuit and that there had always been a rules committee at the circuit level. (Eleventh Circuit.) Another Circuit Executive explained that, because local rulemaking was taken seriously at the district court level and because the courts were territorial about it, telling these courts what rules to have or how to run their courts is problematic. (Eighth Circuit.) Another Executive explained that legal practice in his circuit was, generally, by state and that the attorneys were used to the rules so there was not the difficulty with rules that there may be in circuits with attorneys having multi-state practices. (Fifth Circuit.)

The Circuit Executives were asked what they would like to see in the Local Rules Project Report that would be particularly helpful to them. Five of the Circuit Executives were satisfied with a report that followed the same general format as before. (*E.g.*, Sixth Circuit, Ninth Circuit, District of Columbia.) One of those highlighted that the document should be as brief as possible or be accompanied by a summary. (Fourth Circuit.) Two of them specifically asked for more guidance on numbering. (Eighth Circuit, Ninth Circuit.) Two of the Executives felt any such report was unnecessary because there was no particular interest on the part of the Council (Third Circuit) or because the rules in the circuit are consistent with existing law and numbering (Tenth Circuit).

APPENDIX A

Questions for the Circuit Executives about Circuit Council Review of Local Rules

Name of Person _____ _____Date of Interview _____

(Position) _____ Circuit _____

1. Rulemaking Procedure: What is the process for district courts to make rules? Are they the same for all courts in your circuit? Does the circuit council approve that process? Are there Circuit-wide local rules you require or suggest the district courts use? How often does the rulemaking occur? Is there a circuit council directive about that?

2. Review of Local Rules After Promulgation: What is the process for the circuit council to review local rules? Did the circuit council make that process? If not, who did? How frequently does the circuit council review the rules? Does it abrogate rules? Does it suggest changes in rules? What else does the circuit council do?

3. Standards for Review of Local Rules. What are the circuit council's standards for deciding a rule may repeat existing law? What are the circuit council's standards for deciding a rule may be inconsistent with existing law? How were these standards developed?

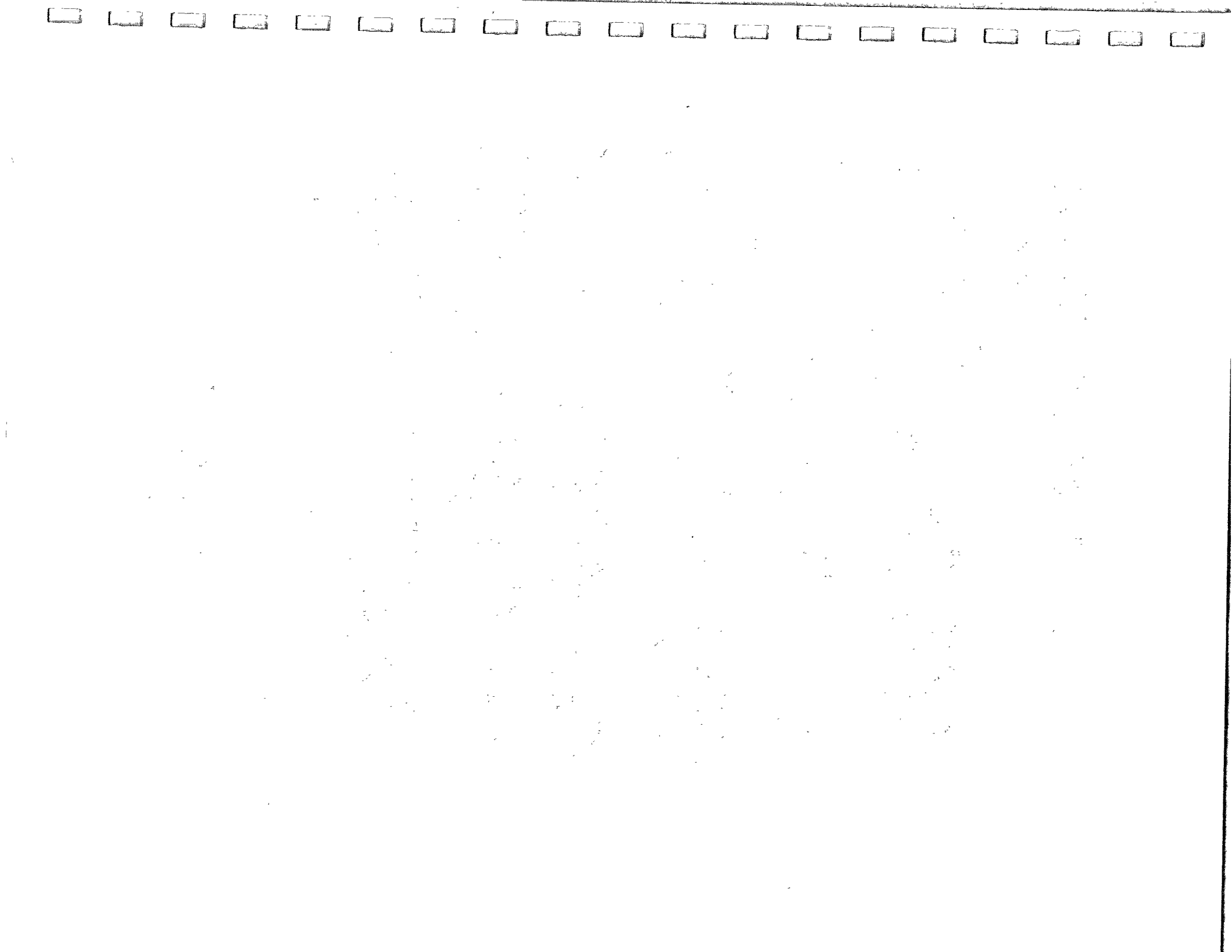
4. Past Activities of the Circuit Council with Respect to Review of Content of Local Rules: What is the frequency with which the circuit council has reviewed the rules? What is the frequency with which the circuit council has abrogated any rules? Do you have a record of how many rules you have abrogated for each district? If so, could I have a copy of that?

5. Past Activities of the Circuit Council with Respect to Review of the Numbering System of Local Rules. Has the Circuit Council reviewed the rules to determine whether they comply with the numbering system? What, if any, action has been taken?

6. Standing Orders, Internal Operating Procedures, and Other Directives: Do they exist in the district courts in your circuit? Do you approve their existence? Do you review them for inconsistency and repetition? What is the process by which you review them? What is the frequency with which the circuit council has abrogated any directives? Do you have a record of how many rules you have abrogated for each district? If so, could I have a copy of that?

7. Any other Comments or Questions?

8. Usefulness of Local Rules Project Report? Do you have any suggestions for making it more useful to you and the Circuit Councils?



Item 14

Agenda Item 14
June 2000
Discussion

Recommendation 73 of the *Long Range Plan:* Review of the Judiciary's Need for Statistical Data and Other Information on District Court Proceedings

The Administrative Office (AO) is undertaking a review of the federal judiciary's need for statistical data and other information concerning civil and criminal proceedings in the United States district courts. The review is the third phase of a comprehensive assessment of the information required for judicial branch administration and policy development, as directed by Recommendation 73 of the *Long Range Plan for the Federal Courts* approved by the Judicial Conference in 1995. This agenda item is presented to the Committee to (1) provide background information on Recommendation 73 and antecedent efforts to implement that recommendation, (2) explain the purpose and scope of the present effort to review district court information, and (3) invite the Committee to consider what kinds of civil and/or criminal case-related data should be collected in its subject area of responsibility.

Background

Recommendation 73 of the *Long Range Plan* (reproduced in Attachment 1) calls for the federal courts to "define, structure, and, as appropriate, expand their data-collection and information-gathering capacity" to obtain better data for judicial administration, planning, and policy development. This process should be broadly inclusive, involving "representatives from all primary data sources, judicial branch users, and outside researchers."[1] Recommendation 73 was adopted in response to problems experienced by the Judicial Conference's Committee on Long Range Planning in obtaining sufficient data for planning with respect to various aspects of court workload, resource usage, and administrative operations.

The Committee on Judicial Resources has responsibility for coordinating implementation of Recommendation 73, with support from the AO's Office of Judges Programs and Office of Human Resources and Statistics. That committee has delegated to its Subcommittee on Judicial Statistics general oversight of implementation efforts, and other Conference committees are brought into the process as the judiciary's need for information in their respective subject areas are addressed. Until recently, these efforts have been focused on data needs related to matters litigated in the bankruptcy courts and courts of appeals (see Attachments 2 and 3, respectively).[2] Because the work in those areas is mostly completed, attention is now turned toward identifying what kinds of data should be collected with respect to district court proceedings.

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[1] Judicial Conference of the United States, *Long Range Plan for the Federal Courts*, Implementation Strategy 73a (reproduced in Attachment 1).

[2] Although implementation efforts are presently focused on improving collection of *case-related* information, Recommendation 73 extends to *all* data needed for "reporting, policy-making, and planning purposes," including information on the judiciary's administrative (*e.g.*, financial, personnel, facilities management) activities.

Discussion

Addressing the Judiciary's Data Needs

To make informed decisions about what judicial resources are required, how they should be allocated and employed, and what other policies should be established with respect to judicial administration, the judiciary needs a variety of statistical data about the nature of cases brought in the federal courts and how they are handled. Historically, only a limited range of case-related information has been collected in a consistent manner that permits statistical comparisons between courts and time periods. Even with the advent, in the 1980's, of automated systems for docketing and case management, caseload data collected in reportable form by the courts have generally been limited to (1) numbers of motions, trials, and cases pending for set periods of time, and (2) descriptive information collected at (a) case opening (*e.g.*, origin of the case, nature of suit or offense, number of criminal defendants, jurisdictional basis, class action status, amount demanded, fee status) and (b) case closing (*e.g.*, type of disposition, nature, timing, and amount of judgment or sentence).[3] Although the AO's Statistics Division has often been able to satisfy information requests with these kinds of data, court records contain other detailed information about cases and workload that is not accessible to policymakers, administrators, or researchers except through painstaking examination of individual case dockets and file folders.

During recent years, the judiciary has been under increasing internal and external pressure to obtain and provide data that better justify the courts' requests for financial, personnel, and other resources, and that demonstrate more precisely the impact on courts of proposed legislation and procedural rules. The more general data already collected permit the judiciary to show overall judicial workload and efficiency, but not to analyze to the extent desirable how cases are litigated and managed, what burdens are imposed by specific procedures, and what kinds of workload burdens are carried by particular categories of judges and court staff. To a large extent, these constraints prompted the Committee on Long Range Planning to include Recommendation 73 in the *Long Range Plan*. Other Judicial Conference committees also have been frustrated occasionally by inability to obtain data needed for policy development.

These unmet needs have prompted the judiciary to explore advances in information technology as means of enhancing its ability to collect and analyze data on court business and operations. Since the mid-1990s, for example, the Committee on the Administration of the Magistrate Judges System has sponsored the Magistrate Judge Statistics through Automated Records (or MJSTAR) project, which has the goal of improving consistency and reliability of information on magistrate judge duties and workload by capturing data in standardized form through the docketing process. Initially, MJSTAR was conceived as an add-on to the existing automated docketing systems, but that approach was overtaken by efforts to develop a new, state-of-the-art Case Management/Electronic Case Files (CM/ECF) system that will be deployed in all court types (appellate, district, and bankruptcy) within the next four to five years. Ultimately,

[3] Largely by means of manually prepared reports (*i.e.*, Forms JS-10 and JS-10A), the courts also track the numbers of hours spent by judges in trials and other proceedings.

the decision was made to use CM/ECF to meet the data collection requirements of MJSTAR–a commitment that paves the way for a broader examination of how CM/ECF and other new information technologies can be used to improve data collection on district court matters.

The CM/ECF project, for example, provides a singular opportunity to enhance the judiciary's ability to collect a wide range of statistical information about cases in the federal courts. As currently envisioned, CM/ECF will replace each court's automated docketing system (*i.e.*, ICMS Civil and Criminal, BANCAP, NIBS, or AIMS) with a new system that allows docket clerks and other users to identify items to be docketed from pre-defined "pick lists" of documents and other events.[4] (Attachment 4 shows an excerpt of the pick list used in one of four district courts presently testing the CM/ECF system.) Since items contained in a pick list can be associated in the computer system with standard definitions that, in turn, link to particular statistical reporting codes,[5] the new system should not only improve the accuracy and consistency of docket entries but, in doing so, also make it possible to capture more and better data on frequency of certain case types and litigation events, relationships between events (*e.g.*, when a motion is contested or the subject of a hearing) and time required to conduct certain proceedings (*e.g.*, the time elapsed between the filing of a motion and the court's decision).[6]

To assist the CM/ECF project in designing the new district court system to make full use of these capabilities, staff in the AO developed a preliminary analysis of the civil and criminal case opening and closing information and litigation events (including certain preliminary and ancillary matters) that might be useful to capture in a standardized format (see Attachment 5). Mindful of administrative burdens and other practical considerations, the staff assigned to each item one of three levels of priority based on the relative importance of the data and the relative ease or difficulty of collecting the data in a consistent way. Although this analysis reflects practical experience with the information requirements of judicial branch policymakers and administrators, it merely illustrates the general range of data needs that all relevant users might identify through the Recommendation 73 process.[7]

Review Process: The Committee's Role

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[4] Each court will have the option to implement either the full CM/ECF system (which includes electronic filing capabilities) or only the new automated docketing/case management component. If electronic filing is used, an individual (judge, attorney, or staff member) who files a document will also make the corresponding entry in the court's docket.

[5] This approach allows each court to use its own nomenclature for documents and other events while enabling the judiciary at large to aggregate data on such events according to nationally defined categories.

[6] In considering the judiciary's need for case-related information, the Committee may wish to distinguish between data that is merely *collected* (*i.e.*, captured in individual court databases) and collected data that is also *extracted* for reports on a district, circuit-wide, or national basis. Data collected by courts individually do not have to be reported on a regular basis, but instead can be stored in each court's automated system for retrieval as needed.

[7] Indeed, because the analysis was prepared with the CM/ECF project in mind, it may omit data needs that could be satisfied more appropriately from other sources.

The process for reviewing the judiciary's need for information on district court cases will include outreach to potential data sources and users inside and, where appropriate, outside the judicial branch. Although not all the details are established at this point, the AO plans to solicit (and, in some cases, already has solicited) the views of judges and court executives who serve in various administrative and policymaking roles, as well as the Federal Judicial Center and U.S. Sentencing Commission. The first step is this effort to involve relevant Judicial Conference committees in assessing the kinds of information about district court proceedings that should be collected to aid policymaking and administration in their respective areas of responsibility.[8] The tentative lists prepared by AO staff can serve as a starting point for that assessment.

As a preliminary matter, this Committee is asked to discuss the extent to which it intends to take part in this phase of the Recommendation 73 assessment of judiciary data needs. The Committee may wish to discuss, for example, whether and to what extent its work might be aided by access to different or additional data concerning district court proceedings. If the Committee decides to pursue the matter, it may wish to ask committee staff or a subcommittee to review the tentative lists and develop recommendations for the Committee to consider at a future meeting. The Committee may also wish to identify in this process other potential data users whose views might be helpful to the overall assessment. Any data collection requirements identified by this Committee will be forwarded to the Subcommittee on Judicial Statistics of the Judicial Resources Committee for consideration.

Attachments:

1. Recommendation 73 of the *Long Range Plan for the Federal Courts*, with implementation strategies and commentary
2. Review of Bankruptcy Statistics under Recommendation 73
3. Review of Appellate Statistics under Recommendation 73
4. Docketing "Pick List" in the Case Management/Electronic Case Files (CM/ECF) System
5. Preliminary Analysis of Priorities for Collecting Data about Civil and Criminal Proceedings in the District Courts

Attachment 1

Long Range Plan for the Federal Courts

December 1995*

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[8] During the present series of committee meetings, agenda items on this topic are being presented to the Committee on the Administration of the Bankruptcy System, Committee on the Administration of the Magistrate Judges System, Committee on Court Administration and Case Management, Committee on Criminal Law, Committee on Defender Services, Committee on Federal-State Jurisdiction, Committee on Rules of Practice and Procedure, and to the Subcommittee on Judicial Statistics of the Committee on Judicial Resources. The Committee on Automation and Technology is also being apprised of this effort. As the Recommendation 73 process goes forward, other Judicial Conference committees may be asked to express their views.

* The numbered recommendations and implementation strategies in the *Long Range Plan* were affirmatively approved by the Judicial Conference of the United States in 1995 and, as such, constitute judiciary policy. The commentary, which was prepared by the Committee on Long Range Planning, explains and supplements the recommendations and implementation strategies but does not necessarily reflect the views of the Conference.

RECOMMENDATION 73: **To refine both operations and policy, the federal courts should define, structure and, as appropriate, expand their data-collection and information-gathering capacity.**

Implementation Strategies:

73a *To obtain better data for reporting, policy-making, and planning purposes, the Judicial Conference should establish a steering group to coordinate and define the process. Members of the group should include representatives from all primary data sources, judicial branch users, and outside researchers.*

73b *This steering group should:*

(6) *Conduct a data needs assessment that includes but is not limited to: courts of appeals, district courts, and bankruptcy courts; magistrate judge reporting; Administrative Office program reporting; research; budgetary impact analysis; and long range planning.*

(7) *Inventory and catalog data collection efforts. Utilize recent surveys conducted by Conference committees and other organizations.*

(8) *Evaluate the ability of current statistical data holdings to support planning and policy.*

(9) *Determine how best to collect and maintain such data. Determine how best to organize and manage such efforts. Determine training requirements.*

(10) *Design the most appropriate single or coordinated network of data bases.*

[Commentary]

In determining the judiciary's need for statistical data and other information, the federal courts should seek input from interested persons outside the system, including scholars and researchers who study the courts. Judicial data collection should include the statistical data and other information needed for planning purposes, *e.g.*, data on historical trends and their impact on the judiciary, and on the demographics of court users. However, expansion of judicial data collection should be preceded by careful research to determine what precisely is needed in order to run the courts fairly and efficiently.

Clearly, a broad-based inquiry into what data and statistics should be regularly collected and how they are used must be made a high, immediate priority. Personnel from all levels and units of the federal court system, and others, should participate in specifying the contours of these data and statistics. The Judicial Conference should support and promote information

resources management to meet the information needs of the courts, the public, the bar, and litigants.

Attachment 2

Review of Bankruptcy Statistics under Recommendation 73

October 1996	The Administrative Office (AO) established a task force to study the bankruptcy statistical system—auditing the existing data collection process in 11 courts and reviewing the nature and scope of data collected in light of present and future needs. The task force, co-chaired by the AO's Assistant Directors for Judges Programs and Human Resources and Statistics, included bankruptcy judges, bankruptcy clerks of court, and a circuit executive.
December 1996	The AO task force members conducted a preliminary meeting with court representatives to identify potential bankruptcy data needs.
March 1997	The task force held a two-day conference to obtain input from bankruptcy data users in the executive and legislative branches, the bar, the academic world, and the media.
June 1997	The Committee on Judicial Resources and the Committee on the Administration of the Bankruptcy System received a task force report that identified general principles, detailed the types of information requested by court and non-court data users, and offered tentative views about whether, and how, the requested information should be gathered. Both committees endorsed the general approach of the report; the Bankruptcy Committee asked its Long-Range Planning Subcommittee to continue the work of the task force and develop policy recommendations for consideration by both committees.
September 1997	The Bankruptcy Committee's Long-Range Planning Subcommittee established two focus groups—one to address the need for financial and demographic data, and the other to address the need for information about litigation events and related issues. The two focus groups subsequently analyzed and prioritized the identified needs and made recommendations to the subcommittee about how to obtain and disseminate the information.
January 1998	The Bankruptcy Committee endorsed the Case Management/ Electronic Case Files (CM/ECF) initiative as "the most appropriate long-term solution" to meeting additional bankruptcy program information needs; it recommended to the Judicial Resources and Automation and Technology Committees that the new CM/ECF systems be used for that purpose. The committee directed its Long-Range Planning Subcommittee, among other things, to develop a list of specific additional information needed to administer the bankruptcy system properly and more effectively, and to determine whether any information now collected is no longer needed.

April 1998	On the recommendation of the Bankruptcy Committee and the Judicial Resources Committee, the Executive Committee adopted on behalf of the Judicial Conference the following position (to be used in responding to congressional proposals on data collection and dissemination): "[T]he federal judiciary should collect and maintain those data it requires for its own operations to fulfill its statutory responsibilities."
January 1999	Focusing on information required to "make appropriate policy decisions in operating the bankruptcy court system and planning for future needs," the Long-Range Planning Subcommittee reported to the Bankruptcy Committee that accurate collection and reporting of that information requires use of uniform standard event codes or data elements in docketing of litigation events. The committee endorsed that approach and authorized the subcommittee to disseminate, for comment in the court community, a priority list of standard docket events and data elements for most chapters and types of proceedings under the Bankruptcy Code.
June 1999	After receiving comments on the proposed list of standard docket events and data elements, the Long-Range Planning Subcommittee forwarded a revised priority list to the Bankruptcy Committee. The committee accepted the list, which was subsequently forwarded to the CM/ECF project for implementation through the new automated case management/docketing system.
June 2000	The Bankruptcy Committee will receive a report on certain items in the list of standard docket events and data elements that have been defined or revised to accommodate docketing and case management practices in the courts or respond to questions from CM/ECF project staff.

Attachment 3

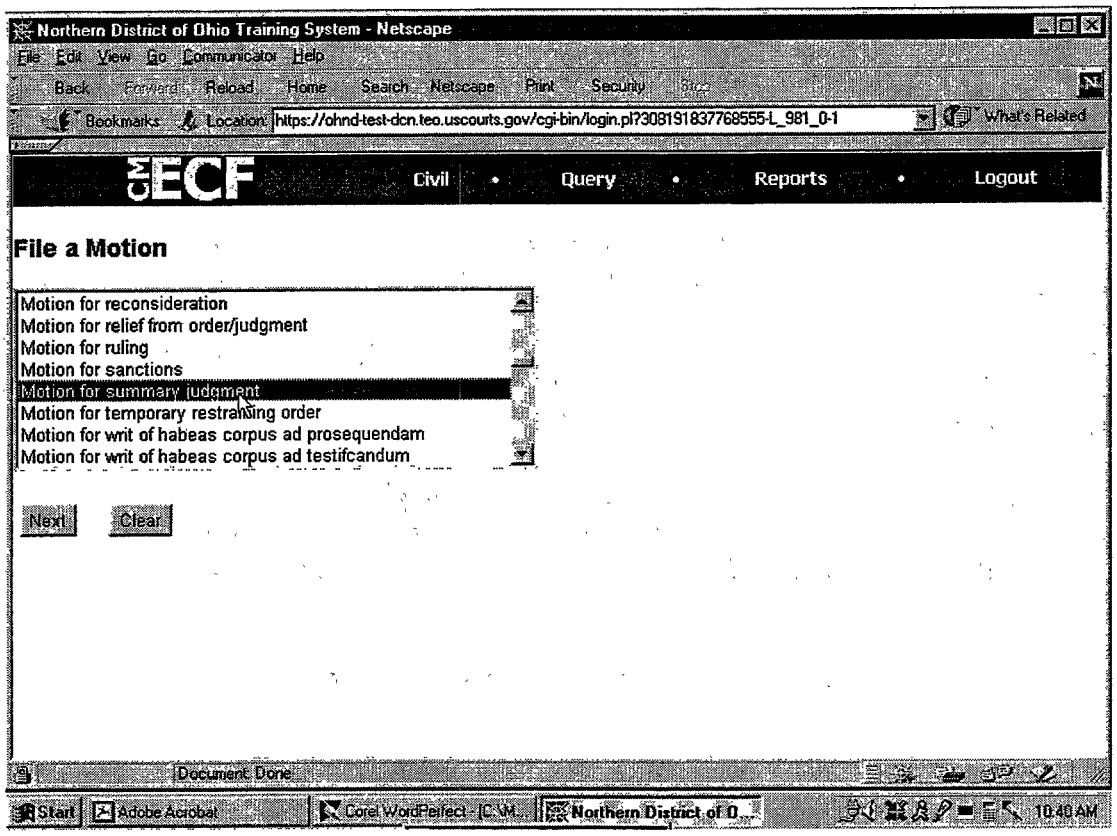
Review of Appellate Statistics under Recommendation 73

October 1998	The second activity phase under Recommendation 73 began with designation of the Administrative Office's (AO's) Appellate Court Advisory Council (composed of circuit judges and appellate court unit executives) as a task force to assist in identifying aspects of data collection on court of appeals proceedings that should be refined or modified. The task force members were asked to consult with their respective chief circuit judges during the course of the project to ensure that their views are taken in account.
October 1998- October 1999	Comments on current appellate statistics were solicited from the Supreme Court, the U.S. Sentencing Commission, the Federal Judicial Center, and the U.S. Department of Justice.
April 1999	At the spring meeting of the Appellate Court Advisory Council, the task force discussed the comments received to that point and decided to focus efforts on collecting and reporting additional information about (1) pro se and prisoner cases, and (2) en banc hearings.
October 1999	At the fall meeting of the Appellate Court Advisory Council, the task force members reviewed, and concurred with, an AO staff analysis of the suggestions received in comments from various sources. They also discussed the feasibility of collecting additional information on characteristics identified in a Federal Judicial Center report as potentially indicative of the difficulty of an appellate case. With regard to pro se and prisoner cases and en banc hearings, the staff was asked to concentrate on those areas where changes in data collection appear to be needed, identify specific, additional data elements to be collected, and propose methods for gathering the information.
December 1999	The Judicial Resources Committee's Subcommittee on Judicial Statistics received a staff report on the progress of the appellate court statistics project, and was asked to consider additional data elements that may be required to aid the subcommittee in evaluating judgeship needs and other areas of subcommittee responsibility.
April 2000	At the spring meeting of the Appellate Court Advisory Council, the task force considered suggestions from the Federal Judicial Center for enhancing collection and/or reporting of statistics with respect to (1) issues on appeal, (2) interlocutory appeals, (3) consolidated and related cases, (4) alternative dispute resolution, (5) oral arguments and en banc proceedings, and (6) procedural terminations. The task force offered recommendations on some but not all of these items.

May 2000	The Subcommittee on Judicial Statistics of the Judicial Resources Committee will receive a report that includes the task force's recommendations.

Attachment 4

Docketing "Pick List" in the Case Management/Electronic Case Files (CM/ECF) System



Attachment 5

Preliminary Analysis of Priorities for Collecting Data about Civil and Criminal Proceedings in the District Courts

The following tables were developed by AO staff, in consultation with staff from the Federal Judicial Center (FJC), to better inform development of data collection capabilities in the new Case Management/Electronic Case Files (CM/ECF) system for the district courts. In these tables, staff have identified, and assigned priorities to, certain case information and litigation events that might be useful to capture in a uniform, consistent manner in civil and criminal cases by means of the automated docket. **The tables represent only a preliminary analysis of data needs for purposes of further study and discussion.**

Explanation of priority rankings:

1 -- Items for which there is a *demonstrable need* for court- and/or system-wide information to aid policymaking, resource allocation, and/or workload management

2 -- Items for which there *may be a need* for court- and/or system-wide information to aid policymaking, resource allocation, and/or workload management, *but* where *the need may or may not be outweighed* by the difficulties of collecting the information in a consistent manner

3 -- Items for which there appears to be *no practical need* for court- and/or system-wide information to aid policymaking, resource allocation, and/or workload management, *and/or* it appears that *collection* of the information in a consistent manner, even if needed, *would be difficult*

[Bracketed italics] are used to depict rankings on which staff members' views were particularly tentative.

Civil Cases

Item	Priority
Information about parties and amici	
Number of party/amicus curiae participants in the case (derived from docketed information identifying parties of record and authorized amici)	1
Represented by counsel (linked with party/amicus information to identify number of separately represented participants in the litigation)	1
Incarcerated	2
Incorporated or business entity	2
Public entity	2
General case information	
More complete description of "nature of suit" (but not necessarily each individual claim or count) and updated, as necessary, to reflect amended complaints and partial dismissals/settlements during the pendency of the case; also the ability to add nature of suit categories easily or to have a separate field where certain types of cases can be easily tracked	1 (flexibility to add/revise NOS categories) 2 (otherwise)
Title/Section (statutory basis for the action): Make this a mandatory field	1
Title/Section. Within the citation table, add two additional dates: Repeal date: The date that a law is repealed Termination date: The date that the AO determines that a title/section will no longer be used and an alternate title/section is required	1 (but not in the docket)
Identify form of relief demanded (*i.e.*, money damages, injunction, or declaratory judgment)	2
In cases that move from one court to another (*i.e.*, through appeals, remands, and transfers), include on the docket of each court, the case, adversary proceeding, and/or other docket number assigned to the matter in every other court in which the case has been docketed	1
Class action status: Update if class action status changes during a case–might be accomplished through capture of the motions/orders affecting class action status	1
Origin code: AO data on multidistrict litigation cases do not match the data maintained by the Judicial Panel on Multidistrict Litigation. The perception is that coding in the districts is not uniform. Orders granting MDL transfers should trigger updates of the origin code and/or capture the event (transfer) date.	1
Litigation events	
Pleadings and case-dispositive pretrial motions	
Joinder, severance, and intervention of parties; participation by amicus curiae	*[2]*
Claims and counterclaims/answers to claims and counterclaims	*[2]*
Motion for summary judgment	1
Order on the summary judgment motion (if granted, this entry can also be used to generate the basis for disposition—see below)	1

Item	Priority
Motion to dismiss	1
Order on dismissal motion (including whether the dismissal is with or without prejudice)	1
Motion for default judgment	3
Order on motion for default judgment (if granted, this entry can also be used to indicate the nature of the disposition--see below)	1 (if granted) 3 (other)
Special events	
Requests for temporary restraining orders and preliminary injunctions (requests for permanent injunctions identified through "form of relief demanded"--see above)	1
Orders on requests for TROs and preliminary injunctions (entry of permanent injunction identified through "form of relief granted"--see below)	1
Order appointing a special master (or its equivalent) in all cases, including prisoner litigation (see below)	1
Filing of special master report	3
Special master fee applications/approvals	3
ADR	
Case sent to arbitration, mediation, etc. (identifying which form of ADR is being used)	*[1]*
Report filed by mediator, arbitrator, etc.	3
Result of ADR activity (need to define)	3
Referrals to magistrate judges (as defined in the MJSTAR requirements)	1
Motion/request for certification (or decertification) of a class action (including request included in a complaint)	1
Order on class certification/decertification	1
Motion/request for recusal	3
Court's action on motion/request for recusal (including sua sponte recusals)	2
Motion to remand a case removed from state court	2
Order sua sponte, or on motion, to remand to state court (if granted, this entry can also be used to indicate the nature of the disposition—see below)	1 (if granted) 2 (otherwise)
Motion to remand to an agency (to supplement the administrative record)	2
Order sua sponte, or on motion, to remand to agency (if granted, this entry can also be used to indicate the nature of the disposition—see below)	1 (if granted) 2 (otherwise)
Transfer to another district under the venue statutes, including any motion for change of venue (this entry can also be used to indicate the nature of the disposition—see below)	1
Transfers under the MDL statute (this entry can also be used to indicate the nature of the disposition—see below)	1
Motion for imposition of sanctions - Rule 11 and Rule 37 (also see below under "Discovery Matters")	1 (Rule 11) 2 (Rule 37)
Motion for disqualification of counsel	2

Item	Priority
Order on sanctions motion	1 (Rule 11) 2 (Rule 37)
Contempt proceedings (need to define)	2
Offer of judgment under Rule 68	2
Motion to seal or unseal filed documents (need to define, and to include not only filing of documents "under seal" but others for which only *electronic* public access is restricted)	2
Order on motion to seal or unseal (need to define, and to include not only filing of documents "under seal" but others for which only *electronic* public access is restricted)	2
Bankruptcy proceedings in district court, including-- Appeals from the bankruptcy court to the district court District court proceedings on non-core matters, and Specific referrals and withdrawals of reference in bankruptcy cases (motions and orders) (In general, case information and events identified for standardized docketing in other civil cases should, to the extent relevant, also be collected in bankruptcy proceedings.)	*[1]*
Motion/application to shift responsibility for prevailing party's attorneys' fees and costs (including the statutory authority for the award—*e.g.*, 42 U.S.C. § 1988 (civil rights), 28 U.S.C. § 2412 (EAJA))	2 (motions/ applications) 3 (statutory authority)
Identify any proceeding conducted with teleconferencing or videoconferencing equipment (also indicate whether the proceeding is conducted by a judge from a remote location inside or outside the district)	2 (judge at remote location) 3 (other uses)
With regard to all motions indicate whether they are contested and whether a hearing is held	2
Discovery matters	
Rule 26(f) meeting of the parties	3
Motion for protective order	2
Order on motion for protective order	*[2]*
Other significant discovery motions (*e.g.*, a motion to compel, a motion for sanctions)	*[2]*
Orders on other significant discovery motions	*[2]*
Other pretrial matters	
Rule 16 pretrial conference	2
Settlement conference	2
Other pretrial conferences	2
Trial matters	
Jury trial or bench trial	1
Jury statistics - numbers called, excused, not serving, etc.	1 (# of jurors deliberating) 3 (other)

Item	Priority
Result of trial—*e.g.*, verdict, no verdict, settled or dismissed (this entry can also be used to generate the basis for disposition—see below)	1
Evidentiary hearings	1
Proposed/requested findings of fact	3
Order containing court's findings	3
Request for jury instructions	3
Court's order on jury instructions	3
Remote transmission of testimony	3
JS10/10A information (including number of trial days) currently obtained on paper forms or through a small computer application developed by the Statistics Division	1
Judgment/Disposition	
Motion for judgment as a matter of law (aka directed verdict)	3
Order on motion for judgment as a matter of law	1 (if granted) 3 (otherwise)
Motion for judgment n.o.v.	3
Order on motion for judgment n.o.v.	1 (if granted) 3 (other)
Judgment entered (including update if judgment is subsequently modified)	1
Consent decree	2
Identify form of relief granted (*e.g.*, monetary, injunctive, declaratory)	1
Identify specific nature of/basis for disposition (as identified in items listed above)	
Post-trial motions/orders	
Modification of judgment	3
New trial	1 (order granting new trial) 3 (motion/ denial)
Other categories of post-trial motions	*[2]*
Award of attorneys' fees and costs (under fee- and cost-shifting statutes)	2
Special Assessments: Provide amount/type of assessment, *i.e.*, court fees.	*[3]*
Post-trial execution	3
Notice of appeal (specifying whether a final or an interlocutory order is being appealed)	1

Item	Priority
Prisoner/pro se litigation	
Payment of filing fee (indicate full, partial, or no payment)	*[2]*
Applications to file *in forma pauperis*	*[2]*
Events and dispositions under the PLRA screening requirement (28 U.S.C. § 1915A) and the "three strikes" provision (28 U.S.C. § 1915(g)) if the information can be captured accurately	*[2]*
Certificate authorizing an appeal	*[2]*
Visiting and senior judge information	
Case assignments, dispositions (of cases, claims, substantive and procedural motions), and any proceedings (hearings, conferences, etc.) involving out-of-district and out-of-circuit judges Link judge code to all openings, closings, and docketed events Flag any case assignment to, or proceeding conducted or disposition made by, a visiting judge	1
Separate "flag" for matters handled by senior judges	1

Criminal Cases*

Item	Priority
Initial proceedings	
Matters covered by MJSTAR, *i.e.*, warrants, detention hearings, etc., whether handled by an Article III judge or a magistrate judge	1
Initiating document, *i.e.*, indictment versus information	1
Procedural status for each defendant at any or all of the following times: prior to arraignment, at arraignment, and prior to trial–making it possible to determine at what point a defendant pleads guilty.	2
Rule 20 transfer from other district	1
Rule 40 removal	1
Fugitive Status date	1
Grand jury proceedings	
Motions to challenge grand jury proceedings	3
Other motions based on alleged defects in the institution of the prosecution	3
Court orders on the motions	3
Counts in the indictment and outcome of each	1
Death Penalty: Identify cases in which the death penalty is available and prosecutors seek its imposition	1
Title/Section. Within the citation table, add two additional dates: Repeal date: The date that a law is repealed Termination date: The date that the AO determines that a title/section will no longer be used and an alternate title/section is required.	1 (but not in the docket)
Motions and pretrial proceedings	
Motions to suppress evidence	1
Court orders on motions to suppress evidence	1
Other kinds of motions, such as:	
Motion for change of venue	3
Motions dealing with unfair publicity	3
Motions on discovery	3
Motions for severance of charges or defendants	3
Court orders on these motions	3
Entry/acceptance of guilty plea (see above re: procedural status)	1
Identify proceedings (motions, hearings, etc.) involving juveniles	*[2]*

* In addition to items specifically identified, this table incorporates by reference any criminal case information and litigation events analogous to items identified in the preceding table with respect to civil cases.

Item	Priority
Trial	
Same information as in civil cases; include non-CVB petty offense and class A misdemeanor cases	1
Motion for judgment of acquittal/order on motion	1 (order granting) 3 (motion/ denial)
JS10/10A information (including number of trial days) currently obtained on paper forms or through a small computer application developed by the Statistics Division	1
Sentencing	
Presentence investigation report filed by probation officer	*[2]*
Party objections to the same	*[2]*
Final report filed with the court	*[2]*
Sentencing hearing	*[2]*
Restitution Assessed: Provide amount/type of restitution ordered.	*[2]*
Special Assessments: Provide amount/type of assessment, *i.e.*, court fees.	*[3]*
Proceedings for modification, termination, or revocation of supervised release (including time spent in revocation hearings)	1
Attorney and other services	
Whether defendant has a CJA attorney	1
Interpreter appointed	2
Visiting and senior judge information	
Case assignments, dispositions (of cases, claims, substantive and procedural motions), and any proceedings (hearings, conferences, etc.) involving out-of-district and out-of-circuit judges Link judge code to all openings, closings, and docketed events Flag any case assignment to, or proceeding conducted or disposition made by, a visiting judge	1
Separate "flag" for matters handled by senior judges	1

Item 15-16

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 9, 2000

MEMORANDUM TO STANDING RULES COMMITTEE

SUBJECT: *Long-Range Planning and Strategic Issues*

I am attaching material prepared by the Administrative Office's long-range planning staff, which contains brief reports from various Judicial Conference committees on the status of relevant long-range issues. The three rules-related issues are: (1) uphold the integrity of the rules process; (2) monitor, analyze, and address the proliferation of local rules; and (3) make effective use of technology and information.

The long-range planning staff is asking each of the pertinent Conference Committees to review its action on its issues and, in particular, determine whether anything more is needed to lessen potential problems or improve coordination among committees of the Judicial Conference. In addition, the long-range planning staff is asking the committees to focus on one overarching issue — the balance between national standards and local flexibility. The report of the rules committees is set out in pages 55-57.

John K. Rabiej

Attachments

AGENDA # 15
June 2000

Long-Range Planning and Budgeting

A. Long-Range Planning

Committees are asked to take the following steps at the Summer 2000 meetings:

1) **Review the key strategic issues identified in the report, *Strategic Planning Issues of the Committees of the Judicial Conference of the United States* (See Attachment 1).** The report lists crosscutting strategic issues followed by the individual committee lists of planning issues and courses of action for dealing with them.

Discuss whether any actions need be taken to lessen potential problems or improve coordination on crosscutting issues or other matters of mutual interest.

Depending on the nature of the issue, the committee might wish to:

- undertake new initiatives
- collect additional information through staff research
- consult and coordinate with other committees
- bring the issue for discussion at the chairs planning meeting.

2) **Discuss how the committee can address the issue of balancing national standards with local flexibility.** Most of the March 13, 2000 long-range planning meeting of Conference committee chairs was devoted to this topic (see Attachment 2). The overall consensus was that there is a place for both national standards and local flexibility. It would be difficult to define overarching principles as to when one or the other approach is preferable. In many cases, it is not an "either/or" question but a matter of determining the desired degree of specificity. Policies, programs, and issues need to be assessed on a case-by-case basis to determine how best to define standards, establish controls, set guidelines, or allow considerable local discretion.

Each committee should determine how to incorporate this assessment as part of its normal practices when developing program guidelines and policies. The following four questions should be considered:

1. **What are the critical program objectives?**

2. **Considering cost, efficiencies, performance, and other relevant factors, is it necessary or would it be appropriate to propose a standard of some kind?**

3. **Would a standard interfere with judicial independence?**

4. **How much standardization or local flexibility is appropriate?**

Based on the committees' past experiences, it appears that stricter national guidelines can be most useful when there is a specific requirement (such as a statutory mandate), some operational necessity, or substantial savings to be realized. Some examples of the use of national standards include:

- the Data Communications Network, which allows judiciary-wide transmission of data and communications;
- network security requirements, which protect against unauthorized access to judiciary records;
- centrally held service contracts, as for computer assisted legal research, which allow for savings through volume discounts;
- budgetary and financial controls, which ensure proper stewardship of public funds;
- judicial compensation and benefits guidelines, which preserve equitability;
- fees for public access to electronic court records, which promote fairness and ensure revenue important to the judiciary's budget;
- standard reports, which comply with external mandates; and
- courtroom planning and design, which ensures that courtrooms meet, but do not exceed, functional requirements.

Allowing for greater local discretion, on the other hand, is preferred when:

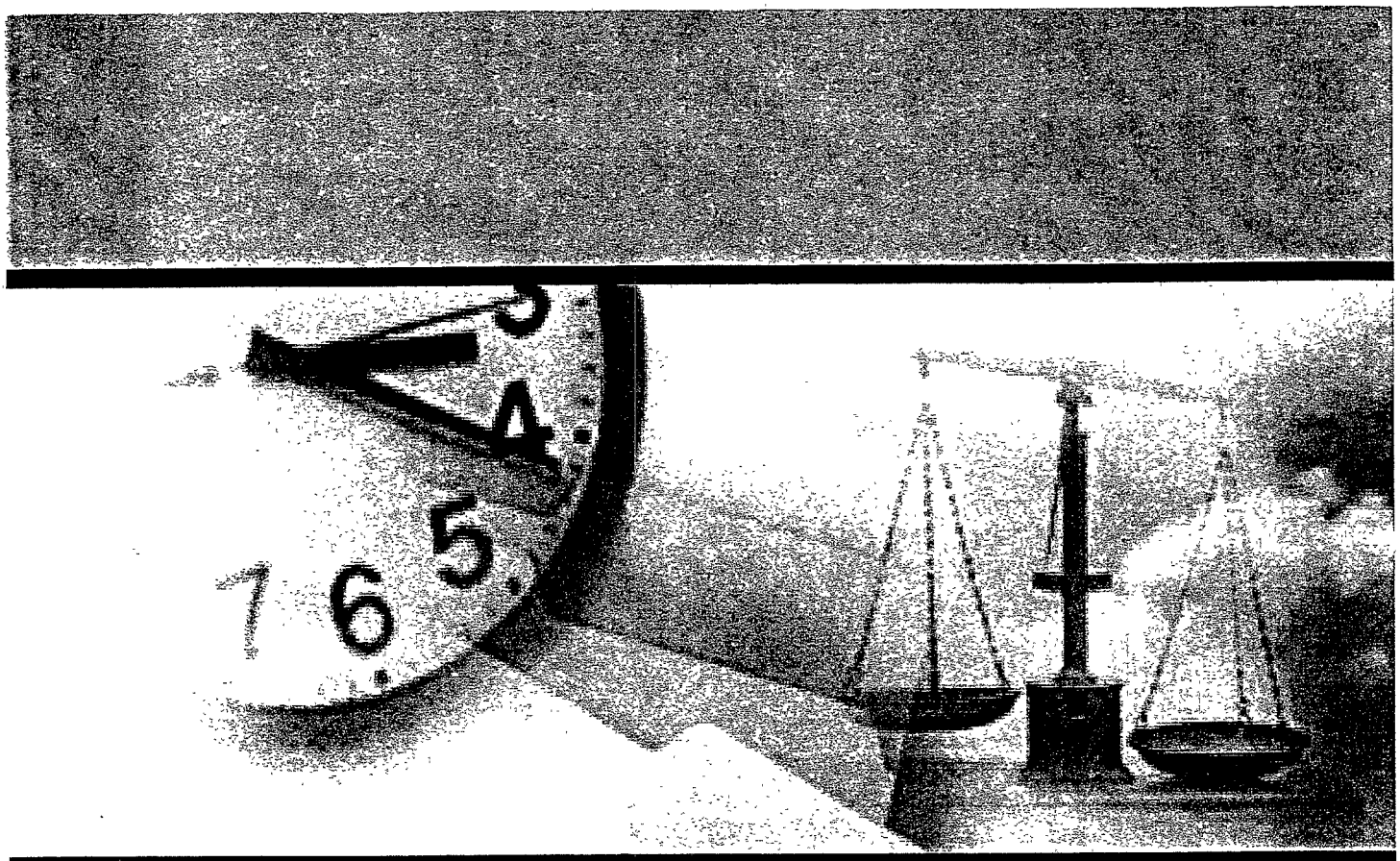
- judicial functions or administration of justice concerns take precedence, such as in determining how to organize and use staff;
- procedures need to be tailored to reflect preferences in support of judgments of the court, such as fine collection and offender supervision; and
- functions or procedures are experimental, such as pilot programs, or still evolving, such as regulating the use of electronic signatures.

Attachment 1: Report of Strategic Planning Issues of the Committees of the Judicial Conference

Attachment 2: Report from the Chairs' Long-Range Planning Meeting March 13, 2000

Attachment 1

Report of Strategic Planning Issues of the Committees of the Judicial Conference



Strategic Planning Issues of the Committees of the Judicial Conference of the United States

February 2000

Administrative Office of the U.S. Courts
Office of Management Coordination and Planning

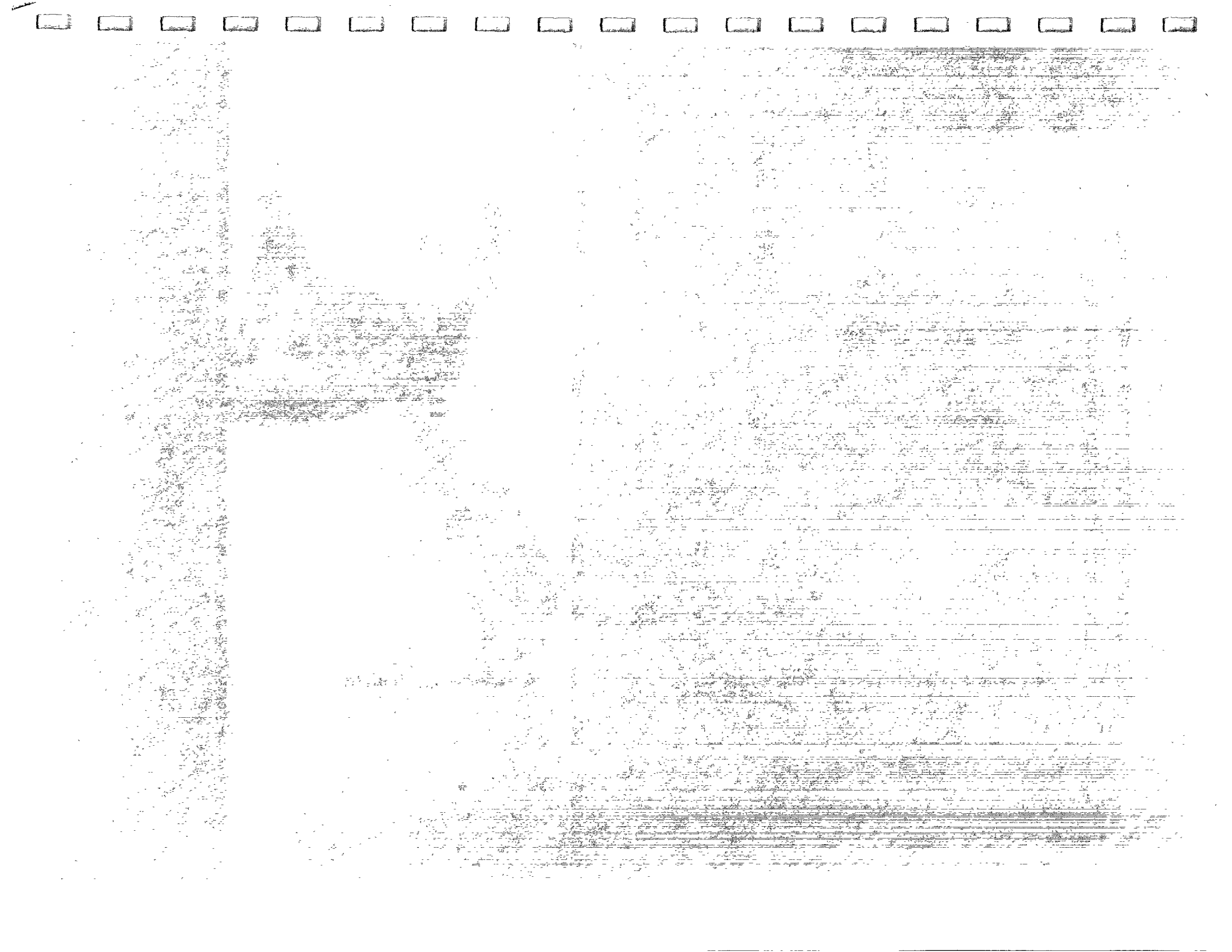


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Introduction

Following the Judicial Conference's approval of the *Long Range Plan for the Federal Courts* in September 1995, Chief Justice William H. Rehnquist determined that the responsibility for planning should rest with the various committees of the Judicial Conference, with the Executive Committee assigned a coordinating role.

To facilitate the planning process, in February 1999, the Executive Committee determined that the long-range planning process would be enhanced if the chairs of Conference committees would play the lead role for each committee and meet as a group as part of regularly scheduled meetings of the chairs at the time of the Judicial Conference.

An enhanced long-range program planning and budgeting process was launched in a meeting of 14 committee chairs and staff in Washington, D.C. in April 1999, and a second long-range planning meeting took place in September 1999. The meetings were led by Judge Lloyd D. George, then the Executive Committee's coordinator for the long-range planning process.

The purpose of the enhanced planning process is to support the judiciary's mission by defining goals and developing plans and budgets to achieve them. Through the planning process, Judicial Conference committees will:

- Identify and address strategic issues facing the judiciary
- Consider judiciary-wide consequences of program and policy choices
- Articulate the judiciary's mission-related budget requirements

In September 1999, Judge Lloyd D. George asked each committee to consider trends, events, initiatives and policies that will or may affect its programs over the next five to ten years and prepare a short planning document outlining its issues and program goals and objectives.

The 1999-2000 committee strategic issues outlines are consolidated as chapters in this report.[1] It is published to inform all committees about strategic issues and planning efforts. As committee program plans change, this report will be updated.

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[1] Strategic goals and initiatives of the Committee on Automation and Technology are contained in the annual updates of the *Long Range Plan for Information Technology in the Federal Judiciary* and published separately. The committee did not provide a summary outline for this report.

Key Crosscutting Strategic Issues

The federal judiciary's fundamental mission is to provide ***Equal Justice Under Law.*** The federal courts exist to maintain the rule of law by providing just and timely resolutions of the disputes that Article III of the United States Constitution and Congress have assigned to them.

As stated in the *Long Range Plan for the Federal Courts*, the judiciary's core values and goals enable it to fulfill its mission and retain the nation's confidence in our system of justice.

- Safeguard the Rule of Law
- Guarantee Equal Justice
- Preserve Judicial Independence
- Sustain Our System of Federalism with National Courts of Limited Jurisdiction
- Maintain Excellence
- Ensure Accountability

Effective planning requires the identification of factors or issues that influence achievement of the judiciary's ability to attain its goals -- those issues that most imperil goals as well as those offering the most promise for enhancing them. Program planning begins with the consideration of the strategic issues, which can be broad or narrow in scope. At the broadest level are judiciary-wide issues that cut across Judicial Conference committee lines.

The following tables show seven key crosscutting issues and some related issues that were developed through discussions at the long-range planning meetings of committee chairs. Also listed under each category are related issues identified by the individual committees. In the chapters following, the committee outlines provide greater detail about their strategic issues and planned courses of action for addressing them.

Preserving the Quality of Justice and the Excellence of Judicial Services	
▸ Determining how to measure the quality of justice and assess the effects of changes or initiatives on the quality of justice ▸ Assessing the implications of the growth in magistrate judges, staff attorneys, and other groups in relation to Article III judgeships ▸ Providing effective defender services ▸ Providing effective supervision of offenders	
Maintaining excellent service to the courts	Committee on the Administrative Office
Preserving the quality of justice and the excellence of judicial services and ensuring the just, speedy, and efficient disposition of cases	Committee on Court Administration and Case Management
Assessing, maintaining, and improving quality of representation	Committee on Defender Services
Monitoring proposals for modification of federal jurisdiction	Committee on Federal-State Jurisdiction
Uphold the integrity of the rules process	Committee on Rules of Practice and Procedure

Coping with Changing Work and Increasing Workload	
▸ Managing increasing criminal filings ▸ Addressing disparate growth in work and the congested dockets in some courts ▸ Handling complex cases	
Potential impact of pending bankruptcy reform legislation	Committee on the Administration of the Bankruptcy System
Consider the impact of the increase in workload associated with supervised release revocation hearings	Committee on Criminal Law

Managing Resources Effectively	
▸ Making effective use of available judicial resources across the judiciary ▸ Considering the growing reliance on senior judges ▸ Allocating, organizing, and using staff resources efficiently ▸ Achieving economies while preserving quality	
Managing resources effectively	Committee on the Administrative Office
Developing and using workforce and technology resources effectively and efficiently	Committee on Court Administration and Case Management
Consider how several long-range proposals could affect program costs	Committee on Criminal Law
Optimum utilization of defender services funds	Committee on Defender Services
Management of California capital habeas costs	Committee on Defender Services
Analyze the growth of the judiciary's pay and benefits costs	Committee on Judicial Resources
Implementation of the recommendations of the Judicial Officers Resources Working Group	Committee on Judicial Resources
Helping courts obtain the greatest benefit from their magistrate judges	Committee on the Administration of the Magistrate Judges System

Maintaining Effective Judicial Governance and Management Mechanisms ▸ Improving mission-based program planning and budgeting ▸ Achieving consensus on priorities and directions ▸ Determining the right balance between national policies and programs vs. local flexibility ▸ Maintaining effective oversight mechanisms to assure accountability	
Providing program leadership and maintaining effective management systems	Committee on the Administrative Office
Ensuring effective judicial governance and management mechanisms, and preparing for different and increased caseloads	Committee on Court Administration and Case Management
Develop long-range planning responsibilities, issues and objectives	Committee on Judicial Resources
Monitoring, analyzing, and addressing the proliferation of local rules	Committee on Rules of Practice and Procedure
Planning for Security resources effectively	Committee on Security and Facilities

Attracting and Retaining a Highly Competent Workforce ▸ Seeking adequate compensation for judges ▸ Improving benefits programs for judges and judiciary employees	
Attracting and maintaining an excellent workforce	Committee on the Administrative Office
Seeking adequate compensation for judges	Committee on the Judicial Branch
Improving benefits programs for judges and staff	Committee on the Judicial Branch

Making Effective Use of Technology and Information ▸ Preparing for electronic case files ▸ Protecting the security of sensitive information ▸ Identifying changes in responsibilities, work methods, staffing, and facilities that will result from the use of new technologies	
Finding the appropriate balance between privacy concerns and the desire of creditors and others to have easy access to detailed financial information about the debtor and the bankruptcy estate	Committee on the Administration of the Bankruptcy System
Managing changes in bankruptcy judges' work due to the advent of electronic case files in the bankruptcy courts	Committee on the Administration of the Bankruptcy System
Meeting the need for more statistical information on the bankruptcy system	Committee on the Administration of the Bankruptcy System
Scrutinize proposed automation projects of the judiciary to determine their impact on matters within the purview of the committee	Committee on Judicial Resources
Making effective use of technology and information	Committee on Rules of Practice and Procedure
Impact of technology on the security and facilities programs	Committee on Security and Facilities

Preserving Judicial Independence, Obtaining Adequate Resources, and Maintaining Effective External Communications and Relationships ▸ Obtaining adequate funding for the judiciary ▸ Obtaining needed judgeships ▸ Ensuring the judiciary has adequate and secure facilities	
Securing adequate resources for the judiciary	Committee on the Administrative Office
Obtaining additional bankruptcy judgeships	Committee on the Administration of the Bankruptcy System
Strengthening the budget justification to congress to enhance the judiciary's ability to obtain needed resources	Committee on the Budget
Managing the judiciary's institutional rate of growth without impairing its ability to carry out its mission	Committee on the Budget
Adequacy of panel attorney rates	Committee on Defender Services
Promoting effective communication and cooperation between the state and federal court systems and their support organizations	Committee on Federal-State Jurisdiction
Finding more effective ways to communicate the judiciary's expertise and resources to executive branch agencies, foreign judiciaries, and organizations involved in international rule of law and judicial reform activities	Committee on International Judicial Relations
Enhancing relationships with government agencies and organizations that are significant players in international judicial reform	Committee on International Judicial Relations
Maintaining effective external communications and relationships	Committee on the Judicial Branch
Planning comprehensively for housing the federal courts	Committee on Security and Facilities
Dealing with GSA restructuring and downsizing	Committee on Security and Facilities

Committee on the Administrative Office

Honorable Edward B. Davis, Chair

Strategic Issues

1. **Maintaining Excellent Service to the Courts**
2. **Securing Adequate Resources for the Judiciary**
3. **Attracting and Maintaining an Excellent Workforce**
4. **Managing Resources Effectively**
5. **Providing Program Leadership and Maintaining Effective Management Systems**

Strategic Issue: Maintaining Excellent Service to the Courts

The Administrative Office's primary mission is to serve the courts and the Judicial Conference and its committees. While the courts have experienced modest growth in staffing, the AO's staff has remained fixed.

Courses of Action

- Maintaining good communication with the courts through the use of advisory groups, the J-Net, and e-mail.
- Presenting timely information to a broad audience in the courts through the Federal Judiciary Television Network (FJTN).
- Transitioning from traditional training methods to distance learning methods.
- Developing, installing, and providing user support for new systems and applications.

Strategic Issue: Securing Adequate Resources for the Judiciary

Obtaining sufficient funding, increases in judicial compensation, needed judgeships, and courthouses are particularly challenging tasks facing the AO and are especially crucial in light of budget restrictions imposed government-wide.

Courses of Action

- Devoting substantial attention to congressional communications and liaison with the legislative branch.
- Increasing public awareness through a Community Outreach/Public Education initiative.
- Completing an assessment of the space and facilities program that will address congressional and executive branch concerns and that may provide cost-savings recommendations.
- Seeking a legislative solution to OMB's blockage of courthouse funding: Federal Courts Budget Protection Act (S.1564, 106th Cong.)

Strategic Issue: Attracting and Maintaining an Excellent Workforce

As jobs in the judiciary become more highly skilled, particularly in the area of computer technology, the AO and the courts will need to fill technical and other skilled positions from a relatively small pool of qualified applicants. The AO's recent success in acquiring and delivering improved employee benefits programs has the potential for a substantially positive impact on the judiciary's workforce, thereby making judiciary employment more attractive. Other courses of action will also need to be pursued.

Courses of Action

- Continuing to provide good benefits for judiciary employees and assessing additional improvements in the field of employee benefits.
- Ensuring competitive pay, particularly for technical employees.
- Exploring the potential for short-term salary bonuses to attract highly competent job candidates.

- Addressing the employee development needs of a changing workforce through the Federal Judiciary Training Needs Assessment.
- Considering the need for appropriate background investigations.

Strategic Issue: Managing Resources Effectively

Making optimal use of available resources in the judiciary is a primary goal.

Courses of Action

- Reviewing the effectiveness of budget decentralization guidelines and formulas for allocating funds.
- Meeting the demands of work changes and resource requirements through work measurement studies in various court units.

Strategic Issue: Providing Program Leadership and Maintaining Effective Management Systems

Preserving the judiciary's independence as the third branch of government requires identifying program needs, making improvements where possible, exercising good stewardship of public funds, taking advantage of information technology, and maintaining effective management oversight mechanisms to ensure accountability.

Courses of Action

- Conducting a strategic assessment of the federal probation & pretrial services system.
- Conducting a comprehensive study of the judiciary's space and facilities program.
- Conducting an assessment of the judiciary's court security program.

- Conducting a comprehensive, independent assessment of the judiciary's information technology program.

- Implementing a financial management improvement program.

Committee on the Administration of the Bankruptcy System

Honorable Michael J. Melloy, Chair

Strategic Issues

1. **Potential Impact of Pending Bankruptcy Reform Legislation**
2. **Obtaining Additional Bankruptcy Judgeships**
3. **Finding the Appropriate Balance Between Privacy Concerns and the Desire of Creditors and Others to Have Easy Access to Detailed Financial Information About the Debtor and the Bankruptcy Estate**
4. **Meeting the Need for More Statistical Information on the Bankruptcy System**
5. **Managing Changes in Bankruptcy Judges' Work Due to the Advent of Electronic Case Files in the Bankruptcy Courts**

Strategic Issue: Potential Impact of Pending Bankruptcy Reform Legislation

Sweeping bankruptcy reform legislation was introduced in the 105th Congress, and again in the106th Congress, that could profoundly affect the future workload and administration of the federal courts in general and the bankruptcy system in particular. Among the controversial and far-reaching provisions in the legislation are the following:

Bankruptcy Appeals - A provision that would give the courts of appeals jurisdiction over appeals from final bankruptcy orders and certain interlocutory bankruptcy orders.

Data Collection - Provisions on the collection, publication, and reporting of bankruptcy statistics and case data.

Filing of Debtor Tax Returns - Provisions would require debtors to file copies of tax returns with the clerk of the bankruptcy court.

Strategic Objectives

- Assure that the Judicial Conference has a position on key provisions of the legislation.
- Assure that the positions of the Judicial Conference are made known to Congress.
- Estimate budgetary effects of bankruptcy reform legislation.

Initiatives or Courses of Action

- Work with other Conference committees to recommend action by the Judicial Conference to formulate positions on various provisions in the pending legislation.
- Draft materials for, provide guidance to, and establish a mechanism for judicial officers and Administrative Office personnel to deliver the positions of the Judicial Conference to Congress.
- Where feasible and appropriate, establish plans for effectively dealing with specific provisions to assure that the Administrative Office and the courts will be ready if legislation is enacted.
- Establish appropriate structure, process, and analytical tools to evaluate potential cost impact of bankruptcy reform legislative proposals.

Strategic Issue: Obtaining Additional Bankruptcy Judgeships

At its March 1999 session, the Judicial Conference approved the recommendation of the Bankruptcy Committee for 24 additional bankruptcy judgeships in lieu of 18 approved by the Judicial Conference in 1997. This request was transmitted to Congress in April 1999. The judiciary has had requests before Congress for the latest round of additional bankruptcy judgeships since 1993. Additional bankruptcy judgeships were last approved in August 1992. Since that time, the bankruptcy caseload has increased by 43 percent.

Strategic Objectives

- Assure that the requested bankruptcy judgeships are authorized by Congress.
- Ensure that the bankruptcy courts have sufficient judicial resources to effectively and efficiently adjudicate the rights and responsibilities of parties in bankruptcy cases and proceedings.

Initiatives or Courses of Action

- Draft materials for, provide guidance to, and establish a mechanism for judicial officers and Administrative Office personnel to deliver to Congress the requisite information concerning the need for additional bankruptcy judgeships.
- Prepare, assemble, and maintain updated statistical information on a regular basis for districts requesting additional judgeships to ensure that all data is up-to-date.
- Advise requesting districts on a regular basis of the status of the judgeships request.

Strategic Issue: Finding the Appropriate Balance Between Privacy Concerns and the Desire of Creditors and Others to Have Easy Access to Detailed Financial Information About the Debtor and the Bankruptcy Estate

The ease of access to electronic case files over the Internet has prompted growing privacy concerns, especially in bankruptcy, where debtors are required to submit detailed and extensive financial information. Concerned about the large number of bankruptcy filings and allegations of bankruptcy fraud, however, creditors and others are demanding that debtors submit even more information and that the parties and the public have easy access to information on bankruptcy cases and debtors. Congress is considering requiring debtors to submit more financial information and requiring the courts to provide easier access to the information.

Strategic Objectives

- Weigh privacy concerns against (1) the parties' legitimate needs for financial information about the debtor and the bankruptcy estate and (2) the efficient operation of the bankruptcy system.

- To the extent feasible, structure access to financial information about the debtor so that the parties get the information they need without unduly intruding on the privacy of debtor and third parties.

Initiatives or Courses of Action

- Coordinate with the Committee on Court Administration and Case Management, the Committee on Automation and Technology, and the Advisory Committee on Bankruptcy Rules on electronic privacy issues in the bankruptcy and other federal courts.

- Coordinate with the Advisory Committee on Bankruptcy Rules on any changes in the Federal Rules of Bankruptcy Procedure and the Official Bankruptcy Forms that may be proposed to ameliorate privacy concerns.

- Coordinate with the judges and other members of the CM/ECF bankruptcy working group in monitoring the implementation of the CM/ECF initiative with respect to privacy concerns.

- Continue examining privacy issues in the bankruptcy context, including exploring ways that the intrusion into individual privacy can be minimized.

Strategic Issue: Meeting the Need for More Statistical Information on the Bankruptcy System

Recommendation 73 of the Long Range Plan for the Federal Courts provides that, to refine operations and policy, the federal courts should define, structure, and, as appropriate, expand their data collection and information-gathering capacity. Congress, members of the bankruptcy community, and academics all have pressed for more extensive data on the bankruptcy system. The Bankruptcy Committee needs a variety of data to evaluate proposed changes in the bankruptcy system, determine judgeship needs, and administer the system.

Strategic Objectives

- Identify the bankruptcy program information needs of the bankruptcy system and the judiciary.
- Ensure that appropriate means are adopted to collect the information for analysis and reporting.

Initiatives or Courses of Action

- Coordinate with the Committee on Automation and Technology, the Committee on Court Administration and Case Management, the Advisory Committee on Bankruptcy Rules, and the Committee on Judicial Resources in identifying bankruptcy program information needs.
- Update and revise the Proposed Standard Docket Events as needed in response to legislation, comments from the courts, and program requirements.
- Coordinate with the CM/ECF initiative to ensure that the needed information can be extracted from that system.
- Coordinate with the Statistics Division and the Office of Information Technology to plan how the needed information will be extracted, compiled, and stored.

Strategic Issue: Managing Changes in Bankruptcy Judges' Work Due to the Advent of Electronic Case Files in the Bankruptcy Courts

As part of the CM/ECF initiative, a new case management system and, at the courts' option, electronic case filing, are to be installed in the bankruptcy and other federal courts over the next several years. Many judges are uneasy with the change. Although judges won't be forced to abandon paper copies, the courts' work processes and interactions with the parties will change dramatically.

Strategic Objectives

- Ensure that electronic case files and the new case management system enhance bankruptcy judges' ability to do their jobs, i.e., deciding the matters before them and administering their caseloads.

- Facilitate the use of electronic case files and the new case management system to enhance service to the parties and the public.

- Ease bankruptcy judges' transition into the use of electronic case files.

Initiatives or Courses of Action

- Coordinate with the Committee on Automation and Technology, the Committee on Court Administration and Case Management, the Advisory Committee on Bankruptcy Rules, the Office of Information Technology, the Office of Court Programs, and the CM/ECF project team to facilitate bankruptcy judges' use of the new system.

- Work with others in the Administrative Office to encourage increased participation by bankruptcy and other judges in electronic case filing.

- Coordinate with the judges and other members of the CM/ECF bankruptcy working group in monitoring the implementation of the CM/ECF initiative with respect to its impact on bankruptcy judges and service to the parties and public.

- Continue examining the impact of electronic filing on the bankruptcy system.

Committee on the Budget

Honorable John G. Heyburn II, Chair

Strategic Issues

1. **Strengthening the Budget Justification to Congress to Enhance the Judiciary's Ability to Obtain Needed Resources**

2. **Managing the Judiciary's Institutional Rate of Growth Without Impairing Its Ability to Carry Out Its Mission**

Strategic Issue: Strengthening the Budget Justification to Congress to Enhance the Judiciary's Ability to Obtain Needed Resources

The judiciary has been very successful in its efforts to convince Congress to provide funding increases. Typically, the judiciary receives larger percentage increases than the executive branch agencies against which it competes for funds, even the Department of Justice. But, despite how well the judiciary fares from a relative perspective, the funding levels Congress provides still fall short of judiciary needs. While the judiciary's inability to receive its full request is largely a function of reduced funding amounts with which Congress has to work, opportunity exists for the judiciary to strengthen the presentation and justification of its request.

Desired Outcome: Obtain from Congress the full amount necessary to support the judiciary's budget requirements.

Courses of Action

- A primary course of action would be to strengthen the link between funding and results. That is, we should consider how to demonstrate better:

  - The positive results on the judicial system of funding increases.
  - The negative impact on the judicial process of inadequate funding.
  - How well the judiciary uses the resources that Congress provides.
  - The impact of congressional mandates on judicial requirements.

- To the extent possible, we should identify ways to demonstrate the above quantitatively vs. anecdotally.

Strategic Issue: Managing the Judiciary's Institutional Rate of Growth Without Impairing Its Ability to Carry Out Its Mission

Based on estimates developed in December 1999, judiciary spending needs could reach about $5.8 billion by fiscal year 2005, a 42% increase over estimated fiscal year 2000 obligation levels of $4.1 billion. Based both on past experience and the expected continued emphasis on government-wide cost containment, it is unlikely that Congress will give the judiciary sufficient funding to support this rate of growth.

Desired Outcome: Achieve a rate of growth that 1) allows the judiciary to accomplish its mission effectively and 2) Congress will be inclined to fund.

Courses of Action

The judiciary needs to pursue the parallel tracks of 1) encouraging Congress to provide adequate resources and 2) continuing efforts to improve productivity and contain spending levels. Possible courses of action include:

- Nurturing, strengthening, and establishing new relationships between judges and key members of Congress.
- Improving how the judiciary justifies its spending needs to Congress (see Strategic Issue #1).
- Continuing to work with program committees to explore opportunities for improving productivity, increasing efficiency, and reducing spending, particularly in the areas of personnel and space, which represent the largest areas of judiciary spending.
- Working to ensure Congress provides commensurate increases in resources when they expand the judiciary's jurisdiction and workload.

Committee on Court Administration and Case Management

Honorable D. Brock Hornby, Chair

Strategic Issues

1. **Preserving the Quality of Justice and the Excellence of Judicial Services, and Ensuring the Just, Speedy, and Efficient Disposition of Cases**

2. **Ensuring Effective Judicial Governance and Management Mechanisms, and Preparing for Different and Increased Caseloads**

3. **Developing and Using Workforce and Technology Resources Effectively and Efficiently**

The major responsibility of the Court Administration and Case Management (CACM) Committee is to evaluate and recommend various policies, programs, and techniques relating to court administration and case management. Because of its broad jurisdictional statement (and lack of programmatic responsibilities), it has been suggested that CACM has a role in considering the "big picture" of issues affecting court administration and case management.

However, the Committee believes it is important to have formal authorization from the Judicial Conference and its committees before undertaking such an expansive role in the long-range planning process. While this Committee seems to have a very broad jurisdiction ("to study and make recommendation on matters affecting case management; the operation of appellate, district and bankruptcy clerks' offices; jury administration; and other court operational matters"), it traditionally has considered particular and discrete issues that have been referred to it from the Judicial Conference. The Committee has strong reservations about the appropriateness of including broad inquiries and initiatives into topics related to court administration and case management without a specific mandate from the Judicial Conference.

Subject to that important caveat, set out below are three broad strategic issues under the jurisdiction of the Committee. Under each issue are the Committee's major programs that pertain to the issue and involve long-range planning. Questions for the Committee to consider regarding that strategic issue are also listed. Following the key strategic issues, there is a list of possible long-term goals for the Committee.

Strategic Issue: Preserving the Quality of Justice and the Excellence of Judicial Services, and Ensuring the Just, Speedy, and Efficient Disposition of Cases

Major Programs/issues of the Committee:

CJRA/Cost and Delay Reduction Measures: The Committee had primary responsibility to implement the Civil Justice Reform Act of 1990, which included the implementation of alternative, more effective cost and delay reduction programs. The Committee will continue to consider issues that would promote the goals of the CJRA, such as assisting courts in reducing the time to disposition of various matters.

Litigation Management Manual: As required by the CJRA, the Committee is drafting a litigation manual for cost and delay reduction. The manual is intended to provide judges -- especially new judges -- with a reference text for the best case management processes and procedures documented under the CJRA, as well as new and developing case management techniques.

Alternative Dispute Resolution: Historically, the Committee been very involved in the development of ADR in the federal courts. For example, the Committee has developed a staffing credit for ADR administrators, developed guidelines for ensuring fair and effective court-annexed ADR, and worked closely with Congress and DOJ to ensure that the ADR Act of 1999 reflected the positions of the Conference. The Committee will continue to analyze the growth of ADR, in the courts, as well as its ability to increase the efficiency and litigant satisfaction.

Judicial Officers Resources Working Group: The Committee was a key participant in the development of the JORWG report recommendations, and will be involved in their implementation.

Questions for the Committee to Consider:

- Following the sunset of the CJRA and many of its requirements, should the Committee develop other national standards for ensuring the just, speedy and efficient disposition of cases?

- What causes the differences in efficiency among the individual courts, and what role should the Committee play in addressing these inequalities?

Strategic Issue: Ensuring Effective Judicial Governance and Management Mechanisms, and Preparing for Different and Increased Caseloads

Major Programs/ Issues of the Committee:

Training for Judges: The Committee has emphasized the importance of training for judges on both case management and court administration issues, and believes that appropriate training could be very beneficial for the judiciary. It has provided its recommendations on training topics to the Administrative Office's newly-formed Education and Training Council and the Judicial Officers Resources Working Group. The Committee plans to work actively with the Council to implement these goals. In addition, the Committee has promoted a series of budget models for chief judges, other members of the court, and court staff to consider when developing budget priorities for the court.

Budget Issues: When making a recommendation regarding a particular program or policy, the Committee has begun to include a statement as to whether funds should be budgeted nationally for the program or if it should be funded at the discretion of the local court using its own decentralized funds.

Questions for the Committee to Consider:

- How can we preserve the quality of justice and excellence of judicial services?
- How can the Committee assist chief judges and courts as a whole with a changing and increasing workload?
- Are the established court governance structures appropriate for the future?

Strategic Issue: Developing and Using Workforce and Technology Resources Effectively and Efficiently

Major Programs/Issues of the Committee:

Privacy: The Committee has formed a subcommittee (which includes liaisons from other committees) to review the issue of privacy and the courts' use of information technology to provide electronic access to court case files.

Courtroom Technologies: The Committee will continue to assist the Conference and court administrators in the development and implementation of emerging courtroom technologies, such as video evidence presentation and electronic case filing.

Videoconferencing: Following a pilot study conducted by the Committee, the Judicial Conference in 1996 authorized a six-year program to support the use of videoconferencing in district courts for prisoner civil rights hearings. To date, 49 district courts have videoconferencing, at more than 120 sites. In addition, the use of the technology has been expanded to various administrative uses. The Committee will continue to explore and evaluate this technology.

Courtroom Sharing/Space: The Committee has an ongoing responsibility for considering and developing recommendations issues surrounding courtroom utilization, assignment, and sharing, and the impact such policies would have on costs, litigant satisfaction, and judicial administration.. The Committee has previously established guidelines for sharing courtrooms, and is assisting with the Ernst and Young report on Courtroom utilization.

Questions for the Committee to Consider:

- How have recent technological developments affected case management and the operation of clerks' offices?
- How have recent technological developments affected judges' management of cases?

Long-Term Goals for the Committee

1. New technologies, such as electronic case files, videoconferencing, and digital recording systems are raising novel policy issues for administering and managing the courts. The growth of these new technologies will only accelerate in the future. It is a goal of the Committee to improve the efficiency and effectiveness of court administrators by the development of policies relating to courtroom technologies.

2. The responsibilities and workload of courts will continue to expand and change. It is a goal of the Committee to evaluate, develop and implement programs designed to improve case management and court administration programs, and to encourage participation in the development of judiciary policies in this area.

Committee on Criminal Law

Honorable William W. Wilkins, Jr., Chair

Strategic Issues

1. **Consider the Impact of the Increase in Workload Associated with Supervised Release Revocation Hearings**

2. **Consider How Several Long-Range Proposals Could Affect Program Costs**

Strategic Issue: Consider the Impact of the Increase in Workload Associated with Supervised Release Revocation Hearings

The increases in supervised release violations and revocation hearings impact the work not only of probation officers, but of judicial officers as well. According to September 1992 data, probation officers handled 2,307 supervised release violations. This number increases to 5,955 supervised release violations handled by probation officers according to the March 1999 data. Based on the results of a recent biennial Judgeship Survey Questionnaire, there appears to be a consensus that work related to violations has increased. However, there are no available statistics to determine whether the increases in violations have resulted in increases in the number of hearings and who is performing the work--magistrate judges or district judges.

Strategic Objective

- To ensure that workload associated with supervised release revocation hearings is adequately accounted for, and if appropriate, make recommendations to the Judicial Conference to streamline that workload.

Course of Action

- In order to obtain reliable data on the supervised release workload for judicial officers, the Committee requested that the AO include in planned criminal electronic case management systems tracking of supervised release hearings and reporting of judicial officer time spent on such hearings. The Committee has also asked the Statistics Subcommittee of the Judicial Resources Committee to revisit the weighting of district court criminal cases that would take into account supervised release revocation hearings. The Committee will continue to monitor the supervised release workload at this time.

Strategic Issue: Consider How Several Long-Range Proposals Could Affect Program Costs

The Committee will continue to consider several long-range proposals that could affect programs and potentially impact long-range personnel and program costs.

Strategic Objective

- The Committee continues to identify and implement meaningful reductions in program and personnel spending through policy recommendations and other programmatic efficiencies. The Committee will continue to study additional strategies, including emphasizing and expanding the use of technologies to achieve efficiencies in supervision, such as hand-held drug testing devices; promoting and encouraging greater utilization of court "better practices," such as greater use of administrative case loads and the early termination of low activity or administrative supervision cases; and recommending greater utilization of probation and pretrial services officer assistants to curtail personnel costs.

Course of Action

- The Committee will continue to recommend policy decisions or other initiatives that might be pursued to achieve greater economies.

Strategic Issue: Monitor the Progress of the Strategic Assessment of the Probation and Pretrial Services System and Consider the Results of the Study

The probation and pretrial services system is an important judiciary program with about 7,200 employees and annual budget of more than $600 million. The growing size and complexity of the system require a comprehensive assessment, with broad participation within the judiciary and by key stakeholders in the executive and legislative branches. The Committee endorsed the decision by Director Mecham to obtain the services of independent consultants to conduct the study, which will commence in the spring of 2000 and take approximately two years to complete.

Strategic Objectives

- The consultant will provide recommendations to help the Committee determine if there are ways in which the program mission can be better accomplished through changes in functions, policies, management systems, processes, organization, assignment of responsibilities, resources, operational approaches, statute or regulation.

Course of Action

- The Committee chair will be briefed by staff of the Federal Corrections and Supervision Division on an ongoing basis during the course of the study and members will be briefed at Committee meetings and as directed by the chair. At the conclusion of the study, the Committee will consider the recommendations of the independent consultant and determine what actions to take or recommend.

Committee on Defender Services

Honorable Robin J. Cauthron, Chair

Strategic Issues

1. **Adequacy of Panel Attorney Rates**
2. **Management of California Capital Habeas Costs**
3. **Optimum Utilization of Defender Services Funds**
4. **Assessing, Maintaining and Improving Quality of Representation**

Congressional cost reduction mandates are expected to continue for the foreseeable future. At the same time, both the number and complexity of federal filings for which Defender Services program appointed counsel services must be provided are expected to grow. This growth, in turn, likely will require a larger percentage increase in funding than Congress will be disposed to provide for government funding overall and for the judiciary in particular. Both federal criminal prosecutions and federal habeas corpus actions challenging state death sentences, because of their historically high costs, have the potential to dramatically impact Defender Services requirements over the next several years.

In this climate, the Defender Services program will need to position itself to compete successfully for limited federal resources by developing baseline measures of its current performance and using them to demonstrate how different funding levels will affect future activities. In addition, measures need to be developed that can be used to show the success of the program in making effective use of the resources it receives. The Committee on Defender Services (Committee) is engaged in a comprehensive, performance based, strategic planning process. One of the products of this process has been the development of a Defender Services Program Strategic Plan Outline (Strategic Plan Outline) that sets forth the program's mission and identifies four goals[2] that must be accomplished in order to realize this mission. The Outline also includes strategies for achieving the goals and attempts to identify measures that can be used to assess the success of each strategy. Typically, a strategy will advance more than one goal. The mission and goals are set forth below, followed by summaries of four key strategic issues.

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[2] The Committee has approved the four goals. The Strategic Plan Outline identifies, for the first three goals, strategies for achieving those goals and performance measures for determining the degree to which the strategies are successful. Strategies and measures for the fourth goal will be developed over the next few months and it is anticipated that the Committee will deliberate on the approval of the Strategic Plan Outline at its June 2000 meeting.

Mission Statement

The mission of the Defender Services program is to ensure that the right to counsel guaranteed by the Sixth Amendment, the Criminal Justice Act (18 U.S.C. 3006A), and other congressional mandates is enforced on behalf of those who cannot afford to retain counsel and other necessary defense services. By fulfilling its mission, the Defender Services program helps to: a) maintain public confidence in the nation's commitment to equal justice under the law; and b) ensure the successful operation of the constitutionally-based adversary system of justice by which both federal criminal laws and federally guaranteed rights are enforced.

Goals

1. **Timely and Comprehensive Services**
   Timely provide assigned counsel services to all eligible persons.

2 **High Quality Services**
   Provide assigned counsel services that are consistent with the best practices of the legal profession.

3. **Cost-Effective Services**
   Provide cost-effective services, limiting increases in cost to those due to inflation and those necessary to respond to changes in the law or changes in prosecutorial, judicial, or law enforcement practices.

4. **Client Focused Services**
   Protect the independence of the defense function performed by assigned counsel so that the rights of individual defendants are safeguarded and enforced.

Strategic Issue: Adequacy of Panel Attorney Rates

In its FY 2000 appropriation request, the judiciary sought authority to increase the in/out-of-court rates of $65/$45 to a flat $75 rate. Congress only approved a $5 increase to each of the existing rates. Judges and federal defenders report that the failure to increase panel attorney rates is jeopardizing the ability of the judiciary to provide lawyers capable of addressing, in a competent and cost-effective manner, the complex issues that characterize federal criminal defense work.

Strategic Objective

- Continue to seek resources and approval for the implementation of panel attorney hourly rates that are sufficient to ensure that defendants to whom panel attorneys are assigned receive representation that is at least comparable to that provided by federal defender organizations.

Courses of Action

- Obtain support within the judiciary for appropriate rate increases.
- Cooperate with other federal criminal justice system components and private constituent groups supporting implementation of a rate increase.
- Convey to Congress the need for and importance of a rate increase.

Resource Impact:

FY 2000 ($70 in court; $50 out of court, effective January 1, 2000): $3,979,000
FY 2001 ($75 rate for in- and out-of-court work, effective April 1, 2001): $11,336,000.

Goal(s) Served:

Timely and Comprehensive Services
High Quality Services
Client Focused Services

Strategic Issue: Management of California Capital Habeas Costs

Congress continues to express concern over the relatively high costs of representation provided to state death-sentenced federal habeas petitioners in the 9th Circuit in general and in California in particular. If the judiciary does not succeed in either reducing those costs or convincing Congress that they are justified, funding for these representations might be limited and effective representation in these cases compromised.

Strategic Objective

- Ensure and demonstrate that Defender Services program costs associated with providing counsel to petitioners in federal capital habeas cases arising in 9th Circuit jurisdictions in general and in California in particular are limited to those necessary under the Constitution and laws of the United States.

Courses of Action

- Provide response to congressional request for report on California capital habeas costs.
- Support Ninth Circuit Judicial Council's initiatives designed to improve the management and reduce the costs of capital habeas cases in the Ninth Circuit.
- Encourage employment of *ex parte* case budgeting techniques to manage assigned counsel costs. Provide training on case budgeting to judges and assigned counsel and make available an automated case budgeting program.
- Encourage the use in capital habeas cases of case management techniques commonly used in complex civil litigation.
- Develop national training and research tools to reduce the time required, and compensation sought, by assigned counsel in capital habeas cases.
- Enhance communication and encourage cooperation among participants in capital litigation.

Resource Impact:
To be determined.

Goal(s) Served:

Cost-Effective Services
High Quality Services
Client Focused Services

Strategic Issue: Optimum Utilization of Defender Services Funds

As funding becomes more restrictive, it is incumbent upon the judiciary to ensure that resources are optimally utilized. The Defender Services program, like the judiciary as a whole, needs to continue to develop tools for ensuring that critical operations are funded and that resources are not wasted.

Strategic Objective

- Ensure and demonstrate that funding provided to defender organizations and panel attorneys is directly related to (a) the number and character of the cases to which they are assigned and (b) local prosecutorial, judicial, or law enforcement practices.

Courses of Action

- Pursue development of a case weighting system for use in allocating resources to defender organizations.
- Assess the viability and benefit of using the defender organization Case Management and TimeKeeper systems to collect information that will help assess the impact on defender organization resource requirements of (a) changes in the law, (b) Department of Justice and other law enforcement initiatives, and (c) other factors affecting the work associated with providing representation in individual cases.
- Through training and other vehicles, encourage the use of case budgets in federal death penalty prosecutions and capital habeas cases.
- Assess the impact of automation on defender organization operations.
- Assess the impact of computer assisted legal research (CALR) tools on federal defender organization library costs.

- Investigate the possibility of providing CALR to panel attorneys at government rates.

- Investigate the cost-effectiveness of using "distance learning" technologies to reduce costs without compromising the quality of training.

Resource Impact:
To be determined.

Goal(s) Served:
Cost-Effective Services
High Quality Services
Timely and Comprehensive Services

Strategic Issue: Assessing, Maintaining and Improving Quality of Representation

Ultimately, the Defender Services program, like the judiciary as a whole, is concerned with fulfilling the constitutional mandate of equal justice under law. The judiciary must find ways to assess, and to respond to, the impact of policy, programmatic, and funding decisions on the quality of representation provided by the Defender Services program. Recent surveys and anecdotal reports suggest that the quality of representation provided by panel attorneys is, on the whole, lower than that provided by staff of federal defender organizations. The implications of such an imbalance within the nation's federal criminal justice system are profound.

It will not be enough to measure the quality of representation provided by the various components of the Defender Services program. The relationship between funding, quality, and justice must be addressed. Initiatives that maintain and improve the quality of services being provided must be pursued.

Strategic Objective

- Develop ways of measuring, maintaining, and improving the quality of representation provided by assigned counsel.

Courses of Action

- Evaluate criteria for assessing qualifications, experience, and credentials of federal defender organization staff.

- Assess whether district Criminal Justice Act (CJA) plans are compatible with the judiciary's Model CJA plan and Judicial Conference policies designed to ensure that qualified attorneys serve on panels.

- Secure sufficient resources to (a) permit federal defender and U.S. attorney staff salary comparability and (b) compensate CJA panel attorneys at a rate sufficient to attract and retain qualified counsel.

- Provide training programs designed to meet the needs of federal defender staff and panel attorneys.

Resource Impact:
See Strategic Issue: Adequacy of Panel Attorney Rates, supra.

Goal(s) Served:
High Quality Services
Timely and Comprehensive Services
Client Focused Services
Cost-Effective Services

Committee on Federal-State Jurisdiction

Honorable Walter K. Stapleton, Chair

Strategic Issues

1. **Monitoring Proposals for Modification of Federal Jurisdiction**

2. **Promoting Effective Communication and Cooperation Between the State and Federal Court Systems and Their Support Organizations**

Strategic Issue: Monitoring Proposals for Modification of Federal Jurisdiction

Much of the Committee's work involves analyzing and responding to legislation in Congress affecting the jurisdiction of the federal courts. The Committee also review proposals altering the structure of the judicial system or the manner in which administrative agency decisions enter the federal courts. Many of these proposals are complex and far-reaching. In addition, jurisdictional implications are not always easily identified or become relevant only after amendments are made during the legislative process. Thus, constant assessment of legislation and interaction with Congress is critical to the Committee's accomplishment of its jurisdictional charge.

Strategic Objectives

- Oppose inappropriate expansions of federal jurisdiction.

- Support jurisdictional amendments that promote the objectives identified in the *Long Range Plan for the Federal Courts* or that reflect solutions or improvements to jurisdictional issues.

Courses of Action

- The Committee prepares letters for the AO to send to Congress when the Judicial Conference has taken a position that is relevant to pending legislation or proposals implicating the jurisdiction of the Committee.

- Committee staff works with federal judges to prepare and assist them in testifying before congressional committees when the Conference's position stems from the Committee's recommendation.

- The Committee is undertaking a study of title 28 and other jurisdictional statutes with the objective of identifying improvements to federal jurisdiction that could be included in future judicial improvement bills sponsored by the Judicial Conference. The Committee will utilize a variety of sources for identifying possible legislative changes to improve federal jurisdiction, including calling upon the Federal Judicial Center for research assistance.

Strategic Issue: Promoting Effective Communication and Cooperation Between the State and Federal Court Systems and Their Support Organizations

As the liaison for the Judicial Conference to state court entities, the Committee must strive to ensure a positive dialogue with the Conference of Chief Justices, the National Center for State Courts, and other state court support organizations. The presence of four state supreme court chief justices as voting members of our Committee provides unique insight into the views of the state judiciary on proposed federal legislation and ideas for amending jurisdiction. In addition, the senior member of that delegation regularly reports at each meeting on significant issues facing the state court system. Information is often shared with state court organizations on issues of common interest.

Strategic Objectives

- Build upon our present good relations with state court organizations.
- Promote the sharing of state-federal judicial information.

Courses of Action

- Provide comments to the Conference of Chief Justices when it considers issues of interest to the Committee.
- The Committee coordinates efforts with individuals of the National Center for State Court to exchange information on the need for state-federal cooperation in developing electronic case files systems. Judge Stapleton, along with Judge Edward Nottingham, Chair of the Judicial Conference Committee on Automation and Technology, Roger Warren, President of the National Center, and others are planning a conference call to discuss:

(1) whether there would be value in communicating among the state courts information about the federal system that is about to be implemented; and

(2) and whether it would be helpful to encourage state federal cooperation in this area at the local level.

- The Committee coordinates liaison activities with the Conference of Chief Justices, such as regular attendance at the mid-year and annual meetings by two members of the Committee on Federal-State Jurisdiction and a member of the Executive Committee.

- The Committee is planning to make state-federal information available through the establishment of a website. The website is expected to include information pertaining to such items as: legal education programs; citations to significant documents; information about local state-federal judicial councils; references to state-federal events; and certain information about the Committee on Federal-State Jurisdiction.

Committee on International Judicial Relations

Honorable Paul A. Magnuson, Chair

Strategic Issues

1. **Finding More Effective Ways to Communicate the Judiciary's Expertise and Resources to Executive Branch Agencies, Foreign Judiciaries, and Organizations Involved in International Rule of Law and Judicial Reform Activities**

2. **Enhancing Relationships with Government Agencies and Organizations That Are Significant Players in International Judicial Reform**

Strategic Issue: Finding More Effective Ways to Communicate the Judiciary's Expertise and Resources to Executive Branch Agencies, Foreign Judiciaries, and Organizations Involved in International Rule of Law and Judicial Reform Activities

The International Judicial Relations Committee is responsible for coordinating and responding to requests for assistance from foreign judges and court managers, and agencies representing their interests, and for facilitating the development of assistance programs in cooperation with Executive Branch and private agencies. This presupposes that potential requesters are cognizant of the Committee and the types of assistance the judiciary can provide. Finding effective ways to communicate this information to the relevant audience is one of the Committee's ongoing challenges.

Effective communication will increase the likelihood that the federal judiciary's assistance will be solicited earlier in the planning process for judicial reform projects and programs, including during the performance of needs assessments. This, in turn, can have a beneficial impact on the quality of the projects and programs. Should the number of requests which come to the Committee come to exceed the judiciary's limited resources, the Committee plans to be more selective about its participation in activities.

- Existing publications about the federal judiciary and its international resources should be adapted–and new publications developed– for a foreign audience, translated into the most used languages, and made available to Executive Branch agencies, foreign judiciaries, and organizations involved in judicial reform activities.

- Because a significant number of assistance requests are transmitted through U.S. embassies and missions, USAID and the State Department should be asked serve

as conduits for the dissemination of materials to embassies and foreign judiciaries.

- The Committee is considering an international page on the Internet to disseminate information about the federal judiciary's international resources to foreign audiences.

Strategic Issue: Enhancing Relationships with Government Agencies and Organizations That Are Significant Players in International Judicial Reform

The development and maintenance of good working relationships between the Committee and Government agencies and organizations involved in international judicial reform is critical to the fulfillment of the Committee's mission: coordinating and making recommendations to the Judicial Conference and other organizations concerning the federal judiciary's relationship with foreign judiciaries. The Committee does not use funds appropriated by Congress to the judiciary for the operation of the federal courts to provide rule of law and judicial reform assistance to foreign judiciaries. Rather, the Committee relies on foreign countries themselves, international organizations, or Executive Branch agencies to fund rule of law assistance programs and activities. The majority of the rule of law assistance programs and activities that the United States provides to countries throughout the world are funded through USAID, the Department of Justice, and the Department of State. With good cooperative relationships, the Committee will have direct access to agency personnel knowledgeable about these agencies' work with foreign judiciaries.

- Committee representatives should hold periodic meetings with key policy-makers and decision-makers within USAID, the Department of State, the Department of Justice, and other large donors.

- The Committee will explore the development of a working relationship with the State Department's Foreign Service Institute, which trains foreign service officers.

- The Committee plans to monitor political and policy developments pertaining to rule of law assistance by the United States so that it can respond appropriately to changing funding mechanisms, direct or indirect.

Strategic Issue: Making Effective Use of Technology in Judicial Reform Activities

While face-to-face meetings may remain the most effective means of teaching principles and building the personal contacts that can facilitate judicial reform, the Committee recognizes that there is also a role for technology. Video telecommunications and the

Internet can help maximize the use of the federal judiciary's limited resources, while at the same time fostering the development of continuing relationships with foreign judiciaries and others interested in judicial reform and enhancement of the rule of law.

- Where feasible and appropriate, the Committee will suggest that video telecommunications technologies be used to facilitate training and conferencing.

- The Committee is considering an international page on the Internet to disseminate information about the federal judiciary to foreign audiences.

Committee on the Judicial Branch

Honorable David R. Hansen, Chair

Strategic Issues

1. **Seeking Adequate Compensation for Judges**
2. **Improving Benefits Programs for Judges and Staff**
3. **Maintaining Effective External Communications and Relationships**

In response to the request of the Executive Committee's long-range planning coordinator, the Committee presents this outline of strategic issues and objectives. The Committee intuitively engages in long-range planning in its work on the problem of judicial compensation and benefits. Also, the Committee has a standing subcommittee on long-range planning, which considers and makes recommendations on matters relating to public outreach. Following are the strategic issues currently being addressed by the Committee.

Strategic Issue: Seeking Adequate Compensation for Judges

Over the past year, the Judicial Branch Committee has vigorously pursued solutions to the problems of salary compression and pay comparability. Seeking cost-of-living adjustments for judges has been an important component in this effort.

Course of Action

- Vigorously support the work of the "Blue Ribbon Panel" on federal employee compensation as well as legislative improvements to judicial salaries.

Strategic Issue: Improving Benefits Programs for Judges and Staff

The Committee has also long sought solutions to the problem of the "total compensation" (salary and benefits) of judges, rather than limiting its work to the question of salary alone. In the previous year, the Committee has supported implementation of a long-term care program and a flexible benefits program for all judiciary employees.

Course of Action

- Strongly support the work of the Administrative Office's Judicial Benefits Office, as well as encourage consideration of additional benefits improvements.

Strategic Issue: Maintaining Effective External Communications and Relationships

The Committee's long-range planning subcommittee recently developed a National Program for Federal Judges and Journalists that brought together 30 federal judges and more than a dozen journalists who regularly report on the courts.

Course of Action

- Continue to discuss how to improve news coverage of the judicial process.

Committee on Judicial Resources

Honorable Dennis G. Jacobs, Chair

Strategic Issues

1. **Develop Long-Range Planning Responsibilities, Issues and Objectives**

2. **Analyze the Growth of the Judiciary's Pay and Benefits Costs**

3. **Implementation of the Recommendations of the Judicial Officers Resources Working Group**

4. **Scrutinize Proposed Automation Projects of the Judiciary to Determine Their Impact on Matters Within the Purview of the Committee**

Strategic Issue: Develop Long-Range Planning Responsibilities, Issues, and Objectives

The Committee on Judicial Resources has been asked to develop documents which set forth the Committee's major responsibilities, issues, and objectives in the area of long-range planning and budgeting. The Committee has developed and adopted the following documents to serve as the framework for future discussions concerning long-range planning and budgeting issues:

- A chart describing the primary responsibilities of the Committee and the responsibilities that are shared with other Judicial Conference committees (attachment I).

- This outline describing the major strategic issues and objectives of the Committee in the area of long-range planning and budgeting.

Strategic Objective

- To use these responsibilities to shape future decision making and use resources to support these responsibilities.

Initiatives or Courses of Action

- The Committee intends to review this outline at each meeting, to determine whether it reflects the current status of the Committee's long-range planning and budgeting effort.

Strategic Issue: Analyze the Growth of the Judiciary's Pay and Benefits Costs

Over the past five years, the judiciary's pay and benefits costs for court employees have increased 38 percent, while the employee workforce has only grown 9 percent. However, many of the influences on costs can not be controlled.

Strategic Objective

- To determine whether salary issues within the control of Committee are contributing to the growth of the judiciary's employees' pay and benefits costs and the growth in the workforce.

Initiatives or Courses of Action

- At future meetings, the Committee intends to monitor the growth of the judiciary's employee workforce and pay and benefits costs. The process will include the examination of comparable salary data in the private and public sectors, including the state courts. The Committee will consider various salary issues within its jurisdiction, including:

  i. The structure and impact of the Court Personnel System and the Judiciary Salary Plan;

  ii. The impact of the new work measurement formulas;

  iii. The judiciary's awards program; and

  iv. New programs or trends within the judiciary which may require the authorization of additional support staff positions.

Strategic Issue: Implementation of the Recommendations of the Judicial Officers Resources Working Group

In September 1999, the Executive Committee of the Judicial Conference reviewed the recommendations of the Judicial Officers Resources Working Group (Working Group). The Working Group had been created to study possible improvements in the management of available judicial officer resources and changes in the jurisdiction of the federal courts. Some of the Working Group's recommendations were referred to the Committee on Judicial Resources for action.

Strategic Objective

- To implement the recommendations of the Working Group and assist in making maximum use of the existing judicial officer resources.

Initiatives or Courses of Action

- Proposals to implement these recommendations in coordination with other committees are being developed for committee review and coordination.

Strategic Issue: Scrutinize Proposed Automation Projects of the Judiciary to Determine Their Impact on Matters Within the Purview of the Committee

The judiciary is in the process of developing new automated systems such as Case Management/Electronic Case Filing (CM/ECF), the Financial Accounting System for Tomorrow (FAS4T), the Jury Modernization System, and others. These and future systems should be evaluated prior to implementation to determine their impact on the courts' support staff, job classification trends, and other matters within the jurisdiction of the Committee.

Strategic Objective

- To ensure that court support staff needs and other personnel requirements are taken into account in the development and implementation of new automated systems within the judiciary.

Initiatives or Courses of Action

- The Committee has asked for reports from staff as to the impact of new automation programs upon the support staff resources of the judiciary.

- In addition, the Chair is exploring options for gathering and sharing information with other Judicial Conference committees affected by automation projects.

Committee on the Administration of the Magistrate Judges System

Honorable Harvey E. Schlesinger, Chair

Strategic Issue: Helping Courts Obtain the Greatest Benefit from Their Magistrate Judges

The Federal Magistrates Act gives each district court wide latitude to assign judicial duties to magistrate judges, enabling courts to consider their own needs and conditions. At a time of resource scarcity and burgeoning demands on judges, courts are reexamining their use of this resource to determine whether changes in its utilization might be in their best interest.

Strategic Objectives

- Courts have ready access to information on how magistrate judges have been used advantageously in other districts.
- Courts are informed about basic ideas or goals common to various successful utilization practices.
- Courts are aware of the value of reexamining their utilization practices before concluding that more resources are needed.
- Courts receive specific, tailored utilization advice when needed.

Initiatives or Courses of Action

- Prepare, assemble, and maintain documents relevant to magistrate judge utilization, and announce the availability of these documents.
- Supplement current utilization information through further analyses, studies, and survey instruments, to the extent practicable.
- Announce the availability of the Magistrate Judges Committee and staff to assist a court in analyzing its utilization of magistrate judges and to give advice on possible changes.

Committee on Rules of Practice and Procedure

Honorable Anthony J. Scirica, Chair

Strategic Issues

1. **Making Effective Use of Technology and Information**
2. **Monitoring, Analyzing, and Addressing the Proliferation of Local Rules**
3. **Uphold the Integrity of the Rules Process**

Strategic Issue: Making Effective Use of Technology and Information

The courts are moving rapidly to expand the use of technology by the bench and bar.

Strategic Objectives

- Ensure that the rules of practice and procedure do not unintentionally impede the increased use of technology by the courts.

Initiatives or Course of Action

- Formed a technology subcommittee with representatives from each advisory committee.
- Published for public comment proposed amendments that would allow electronic service with consent of the parties.
- Participate in the Committee on Court Administration and Case Management' s ad hoc committee discussions and meetings on privacy.
- Closely monitor the CM/ECF project.

Strategic Issue: Monitoring, Analyzing, and Addressing the Proliferation of Local Rules

A comprehensive review of the local rules of court was last made in 1986 in accordance with a Congressional mandate. The local rules were reviewed for legal error, internal inconsistency, and consistency with federal law and national rules. The report identified particular local rules that made sense for national adoption. The project resulted in many changes to the national rules and the implementation of a uniform numbering system for local rules.

The Standing Committee believes it is time for another comprehensive review of local rules to assess their consistency with national rules and statutes and to suggest changes to the courts, when appropriate. Many amendments have been made to local rules since the last review. Moreover, case law on local rules has substantially increased. In addition, local rules have been revised to account for changes prompted by the Civil Justice Reform Act. As courts struggle to develop alternative dispute resolution programs and incorporate increased reliance on electronic filing, more and more local rules and internal operating procedures are being promulgated. Finally, the uniform numbering system authorized by the Judicial Conference has been in place for approximately two years. A review of local rules would show the extent of its adoption in the courts. It would also provide hard data on the overall increase in the number of local rules since 1990.

The bar routinely complains about the growing number of local rules. Local rule proliferation has now become a primary concern of the Litigation Section of the ABA. In the past, Congress has listened to the bar's complaints and called for reform — including the 1986 local rules project initiated by Congress. The rules committees are statutorily responsible for monitoring the operation and effect of the rules. The proposed project is consistent with the committees' statutory obligations. It will provide the courts with a useful service and may dissuade any direct Congressional interference.

Strategic Objectives

- The Rules Committee will review all local rules and identify possible new national rules.

Initiatives or Course of Action

- A law professor has been selected to gather and study all local rules.
- The project is expected to be completed in 2 or 3 years.

Strategic Issue: Uphold the Integrity of the Rules Process

The current rulemaking process carefully balances the authority and responsibility of courts to enact procedures to govern cases it must decide with the authority and responsibility of Congress to enact substantive law. In recent years Congress has become increasingly involved in the rulemaking process.

Strategic Objective

- Ensure the rulemaking process remains within the Third Branch.

Initiatives or Course of Action

- Work closely with the Office of Legislative Affairs to educate members and staff of Congress about the rulemaking process.
- Diligently monitor legislation to quickly identify any attempts to directly or indirectly amend the Federal Rules of Practice and Procedure.
- Respond to specific bills that would amend the rules.

Committee on Security and Facilities

Honorable Jane R. Roth, Chair

Strategic Issues

1. **Planning Comprehensively For Housing the Federal Courts**
2. **Dealing with GSA Restructuring and Downsizing**
3. **Impact of Technology on the Security and Facilities Programs**
4. **Planning for Security Resources Effectively**

Strategic Issue: Planning Comprehensively For Housing the Federal Courts

Currently, the Five-Year Courthouse Project Plan developed in 1996 by the Committee on Security and Facilities and considered by the Judicial Conference each year tends to focus primarily on new courthouse construction projects. The repair and alteration program for courthouses is determined by GSA; minor repairs and alterations are not addressed in any comprehensive way. The judiciary may wish to become more involved with reviewing needs in the repair and alteration program as its new construction program winds down at some point.

The judiciary is under increasing pressure from courts to consider other means of obtaining space, such as build-to-suit leased buildings funded by private developers. These projects are generally completed in considerably fewer than the average of eight years that federally-funded projects take.

The Judicial Conference may wish to determine whether the judiciary needs a comprehensive capital facilities plan.

Strategic Objective

- Develop a capital planning program that takes into account all the judiciary's housing needs — new construction, minor and major renovations, and potentially leasing.

Initiatives or Courses of Action:

- Assess whether the judiciary wants greater responsibility for prioritizing repair and alteration projects priorities.
- Assess whether the judiciary wishes to pursue build-to-suit lease projects for housing courts.
- Assess whether the judiciary should establish separate Five-Year Project Plans for new construction, repair and alteration, and leasing, or a comprehensive plan.
- Assess whether and how the various types of projects should be prioritized.
- Assess legislative changes that are needed, if any.
- Assess whether the judiciary will reach a point when the Five-Year Courthouse Project Plan, as currently compiled, is no longer needed because projects identified in out-years will have very low priority scores.

Strategic Issue: Dealing with GSA Restructuring and Downsizing

Since fiscal year 1993, GSA has downsized by 6,100 full-time positions, or 30 percent, the greatest percentage reduction of any large executive branch agency. GSA has received authority to offer buy-outs and early retirement to employees in FY 2000. The agencies GSA serves are being forced to take on work formerly performed by GSA. There is also the potential for GSA to be eliminated and for agencies such as the AO and the USMS to become responsible for facilities and security functions currently performed by GSA.

The Committee on Security and Facilities needs to assess the implications of taking on additional responsibilities for facilities construction, maintenance, renovations, leasing space planning, and possibly security. The Committee might have a greater role in policy-making about these issues if GSA were to be significantly restructured. The role of circuit judicial councils might be enhanced. If the role of the circuit judicial councils were to change (the councils have certain statutory responsibilities with regard to court space), the judiciary might need to work with Congress in making necessary statutory changes. The responsibilities of the courts and the AO would need to be determined. With regard to security, the judiciary is already studying whether the USMS and/or others should assume most of GSA's responsibilities.

The judiciary would need to decide which work to conduct and which to contract out. Additional judiciary or AO contract staff might be needed to manage the increased responsibilities of the program. The knowledge, skills, and abilities of judiciary staff might need upgrading to deal with these additional responsibilities.

The judiciary also would take on greater or total responsibility for facilities funding including assessing costs, budgeting, and obtaining funds from Congress. The overall size of the judiciary's budget may increase. The judiciary's facilities budget would likely come under increased Congressional scrutiny.

Strategic Objective

- Place the judiciary in a position to take on additional responsibilities for facilities that GSA may no longer handle.

Initiatives or Courses of Action

- Track GSA downsizing and restructuring to determine tasks the judiciary needs to prepare to assume.
- Assess the areas GSA is currently delegating to agencies and any potential effects on the courts, the AO, the judicial councils, and the Judicial Conference.
- Consider the appropriate organizational structure for managing a facilities program including the roles of the Committee on Security and Facilities, the circuit judicial councils, the courts, the AO and the Judicial Conference. Assess needed legislative changes.
- Consider which work to contract out and which work to perform within the judiciary.
- Consider the knowledge, skills, and abilities needed by judges and staff in the judiciary to manage successfully a facilities program.
- Consider budgetary changes, including increases for additional staff, training, maintenance, new construction projects, and effects on rental costs.
- Determine the possible roles of other federal, state or local agencies and the private sector as a result of the GSA downsizing.

Strategic Issue: Impact of Technology on the Security and Facilities Programs

The judiciary is making greater use of technology in conducting its work. Innovations such as distance learning, bankruptcy noticing, enhanced security systems, automated case management systems, and computer-assisted legal research and the virtual law library are in place. The judiciary is also working on new applications of technology for electronic case filing, financial and accounting systems, personnel systems, library systems, case management for probation and pretrial services, and facilitating judicial proceedings.

The judiciary is currently re-examining the staffing standards used to determine staffing levels in courts due partially to advances in technology. The equipment needed by employees to do their work has implications for the size and design of court facilities, as do emerging theories of management focused on team-building and, to some extent, more collegial working environments made possible by technological advances. Moreover, using technology to ensure court buildings are secure, is an important consideration for the future given past and recent acts of violence that have occurred throughout the country and throughout the world.

Strategic Objective

- Assure that technological advances are factored into the judiciary's security and facilities program.

Initiatives or Courses of Action

- Assess the impact of new court personnel staffing standards on court facilities.
- Consider changes needed in new and existing court facilities to accommodate appropriate new technologies and the budgetary impact.
- Assess whether the judiciary appropriately and comprehensively considers technology in its security and facilities program.
- Coordinate with the Committee on Judicial Resources, the Committee on Automation and Technology, and the Committee on Court Administration and Case Management on the effects and implications on courthouse space of changing technologies, including the impact of new work environments on employees and court managers.

Strategic Issue: Planning for Security Resources Effectively

The judiciary is operating in an increasingly hostile environment. The risk of attacks upon public buildings by individuals and terrorists groups continues to grow. The very nature of judicial proceedings is inherently dangerous and volatile. The judiciary continues to submit requests for sizable increases in court security funding to Congress. It also continues to pursue resources, although unsuccessfully, through supplemental appropriations requests in order to keep pace with enhanced security levels implemented successfully for other high-risk federal organizations.

At present, and into the foreseeable future, there will be pressure to provide more resources for the courthouse security program. In the past, new initiatives, such as technologically-advanced equipment and the need for additional court security officer positions were not integrated into an overall security plan for the judicial branch, making resource management and policy development difficult.

Strategic Objective

- Development of a comprehensive security plan for the future direction of a security program for the judicial branch.

Initiatives or Courses of Action

- Assure that the comprehensive independent study of the court security program scheduled in the years 2000 and 2001 provides the basis for developing the *Federal Courts Judicial Security Plan.*
- Determine the level of risk acceptable for judiciary personnel and facilities.
- Assess whether court security officers should be federal or contract employees.
- Develop a policy on security coverage after normal business hours.
- Assess if change is needed in the roles of the three organizations responsible for court security: the judiciary for funding; the United States Marshals Service; and, the General Services Administration for providing security services to the judiciary. Assess changes needed to the memoranda of agreement between these agencies and to legislation to implement any changes in responsibilities.

- Examine, pursuant to a request by the Conference's Executive Committee, whether the judiciary should take over its own security program.

Attachment 2

Report of the Chairs' Long-Range Planning Meeting March 13, 2000

Judicial Conference Committee Chairs Long-Range Planning Meeting

March 13, 2000

Report

Administrative Office of the United States Courts
Office of Management Coordination and Planning

SUMMARY REPORT
MARCH 2000 LONG-RANGE PLANNING MEETING

Judicial Conference committee chairs representing 14 committees met for the third time on March 13, 2000 in Washington, D.C. The meeting was led by Judge Ralph G. Thompson, a member of the Judicial Conference's Executive Committee who is coordinating the long-range planning process for the Executive Committee. Admin-istrative Office Director Leonidas Ralph Mecham welcomed the new coordinator and attended a portion of the meeting. Also in attendance were Administrative Office Associate Director Clarence A. Lee, and Deputy Associate Director, Cathy A. McCarthy, who provides principal staff support for the integrated long-range planning process. Other senior Administrative Office committee staff also attended. A list of participants is included as Appendix A.

Report on Strategic Planning and Issues

A report, *Strategic Planning Issues of the Committees of the Judicial Conference of the United States*, was distributed to all participants. It lists the crosscutting strategic issues identified by the planning group, followed by the individual committees' lists of planning issues and courses of action for dealing with them. The report will be updated periodically as the issues and committee plans change.

Balancing National Standards with Local Flexibility

The primary agenda topic for the meeting was to discuss the appropriate balance between national standards and local flexibility. A white paper on the subject provided background for the discussion (see Appendix B). A panel of eight committee chairs presented their views. They described important program policies and the degree of local discretion allowed. They discussed the effectiveness of current approaches, including benefits and risks, resource implications, and program management issues. They identified certain areas in which tighter standards are most appropriate and others where more local discretion is preferred. They discussed limits of Judicial Conference authority, the roles sometimes played by circuit judicial councils, the keen interest in maintaining local administrative autonomy, and the challenge this sometimes creates for the committees in trying to plan and oversee a national program.

Judge Jane R. Roth, chair of the Security and Facilities Committee, described the value of having more local flexibility in dealing with security needs. On the other hand, it has been important to have consistent national space standards for courthouse design in guiding GSA's design and construction. But, this has resulted in GSA, OMB, and Congress viewing the *United States Courts Design Guide* as a set of "standards," and any modifications desired by districts as "departures" from the judiciary's own standards.

Judge Dennis G. Jacobs, chair of the Judicial Resources Committee, described the different approaches taken with regard to judicial and chambers resources versus other court personnel. There are national standards for Article III judgeships and for staffing and compensation of chambers staff, while there is broader flexibility for courts to determine the number and compensation of other court staff. It is recognized that without standard operating procedures, individual court staffing needs will vary, but the Court Personnel System and budget decentralization allow the courts flexibility to determine how to use staff resources. Nevertheless, a system with so much local discretion creates challenges for national staff resource planning and national work measurement formulas.

Judge Robin J. Cauthron, chair of the Defender Services Committee, described the need to confront questions about national program objectives in order to engage in long-range planning and budgeting. With a budget of $360 million, it is important to face the question of how much control is needed. Local courts and federal defenders often will not accept national guidelines that would change how they presently do things, especially if individual judges perceive that their administrative authority is being eroded, or if defenders feel their independent advocacy role is at risk.

Judge D. Brock Hornby, chair of the Court Administration and Case Management Committee, noted that almost every issue that comes before the committee involves local control and national guidelines. They come to the committee because a district would like to deviate from established national guidelines. For example, the committee has recently considered the "under advisement" guidelines in the CJRA case reporting guidelines. Another good example is cameras in the courtroom. Despite a clear Conference policy (September 1994) that prohibits cameras in the district courts except for ceremonial proceedings, there have been several instances where district court judges have chosen to ignore the policy and permit proceedings to be televised. Judge Hornby suggested from these types of issues, it may be impossible to develop firm national principles. Also, the issue of

Article III independence and the question of how to enforce policies are always just below the surface.

Judge Edward W. Nottingham, chair of Automation and Technology Committee, noted that the judiciary has a culture of independence, and the Judicial Conference's central authority is only advisory. But, the automation area "cries out" for some national standardization. Not only are there strong economic and technical reasons for this, but in this program, autonomy is not possible. For example, since all courts are connected to the Data Communications Network, the security of the entire network can be at risk through the actions of any one court. What will we do if a court connects to the Internet through a means other than one of the three secure national gateways? Another concern is that if the funds provided to the courts to upgrade computer equipment is not spent for that purpose, they may subsequently be unable to run new or upgraded systems. This has occurred, and more centralized funds needed to be spent without the courts feeling any consequences from the choices they made.

Judge William G. Young, chair of the Budget Committee's Economy Subcommittee, demonstrated through role play the contrasting views of a Chief Judge in favor of local flexibility to ensure the proper administration of justice in his district vs. the Budget Committee and Economy Subcommittee member who sees a need for national standards in order to make budgetary justifications and avoid inefficiency and waste.

Judge William W. Wilkins, Jr., chair of the Criminal Law Committee, described his support for both standards and local flexibility where they are most appropriate. Because probation officers perform many duties in support of judgments of the court, local flexibility can support judicial independence. Where national standards are necessary, they should apply across the board.

Judge Anthony J. Scirica, chair of the Committee on Rules of Practice and Procedure, spoke of the principal function of the standing and advisory Rules Committees to write federal rules that are national in scope, as allowed for by the Rules Enabling Act. However, the rules committees consider the same local-national balance issues to determine if there is there a problem, whether it needs a rule, and whether the rule should be uniform and national or allow for local variations. There is a good reason to allow local rules: experimentation, i.e., we may not yet know enough to determine a national standard, such as regarding electronic filing procedures.

Conclusions

The overall consensus of the panelists was that there is a place for both national standards and local flexibility. It would be difficult to define overarching principles as to when one or the other approach is preferable. In many cases, it is not an "either/or" question but a matter of determining the desired degree of specificity. Policies, programs, and issues need to be assessed on a case-by-case basis to determine how best to define standards, establish controls, set guidelines, or allow considerable local discretion.

Based on the committees' past experiences, it appears that stricter national guidelines can be most useful when there is a specific requirement (such as a statutory mandate), some operational necessity, or substantial savings to be realized. Some examples of the use of national standards include:

- the Data Communications Network, which allows judiciary-wide transmission of data and communications;
- network security requirements, which protect against unauthorized access to judiciary records;
- centrally held service contracts, as for computer assisted legal research, which allow for savings through volume discounts;
- budgetary and financial controls, which ensure proper stewardship of public funds;
- judicial compensation and benefits guidelines, which preserve equitability;
- fees for public access to electronic court records, which promote fairness and ensure revenue important to the judiciary's budget;
- standard reports, which comply with external mandates; and
- courtroom planning and design, which ensures that courtrooms meet, but do not exceed, functional requirements.

Allowing for greater local discretion, on the other hand, is preferred when:

- judicial functions or administration of justice concerns take precedence, such as in determining how to organize and use staff;
- procedures need to be tailored to reflect preferences in support of judgments of the court, such as fine collection and offender supervision; and
- functions or procedures are experimental, such as pilot programs, or still evolving, such as regulating the use of electronic signatures.

However, it is important to consider these questions in a deliberate way in developing guidelines or standards for a new policy or program:

1. What are the critical program objectives?
2. Considering cost, efficiencies, performance, and other relevant factors, is it necessary or would it be appropriate to propose a standard of some kind?
3. Would a standard interfere with judicial independence?
4. How much standardization or local flexibility is appropriate?

Role of the Planning Group

The group discussed the future direction and role for the planning group. In particular, whether the primary purpose is to exchange views and information or whether the group would like to see other results. Judge Thompson noted that planning is a part of normal business of the committees, and the group of chairs has used the planning meetings to discuss strategic issues that cut across committee lines.

Several judges commented that this information exchange has given them a deeper understanding of the work of all committees and the issues that they are pursuing, as well as an appreciation for the value of considering the broader implications of committee actions.

Judge Thompson suggested that by September's meeting, the group of chairs develop and agree to a mission statement.

Additional Strategic Issues

Other strategic issues were mentioned at the meeting as potential future discussion topics:

1. Growth of non-Article III judicial officers

2. Electronic Case Files (continuing)

3. Cost of Habeas Litigation

Appendix A: Participants in the March 2000 Long-Range Planning Meeting

Committee Representatives	Administrative Office Staff
Planning Coordinator Hon. Ralph G. Thompson	Clarence A. Lee, Jr. Cathy A. McCarthy William M. Lucianovic Kerry Mueller
Executive Committee Hon. Ralph G. Thompson	Wendy Jennis Helen Brounstein
Committee on the Administrative Office Hon. Edward B. Davis, Chair	Cathy McCarthy
Committee on Automation and Technology Hon. Edward W. Nottingham, Chair	Mel Bryson Terry Cain
Committee on the Administration of the Bankruptcy System Hon. Michael J. Melloy, Chair	Francis F. Szczebak William T. Rule
Committee on the Budget Hon. John G. Heyburn II, Chair Hon. William G. Young	George H. Schafer Gregory D. Cummings Valerie Jarrell Bruce Johnson
Committee on Court Administration and Case Management Hon. D. Brock Hornby, Chair	Noel J. Augustyn Abel J. Mattos Mark S. Miskovsky
Committee on Criminal Law Hon. William W. Wilkins, Jr. Chair	John M. Hughes Kim Whatley

Committee on Defender Services Hon. Robin J. Cauthron, Chair	Theodore J. Lidz Steven G. Asin Robert Brock
Committee on Federal-State Jurisdiction Hon. Walter K. Stapleton, Chair	Karen M. Kremer
Committee on Intercircuit Assignments Hon. Stanley S. Harris, Chair	David L. Cook
Committee on the Judicial Branch Hon. David R. Hansen, Chair	Steven M. Tevlowitz
Committee on Judicial Resources Hon. Dennis G. Jacobs, Chair	Alton C. Ressler Charlotte G. Peddicord H. Allen Brown
Committee on the Administration of the Magistrate Judges System Hon. Harvey E. Schlesinger, Chair	Thomas Hnatowski Charles E. Six
Committee on Rules of Practice and Procedure Hon. Anthony J. Scirica, Chair	Peter G. McCabe John K. Rabiej
Committee on Security and Facilities Hon. Jane R. Roth, Chair	Ross Eisenman William J. Lehman Linda Holz
	Other Administrative Office Staff: John Hehman Robert Lowney Glen Palman Steven R. Schlesinger Jeffrey A. Hennemuth

Appendix B: Long-Range Planning White Paper

Balancing Local Flexibility with National Standards

Should the judiciary continue its current practice of broad national policies with local administrative flexibility? Despite the great success of management and budget decentralization, Congress and others have questioned this arrangement when there are local deviations from national policy or practices that result in greater costs or inefficiencies. To what extent does the desire for local flexibility on the one hand conflict with national standards and program objectives on the other? What are the benefits and problems inherent in the current arrangement? Are there risks if the balance swings too far in one direction?

Statutory Provisions for Judicial Branch Administration

Judicial Conference

Congress in 1922 created what was later known as the Judicial Conference of the United States to monitor the business of the federal courts, encourage temporary assignment of judges, and make suggestions for procedural changes (28 U.S.C. § 331). The Conference serves as the central policy-making body for the federal court system and performs numerous other statutory duties, including:

- making a comprehensive survey of the condition of business in the courts of the United States;
- preparing plans for assignment to or from courts of appeals or districts where necessary;
- submitting suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business; and
- supervising and directing the Director of the Administrative Office in performance of his duties as the administrative officer of the courts of the United States (see next page).

Circuit Judicial Councils

The circuit judicial councils were created by Congress in 1939. They have the responsibility for overseeing the administration of justice in the circuit, for considering

complaints of judicial unfitness and taking necessary action, for approving accommodations for courts and judges, and for reviewing numerous administrative measures and plans (28 U.S.C. § 332). Circuit judicial councils are authorized to issue orders for the expeditious administration of justice within the circuit, and all judges and employees in the circuit are required by statute to effect council orders.

Both Congress and the Judicial Conference have vested numerous district court oversight responsibilities in the circuit councils, including review and abrogation of local rules, approval of district court requests for legislation to authorize additional judgeships, and approval of district court plans for administering juries, implementing the Speedy Trial Act, and other functions.

Administrative Office

Congress also created the Administrative Office of the United States Courts (AO) in 1939. Important administrative responsibilities, such as budget formulation and execution, reside in the Director, who serves under the supervision of the Judicial Conference. The AO provides staff support to the Judicial Conference and its committees and implements and executes the Judicial Conference's policies. The AO provides a broad range of administrative, legal, management, program, communications, and technical support and services to the courts (28 U.S.C. §§ 604-612). Specific authorities of the Director include:

- serving as Secretary to the Judicial Conference;
- developing and administer the budget;
- promulgating Judicial Conference policies;
- gathering and reporting caseload statistics;
- providing financial accounting and audit services;
- providing contracting and procurement;
- providing accommodations for the courts;
- examining the state of the dockets of the courts; and
- supervising all administrative matters relating to the offices of magistrate judges, clerks, and other clerical and administrative personnel of the courts.

In 1986, the Director of the Administrative Office initiated the "3-D" campaign to decentralize, delegate and divest, resulting in major shift in administrative authority from the AO director to the courts, especially regarding budget decentralization, procurement delegations, and personnel management authorities. Many of these authorities are delegated to court unit executives.

For example, budget decentralization places the responsibility for planning, management, and control of allotted funds at the local court level, where reaction to local needs can occur quickly. Court unit heads have the discretion to reprogram funds between most accounts (salaries, travel, supplies, etc.) and, with the approval of the AO, between units. Courts are responsible for establishing an organizational structure and procedures to oversee budget development, budget monitoring, and implementation processes and to establish priorities for the expenditure of funds.

National Policies and Conformance

Judicial Conference committees develop and oversee the judiciary's major programs and make policy recommendations to the Conference. Judicial Conference policies are documented in the *Report of the Proceedings of the Judicial Conference* and they are further defined and communicated in numerous ways. These include specific provisions in the *Guide to Judiciary Policies and Procedures*, through other manuals or publications, and through the allocation of resources and specific budget limitations.

National authority "rests primarily on the willingness of courts and judges to respect [the Judicial Conference's] policies, on the authorities granted to the Director of the Administrative Office to promulgate and administer many administrative programs, and on the actions of circuit judicial councils...to enforce policy decisions of the Judicial Conference." (*Getting Started as a Federal Judge*, p. 160)

Each court carries out its business independently within the framework of statutes, rules, Judicial Conference policies, AO policies and directives and circuit judicial council orders. Each court determines local practices and issues administrative orders for the conduct of business in the court. Clerks of court, chief probation and pretrial services officers, and other unit executives exercise a high degree of management autonomy.

The normal processes by which program policies are developed usually involve many different actors. Court staff, court managers, AO program managers, judges on Conference committees, and Conference members may have different concepts of how much specificity is desirable and necessary for a program or a particular aspect of a program. Reaching a consensus often produces more flexible guidelines rather than more restrictive standards. While some Judicial Conference policies are very specific, with defined standards that leave little room for variation, many Conference policies are intentionally broad to allow for local discretion.

Reviews have demonstrated that the courts generally follow Judicial Conference policies, but they do not always. Mechanisms for monitoring and enforcing compliance to national standards range from more strict to more *laissez faire* approaches with budget controls, written standards, *post facto* audits and reviews, self reporting, and no reporting or monitoring. Outside entities, including Congress and the General Accounting Office, from time to time have raised questions about accountability for judiciary programs and funds, given the degree of flexibility and absence of a clear administrative hierarchy in the judiciary.

Following are several examples of the range of specificity and flexibility in the articulation and implementation of judiciary policies and programs.

- *No exceptions*

  The Committee on Judicial Resources developed and the Judicial Conference approved national formulas for determining grades and compensation for clerks of court. Salary levels depend on size of court, size of staff supervised, number of judges supported, and district pay comparability. The resulting salary determinations for individual clerks cannot be exceeded.

- *Strict Guidelines on Exceptions*

  An example of a program policy that has fairly strict guidelines is the electronic public access to court data (EPA) program. The Conference has prescribed a specific per-minute fee (currently 60 cents) for electronic access to district, bankruptcy, and appellate courts and Court of Federal Claims files. Not only does a standard fee ensure equitability across districts, but the revenue generated from the fee is to be used to support and enhance the electronic public access systems. Although the courts' Miscellaneous Fee Schedules provide that a court may exempt persons or classes of persons from the fees, the Judicial Conference has determined that exemptions to the fee payment for electronic access should be granted as the exception, not the rule:

  - Examples of persons and classes of persons who may be exempted from electronic access fees include indigents, bankruptcy case trustees, not-for-profit organizations, and voluntary ADR neutrals.
  - Adherence to the Judicial Conference policy for granting exemptions will be necessary for courts to receive funding for electronic public access-related services to the extent that such funding is derived from fees for electronic access (JCUS - MAR 1995, p. 15).

Although the Conference policy in this area is relatively straightforward, nevertheless, a few districts have decided not to comply with the Conference fee policy and they have opted to provide the services without charging fees. As a result, users obtain data at no cost in these districts that they would pay for in others.

- *Formal Process for Granting Exceptions*

An example of a formal process for granting exceptions to national guidelines is in the planning and design of new court facilities. In March 1991, when the Judicial Conference approved the 1991 edition of the *United States Courts Design Guide*, it directed that any significant deviations from the guidelines must be approved by the judicial council in each circuit (*Design Guide*, 1991, p.12). This policy is still in effect.

In March 1997, the Judicial Conference endorsed planning assumptions that afford flexibility to courts and circuit councils when determining the number of courtrooms to construct in a new building. With regard to senior judges, it is generally assumed that a senior judge will need a courtroom for ten years after taking senior status. The Conference agreed that courts and judicial councils can change this assumption based on circumstances at a specific location. In some instances, courts have requested, and judicial councils have approved, changing the number of years a senior judge is projected to need an exclusive courtroom from ten to as many as 15 years. Although the Conference policy allows for this change, nevertheless, GSA, OMB, and the Congress view this as an "exception" to the judiciary's space standards.

- *Specific Guidelines, But Not Mandatory*

Program Guidelines. In March 1999, upon recommendation by the Criminal Law Committee, the Judicial Conference approved a monograph on the judiciary's Home Confinement Program for defendants and offenders that outlines national program standards for operating the program at the district level. The monograph combines specific standards with allowances for flexibility to allow probation and pretrial service officers to implement procedures based on individual court needs.

For example, the monograph defines specific limits on the number and types of places where participants should be authorized to travel outside the home while in the program. Some districts have imposed additional restrictions that also prohibit

or limit the number of visitors or guests a participant may have in the home during placement in the home confinement program.

Also, the monograph has specific requirements and time frames for the electronic monitoring contractor to notify a probation officer when certain events occur that may indicate a problem with someone in home confinement. However, the monograph does not specify a standard approach for addressing these situation, but instead offers a list of possible responses for officers to "consider."

Administrative Guidelines. An example of non-mandatory guidelines in an administrative area is the policy on storage and retention of sealed court records. In September 1999, upon recommendation of the Committee on Court Administration and Case Management, the Judicial Conference adopted non-mandatory guidelines on management of sealed records. The guidelines are written to encourage courts to consider taking certain actions, such as establishing a practice for judges to specify when a seal may be vacated and for unsealing older bodies of sealed material.

- *Broad Flexibility*

The judiciary's automation program provides broad local flexibility for the courts to use decentralized funds to purchase computer equipment, develop systems, and hire systems staff. For example, funds for the purchase of office automation equipment are based on formulae intended to enable them to keep their desktop infrastructure up to date. Under budget decentralization, courts may re-program other funds to cover costs associated with local development, the purchase of additional office automation equipment, or other expenses associated with information technology.

As a result of this broad flexibility, similar courts may have wide variations in the number of systems staff, and they may use technology at different levels of sophistication to support court operations. Also, courts have accumulated a variety of hardware types and software applications which can cause technical incompatibility problems. One recent example is the Administrative Office's effort to use electronic mail, rather than mail and fax, for transmitting memoranda to chief judges and unit heads. This effort met with unexpected problems related to dissimilar systems for electronic mail, and corrections for some court systems led to problems for others.

Strategic Considerations

These questions opened this paper: Should the judiciary continue its current practice of broad national policies with local administrative flexibility? To what extent does the desire for local flexibility on the one hand conflict with national standards and program objectives on the other? What are the benefits and problems inherent in the current arrangement? Are there risks if the balance swings too far in one direction?

Local flexibility is a significant tradition in the administrative and governance structures of the judicial branch. However, there may be important economic and program management implications of allowing too much discretion. In some areas, the application of strict standards may be more cost-effective while in other areas, flexibility may deliver better results. How much flexibility is desirable may vary from one program to another, and it may change over time. A strategic consideration of the current approaches and how well they have served and will serve to meet the judiciary's needs will help guide future governance, program management and policy-making decisions.

Current State Assessment

Consider the policy areas, programs, operations, and functions for which each committee has jurisdiction, the extent to which they rely on national standards, and the degree of local flexibility.

1. How specific are the program policies? Are there written standards or guidelines? If there are national standards, is there a formal exception process?

2. How are specific authorities and accountabilities defined (e.g., unit executive, court, circuit judicial council, Judicial Conference, Conference committee, Administrative Office)?

- What is the degree of local discretion in implementation? How do the courts view policy and program standards?

4. Is local compliance monitored in any way? How do committees oversee program policy implementation? What role do the circuit judicial councils play in assisting the courts in implementing national policies? What is the AO's oversight responsibility?

5. What are the implications or risks if the standards or guidelines are not uniformly followed? (Note: the implications need not be negative.)

6. Overall, how well has the current approach worked? Has it cost more or saved money? Has it resulted in better programs? Has it generated criticism? What are the greatest risks?

Future Directions

1. How much local flexibility in implementing judiciary policies is desirable?

2. What are the resource implications of more or less local flexibility?

3. Are mandatory standards appropriate for:

   (a) specific administrative areas (e.g. automation, communications, facilities, finance, personnel)?

   (b) specific program areas (e.g. fine and restitution collection, drug testing and treatment, case docketing definitions, case citations)?

4. In approaching the development of program policies and the distribution of resources, should committees aim for consistency regarding the level of local discretion permitted?

5. What oversight mechanisms are appropriate?

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