COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

Philadelphia, Pennsylvania
June 9-10, 2003

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JUNE 9-10, 2003

1. Opening Remarks of the Chair

   - Supreme Court approval of proposed amendments to the Appellate, Bankruptcy, Civil, and Evidence Rules
   - Report on Executive Committee action on minimal-diversity jurisdiction legislation

2. **ACTION** — Approving Minutes of January 2003 Committee Meeting

3. Report of the Administrative Office

   A. Legislative report
   B. Administrative report

4. Report of the Federal Judicial Center

5. Report of the Advisory Committee on Appellate Rules

   A. **ACTION** — Approving publishing for public comment proposed amendments to Rules 4, 26, 28, 32, 34, 35, and 45, and new Rules 27(d)(1)(E), 28.1, and 32.1
   B. Minutes and other informational items

6. Report of the Advisory Committee on Criminal Rules

   A. **ACTION** — Approving and transmitting to the Judicial Conference proposed amendments to Rules 35 and 41 and comprehensive revision of Rules Governing § 2254 and § 2255 Proceedings and accompanying forms
   B. **ACTION** — Approving publishing for public comment proposed amendments to Rules 12.2, 29, 32, 32.1, 33, 34, 45, and new Rule 59
   C. Minutes and other informational items

7. Report of the Advisory Committee on Civil Rules

   A. **ACTION** — Approving publishing for public comment new Rule 5.1, and proposed amendments to 6(e), 27(a), and 45(a) (proposed amendments to Admiralty Rules "B" and "C" approved for publication at January meeting)
   B. **ACTION** — Approving publishing at a later date for public comment proposed style revision of Rules 1 through 15
   C. Minutes and other informational items

8. Report of the Advisory Committee on Evidence Rules

   A. **ACTION** — Approving and transmitting to the Judicial Conference proposed amendments to Rule 804(b)(3)
   B. Minutes and other informational items

9. Report of the Advisory Committee on Bankruptcy Rules

   A. **ACTION** — Approving and transmitting to the Judicial Conference proposed amendments to Rules 1011, 2002, and 9014, and new Official Form 21
   B. **ACTION** — Approving publishing for public comment proposed amendments to Rules 1007, 3004, 3005, 4008, 7004, and 9006
   C. Minutes and other informational items

10. **ACTION** — Approving notifying courts of report on Local Rules Project

11. Report of Technology Subcommittee

12. Status Report on Attorney Conduct Rules (oral report)

13. Long-Range Planning

14. Next Committee Meeting (Phoenix, Arizona, January 16-17, 2004)

JUDICIAL CONFERENCE RULES COMMITTEES
June 2, 2003

Chairs	Reporters
Honorable Anthony J. Scirica United States Circuit Judge 22614 United States Courthouse Independence Mall West 601 Market Street Philadelphia, PA 19106	Prof. Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02159
Honorable Samuel A. Alito, Jr. United States Circuit Judge 357 United States Post Office and Courthouse 50 Walnut Street Newark, NJ 07101	Prof. Patrick J. Schiltz University of St. Thomas School of Law 1000 La Salle Avenue Minneapolis, MN 55403-2005
Honorable A Thomas Small United States Bankruptcy Judge United States Bankruptcy Court Post Office Drawer 2747 Raleigh, NC 27602	Prof. Jeffrey W. Morris University of Dayton School of Law 300 College Park Dayton, OH 45469-2772
Honorable David F. Levi United States District Judge United States Courthouse 501 I Street, 14th Floor Sacramento, CA 95814	Prof. Edward H. Cooper University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215
Honorable Edward E. Carnes United States Circuit Judge United States Court of Appeals United States Courthouse, Suite 500D One Church Street Montgomery, AL 36104	Prof. David A. Schlueter St. Mary's University School of Law One Camino Santa Maria San Antonio, TX 78228-8602
Honorable Jerry E. Smith United States Circuit Judge United States Court of Appeals 12621 Bob Casey U.S. Courthouse 515 Rusk Avenue Houston, TX 77002-2698	Prof. Daniel J. Capra Fordham University School of Law 140 West 62nd Street New York, NY 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, PA 19106

Members:

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

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

Honorable Sidney A. Fitzwater
United States District Judge
United States District Court
15A3 Earle Cabell Federal Building
and United States Courthouse
1100 Commerce Street
Dallas, TX 75242-1003

Honorable Thomas W. Thrash, Jr.
United States District Judge
United States District Court
2188 Richard B. Russell Federal Building
and United States Courthouse
75 Spring Street, S.W.
Atlanta, GA 30303-3361

Honorable Charles Talley Wells
Chief Justice
Supreme Court of Florida
500 South Duval Street
Tallahassee, FL 32399-1925

Dean Mary Kay Kane
University of California
Hastings College of Law
200 McAllister Street
San Francisco, CA 94102-4978

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

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

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

Mark R. Kravitz, Esquire
Wiggin & Dana LLP
One Century Tower, P.O. Box 1832
New Haven, CT 06508-1832

Deputy Attorney General (ex officio)
Honorable Larry D. Thompson
U.S. Department of Justice
950 Pennsylvania Avenue, N.W., Rm. 4139
Washington, DC 20530

May 21, 2003
Projects

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (CONTD.)

Reporter:

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

Advisors and Consultants:

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

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

Professor R. Joseph Kimble
Thomas M. Cooley Law School
300 South Capitol Avenue
Lansing, MI 48933

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

Secretary:

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

ADVISORY COMMITTEE ON APPELLATE RULES

Chair:

Honorable Samuel A. Alito, Jr.
United States Circuit Judge
United States Court of Appeals
357 United States Post Office
and Courthouse
50 Walnut Street
Newark, NJ 07101

Members:

Honorable Diana Gribbon Motz
United States Circuit Judge
United States Court of Appeals
920 United States Courthouse
101 West Lombard Street
Baltimore, MD 21201

Honorable Carl E. Stewart
United States Circuit Judge
United States Court of Appeals
2299 United States Court House
300 Fannin Street
Shreveport, LA 71101-3074

Honorable John G. Roberts, Jr.
United States Circuit Judge
United States Court of Appeals
333 Constitution Avenue, N.W.
Washington, DC 20001

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

Honorable Richard C. Howe
Justice
Supreme Court of Utah
830 East 5600 South
Salt Lake City, UT 84107

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

W. Thomas McGough, Jr., Esquire
Reed Smith LLP
435 Sixth Avenue
Pittsburgh, PA 15219

Sanford Svetcov, Esquire
Milberg Weiss Bershad Hynes & Lerach LLP
100 Pine Street, Suite 2600
San Francisco, CA 94111

Solicitor General (ex officio)
Honorable Theodore B. Olson
Douglas Letter, Appellate Litigation Counsel
Civil Division, U.S. Department of Justice
601 D Street, N.W., Room 9106
Washington, DC 20530

Reporter:

Professor Patrick J. Schiltz
University of St. Thomas School of Law
1000 La Salle Avenue
Minneapolis, MN 55403-2005

May 21, 2003
Projects

ADVISORY COMMITTEE ON APPELLATE RULES (CONTD.)

Advisors and Consultants:

Marcia M. Waldron
Circuit Clerk
United States Court of Appeals
601 Market Street
Philadelphia, PA 19106

Liaison Member:

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

Secretary:

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

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Chair:

Honorable A. Thomas Small
United States Bankruptcy Judge
United States Bankruptcy Court
Post Office Drawer 2747
Raleigh, NC 27602

Members:

Honorable Ernest C. Torres
Chief Judge
United States District Court
United States Courthouse
One Exchange Terrace
Providence, RI 02903-1779

Honorable Irene M. Keeley
Chief Judge
United States District Court
500 West Pike Street, 2nd Floor
Clarksburg, WV 26301

Honorable Robert W. Gettleman
United States District Judge
Everett McKinley Dirksen
United States Courthouse
219 South Dearborn Street
Chicago, IL 60604

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

Honorable Thomas S. Zilly
United States District Judge
United States District Court
410 United States Courthouse
1010 Fifth Avenue
Seattle, WA 48104-1130

Honorable Laura Taylor Swain
United States District Judge
United States District Court
426 Thurgood Marshall United States Courthouse
40 Centre Street
New York, NY 10007

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

Honorable Christopher M. Klein
United States Bankruptcy Judge
United States Bankruptcy Court
3-200 United States Courthouse
501 I Street
Sacramento, CA 95814-2322

Honorable Mark B. McFeeley
United States Bankruptcy Judge
United States Bankruptcy Court
421 Gold Street, S.W., 6th Floor
Albuquerque, NM 87102

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

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

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

ADVISORY COMMITTEE ON BANKRUPTCY RULE (CONTD.)

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

K. John Shaffer, Esquire
Stutman, Treister & Glatt, P.C.
3699 Wilshire Boulevard, Suite 900
Los Angeles, CA 90010

Director, Commercial Litigation Branch,
Civil Division, U.S. Dept. of Justice (ex officio)
J. Christopher Kohn, Esquire
1100 L Street, N.W., 10th Floor, Room 10036
Washington, DC 20005

Reporter:

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

Advisors and Consultants:

James J. Waldron
Clerk, United States Bankruptcy Court
Martin Luther King, Jr. Federal Building
and United States Courthouse
Third Floor, 50 Walnut Street
Newark, NJ 07102-3550

Lawrence A. Friedman
Director, Executive Office for
United States Trustees
20 Massachusetts Avenue, N.W., Suite 8000
Washington, DC 20530

Professor Bruce A. Markell
University of Nevada Las Vegas
William S. Boyd School of Law
4505 Maryland Parkway, Box 451003
Las Vegas, NV 89154-1003

Melissa B. Jacoby, Assistant Professor
Temple University
James E. Beasley School of Law
1719 N. Broad Street
Philadelphia, PA 19122

Liaison from Committee on the Administration of the Bankruptcy System:

Honorable Dennis Montali
United States Bankruptcy Court
235 Pine Street
San Francisco, CA 94104

Secretary:

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

ADVISORY COMMITTEE ON CIVIL RULES

Chair:

Honorable David F. Levi
United States District Judge
United States Courthouse
501 I Street, 14th Floor
Sacramento, CA 95814

Members:

Honorable Paul J. Kelly, Jr.
United States Circuit Judge
United States Court of Appeals
120 South Federal Place
Santa Fe, NM 87501

Honorable Lee H. Rosenthal
United States District Judge
11535 Bob Casey United States Courthouse
Houston, TX 77002

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

Honorable Shira Ann Scheindlin
United States District Judge
United States District Court
1050 United States Courthouse
500 Pearl Street
New York, NY 10007-1312

Honorable Thomas B. Russell
United States District Judge
United States District Court
307 Federal Building
501 Broadway Street
Paducah, KY 42001

Honorable H. Brent McKnight
United States Magistrate Judge
United States District Court
168 Charles R. Jonas Federal Building
401 West Trade Street
Charlotte, NC 28202

Honorable Nathan L. Hecht
Justice, Supreme Court of Texas
201 West 14th Street
Austin, TX 78701

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

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

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

Andrew M. Scherffius, Esquire
Scherffius, Ballard, Still & Ayres, L.L.P.
1201 Peachtree Street, N.E.
400 Colony Square, Suite 1018
Atlanta, GA 30361

Robert C. Heim, Esquire
Dechert
4000 Bell Atlantic Tower
1717 Arch Street
Philadelphia, PA 19103-2793

ADVISORY COMMITTEE ON CIVIL RULES (CONTD.)

Assistant Attorney General
Civil Division (ex officio)
Honorable Robert D. McCallum, Jr.
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Liaison Members:

Honorable Sidney A. Fitzwater
United States District Judge
United States District Court
15A3 Earle Cabell Federal Building
and United States Courthouse
1100 Commerce Street
Dallas, TX 75242-1003

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

Reporter:

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

Advisors and Consultants:

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

Professor Thomas D. Rowe, Jr.
Duke Law School
Science Drive at Towerview
Durham, NC 27708-0360

Secretary:

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

ADVISORY COMMITTEE ON CRIMINAL RULES

Chair:

Honorable Edward E. Carnes
United States Circuit Judge
United States Court of Appeals
United States Courthouse, Suite 500D
One Church Street
Montgomery, AL 36104

Members:

Honorable John M. Roll
United States District Judge
Evo A. DeConcini United States Courthouse
405 West Congress Street, Suite 5190
Tucson, AZ 85701-5053

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

Honorable David G. Trager
United States District Judge
United States District Court
225 Cadman Plaza, East
Room 224
Brooklyn, NY 11201

Honorable Harvey Bartle III
United States District Court
16614 James A. Byrne United States Courthouse
601 Market Street
Philadelphia, PA 19106-1714

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

Honorable Reta M. Strubhar
Judge
Court of Criminal Appeals of Oklahoma
State Capitol Building, Room 230
2300 North Lincoln Boulevard
Oklahoma City, OK 73105

Professor Nancy J. King
Vanderbilt University Law School
131 21st Avenue South, Room 248
Nashville, TN 37203-1181

Robert B. Fiske, Jr., Esquire
Davis Polk & Wardwell
450 Lexington Avenue
New York, NY 10017

Donald J. Goldberg, Esquire
Ballard Spahr
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599

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

Assistant Attorney General
Criminal Division (ex officio)
Honorable Michael Chertoff
Eric H. Jaso, Counselor
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 2708
Washington, DC 20530-0001

ADVISORY COMMITTEE ON CRIMINAL RULES (CONTD.)

Reporter:

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

Liaison Member:

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

Advisors and Consultants:

Professor Ira P. Robbins
American University
Washington College of Law
4801 Massachusetts Avenue, N.W.
Washington, DC 20016

Secretary:

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

ADVISORY COMMITTEE ON EVIDENCE RULES

Chair:

Honorable Jerry E. Smith
United States Circuit Judge
United States Court of Appeals
12621 Bob Casey United States Courthouse
515 Rusk Avenue
Houston, TX 77002-2698

Members:

Honorable Ronald L. Buckwalter
United States District Judge
United States District Court
14614 James A. Byrne
United States Courthouse
601 Market Street
Philadelphia, PA 19106-1714

Honorable Robert L. Hinkle
United States District Judge
United States District Court
United States Courthouse
111 North Adams Street
Tallahassee, FL 32301-7717

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

David S. Maring, Esquire
Maring Williams Law Office P.C.
400 E. Broadway, Suite 307
Bismarck, ND 58501

Patricia Lee Refo, Esquire
Snell & Wilmer L.L.P.
One Arizona Center
Phoenix, AZ 85004-2202

Thomas W. Hillier II
Federal Public Defender
Suite 1100
1111 Third Avenue
Seattle, WA 98101-3203

Assistant Attorney General
(ex officio)
Christopher A. Wray
Principal Associate Deputy Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W., Room 4607
Washington, DC 20530

ADVISORY COMMITTEE ON EVIDENCE RULES (CONTD.)

Liaison Members:

Honorable Thomas W. Thrash, Jr.
United States District Judge
United States District Court
2188 Richard B. Russell Federal Building
and United States Courthouse
75 Spring Street, S.W.
Atlanta, GA 30303-3361

Honorable Christopher M. Klein
United States Bankruptcy Judge
United States Bankruptcy Court
3-200 United States Courthouse
501 I Street
Sacramento, CA 95814-2322

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

Honorable David G. Trager
United States District Judge
United States District Court
225 Cadman Plaza, East
Room 224
Brooklyn, NY 11201

Reporter:

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

Advisors and Consultants:

Honorable C. Arlen Beam
United States Court of Appeals
435 Robert V. Denney United States Courthouse
100 Centennial Mall North
Lincoln, NE 68508

Professor Leo H. Whinery
University of Oklahoma
College of Law
300 Timberdell Road
Norman, OK 73019

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

Secretary:

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

LIAISON MEMBERS

Appellate:

Judge J. Garvan Murtha (Standing Comm.)

Civil:

Judge Sidney A. Fitzwater (Standing Comm.)

Judge James D. Walker, Jr. (Bankruptcy Rules Comm.)

Criminal:

Judge A. Wallace Tashima (Standing Comm.)

Evidence:

Judge Thomas W. Thrash, Jr.(Standing Comm.)

Judge Christopher M. Klein (Bankruptcy Rules Comm.)

Judge Richard H. Kyle (Civil Rules Comm.)

Judge David G. Trager (Criminal Rules Comm.)

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Staff:

John K. Rabiej
Chief, Rules Committee Support Office
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1755

James N. Ishida
Attorney-Advisor
Office of Judges Programs
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1755

Judith W. Krivit
Administrative Specialist
Rules Committee Support Office
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1755

Anne Rustin
Secretary, Rules Committee
Support Office
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1755

Jeffrey A. Hennemuth
Deputy Assistant Director
Office of Judges Programs
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1755

Patricia S. Ketchum
Senior Attorney, Bankruptcy
Judges Division
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1900
Fax 202-502-1988

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

SUBCOMMITTEES

Subcommittee on Attorney Conduct
Professor Daniel R. Coquillette (Standing)
Judge Thomas W. Thrash, Jr. (Standing)
Charles J. Cooper, Esquire (Standing)
Judge Samuel A. Alito, Jr. (Appellate)
Professor Patrick J. Schiltz (Appellate)
Judge Robert W. Gettleman (Bankruptcy)
Professor Jeffrey W. Morris (Bankruptcy)
Judge Lee H. Rosenthal (Civil)
Professor Myles V. Lynk (Civil)
Judge Paul L. Friedman (Criminal)
Robert B. Fiske, Jr., Esquire (Criminal)
Professor Daniel J. Capra (Evidence)
Judge Ewing Werlein (Federal/State liaison)
Judge John W. Lungstrum (CACM liaison)

Subcommittee on Technology
Judge Sidney A. Fitzwater, Chair
Judge Thomas W. Thrash, Jr. (Standing)
Mark R. Kravitz, Esquire (Standing)
Sanford Svetcov, Esquire (Appellate)
Judge Thomas S. Zilly (Bankruptcy)
Professor Myles V. Lynk (Civil)
Judge Reta M. Strubhar (Criminal)
Committee Reporters, Consultants

Subcommittee on Style
Judge J. Garvan Murtha, Chair
Judge Anthony J. Scirica *(ex officio)*
Judge Thomas W. Thrash, Jr.
Dean Mary Kay Kane
Professor R. Joseph Kimble, Consultant
Joseph F. Spaniol, Jr., Esquire, Consultant

LIAISONS TO ADVISORY RULES COMMITTEES

Judge J. Garvan Murtha (Appellate)
Judge Sidney A. Fitzwater (Civil)
Judge A. Wallace Tashima (Criminal)
Judge Thomas W. Thrash, Jr. (Evidence)

May 7, 2003
Projects

ADVISORY COMMITTEE ON BANKRUPTCY RULES

SUBCOMMITTEES

Subcommittee on Attorney Conduct and Health Care
Judge Robert W. Gettleman, Chair
Judge Ernest C. Torres
Judge Mark B. McFeeley
Howard L. Adelman, Esquire
K. John Shaffer, Esquire

Subcommittee on Business Issues
Professor Alan N. Resnick, Chair
Judge Thomas S. Zilly
Judge Christopher M. Klein
K. John Shaffer, Esquire
J. Christopher Kohn, Esquire
James J. Waldron, ex officio

Subcommittee on Consumer Issues
Eric L. Frank, Esquire, Chair
Judge Laura Taylor Swain
Judge James D. Walker, Jr.
Professor Mary Jo Wiggins
James J. Waldron, *ex officio*

Subcommittee on Forms
Judge James D. Walker, Jr., Chair
Judge Christopher M. Klein
Professor Mary Jo Wiggins
Eric L. Frank, Esquire
J. Christopher Kohn, Esquire
James J. Waldron, *ex officio*

Subcommittee on Privacy, Public Access, and Appeals
Howard L. Adelman, Esquire, Chair
Judge Robert W. Gettleman
Judge Ernest C. Torres
Judge James D. Walker, Jr.
K. John Shaffer, Esquire

Subcommittee on Style
Professor Alan N. Resnick, Chair
Judge Christopher M. Klein
Professor Mary Jo Wiggins

Subcommittee on Technology and Cross Border Insolvency
Judge Thomas S. Zilly, Chair
Judge Irene M. Keeley
Judge Norman C. Roettger, Jr.
Judge Laura Taylor Swain
Judge Mark B. McFeeley

ADVISORY COMMITTEE ON CIVIL RULES

SUBCOMMITTEES

Subcommittee on Civil Forfeiture/ Settlement Sealing
Judge H. Brent McKnight, Chair
Judge Richard H. Kyle
Dean John C. Jeffries, Jr.
Robert C. Heim, Esquire
Professor Richard L. Marcus, Consultant

Subcommittee on Class Action
Judge Lee H. Rosenthal, Chair
Judge Richard H. Kyle
Sheila L. Birnbaum, Esquire
Andrew M. Scheriffius, Esquire

Subcommittee on Discovery
Professor Myles V. Lynk, Chair
Judge Lee H. Rosenthal
Judge Shira Ann Scheindlin
Andrew M. Scherffius, Esquire
Sheila L. Birnbaum, Esquire
Robert C. Heim, Esquire
Professor Richard L. Marcus, Consultant

Subcommittee on Simplified Procedure
Judge Richard H. Kyle, Chair
Dean John C. Jeffries, Jr.
Professor Richard L. Marcus, Consultant

Subcommittee on Style
Subcommittee A
Judge Thomas B. Russell, Chair
Judge Lee H. Rosenthal
Judge H. Brent McKnight
Dean John C. Jeffries, Jr.
Sheila L. Birnbaum, Esquire
Andrew M. Scherffius, Esquire
DOJ representative
Professor Thomas D. Rowe, Jr., Consultant

Subcommittee B
Judge Paul J. Kelly, Jr. Chair
Judge Shira Ann Scheindlin
Judge Richard H. Kyle
Justice Nathan L. Hecht
Professor Myles V. Lynk
Robert C. Heim, Esquire
DOJ representative
Professor Richard L. Marcus, Consultant

May 7, 2003
Projects

ADVISORY COMMITTEE ON CRIMINAL RULES

SUBCOMMITTEES

Rule 41 Subcommittee
Judge Tommy E. Miller (Chair)
Judge Harvey Bartle III
Professor Nancy J. King
Lucien B. Campbell, Esquire
Eric H. Jaso, Counselor

Subcommittee on Grand Jury
Judge Susan C. Bucklew, Chair
Judge Paul L. Friedman
Robert B. Fiske, Jr., Esquire
Donald J. Goldberg, Esquire
Eric H. Jaso, Counselor

Subcommittee on Habeas Corpus
Judge David G. Trager, Chair
Judge Tommy E. Miller
Professor Nancy J. King
Lucien B. Campbell, Esquire
Eric H. Jaso, Counselor
Professor Ira P. Robbins, Consultant

May 7, 2003
Projects

ADVISORY COMMITTEE ON EVIDENCE RULES

SUBCOMMITTEES

Subcommittee on Privileges
Professor Daniel J. Capra
Judge Jerry E. Smith, *ex officio*
Judge Ronald L. Buckwalter
David S. Maring, Esquire
Professor Kenneth S. Broun, Consultant

May 7, 2003
Projects

MAR 27 2003

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That Forms 1, 2, 3, and 5 in the Appendix to the Federal Rules of Appellate Procedure be, and they hereby are, amended by replacing all references to "19__" with references to "20__."

2. That the foregoing amendments to the forms in the Appendix to the Federal Rules of Appellate Procedure shall take effect on December 1, 2003, and shall govern in all proceedings in appellate 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 Appellate Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

MAR 2 7 2003

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Bankruptcy Procedure be, and they hereby are, amended by including therein amendments to Bankruptcy Rules 1005, 1007, 2002, 2003, 2009, and 2016, and new Rule 7007.1.

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

2. That the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 2003, 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.

MAR 27 2003

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Civil Procedure be, and they hereby are, amended by including therein amendments to Civil Rules 23, 51, 53, 54, and 71A.

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

2. That Forms 19, 31, and 32 in the Appendix to the Federal Rules of Civil Procedure be, and they hereby are, amended by replacing all references to "19__" with references to "20__."

3. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 2003, and shall govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

4. 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.

MAR 27 2003

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Evidence be, and they hereby are, amended by including therein the amendments to Evidence Rule 608(b).

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

2. That the foregoing amendments to the Federal Rules of Evidence shall take effect on December 1, 2003, and shall govern in 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.

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

CAROLYN DINEEN KING
MAN, EXECUTIVE COMMITTEE

(713) 250-5750
(713) 250-5050 FAX
CDKING@CA5.USCOURTS.GOV

Memorandum of Action

Executive Committee
Judicial Conference of the United States

April 24, 2003

The Executive Committee met by teleconference on April 24, 2003. All members participated except Judges Boyce Martin, Joel Flaum, and D. Brock Hornby, who were unavailable. Present from the Administrative Office were Karen K. Siegel, Michael Blommer, Peter McCabe, Wendy Jennis, John Rabiej, Karen Kremer, and Helen Bornstein.

Class Action Litigation

At its March 2003 session, the Judicial Conference approved the following resolution regarding class action legislation:

> The Judicial Conference recognizes that the use of minimal diversity of citizenship may be appropriate to the maintenance of significant multi-state class action litigation in the federal courts, while continuing to oppose class action legislation that contains jurisdictional provisions that are similar to those in the bills introduced in the 106th and 107th Congresses. If Congress determines that certain class actions should be brought within the original and removal jurisdiction of the federal courts on the basis of minimal diversity of citizenship and an aggregation of claims, Congress should be encouraged to include sufficient limitations and threshold requirements so that federal courts are not unduly burdened and states' jurisdiction over in-state class actions is left undisturbed, such as by employing provisions to raise the jurisdictional threshold and to fashion exceptions to such jurisdiction that would preserve a role for the state courts in the handling of in-state class actions. Such exceptions for in-state class actions may appropriately include such factors as whether substantially all members of the class are citizens of a single state, the relationship of the defendants to the forum state, or whether the claims arise from death, personal injury, or physical property damage within the state. Further, the Conference agreed to continue to explore additional approaches to the consolidation and coordination of overlapping or duplicative class actions that do not unduly intrude on state courts or burden federal courts.

The resolution, which was presented to the Conference by the Federal-State Jurisdiction Committee, was the product of a joint effort by that Committee and the Committee on Rules of

Practice and Procedure. On March 26, 2003, Leonidas Ralph Mecham, as Secretary to the Judicial Conference, sent a letter to members of the Senate and House Judiciary Committees, informing them of the Conference's position.

In early April 2003, Director Mecham received a letter from Senator Patrick Leahy, Ranking Member of the Senate Judiciary Committee, requesting legislative language implementing the Judicial Conference's March 2003 position. A second letter from Senator Leahy, received shortly after the first, sought the views of the Conference on S. 274 (108th Congress), the proposed "Class Action Fairness Act of 2003," as ordered reported by the Senate Judiciary Committee on April 11, 2003.

The Federal-State Jurisdiction Committee was requested to draft a combined response to Senator Leahy's letters. In view of the Rules Committee's involvement in the preparation of the Conference's resolution, the Rules Committee chair was consulted regarding the draft response. The Rules Committee chair disagreed with the approach taken in the draft response, advising that he thought that it went beyond the Conference's resolution. The Executive Committee was asked to review the matter.

The Executive Committee considered not only the draft response prepared by the Federal-State Jurisdiction Committee, but also an alternative response prepared by the chair of the Rules Committee. The Executive Committee decided to utilize the Rules Committee's approach with some modifications. The overriding consideration of the Executive Committee was to be faithful to the Conference's resolution and not extend it beyond what the Conference had adopted. The response to Senator Leahy, as approved by the Executive Committee, is attached.

Carolyn Dineen King

Committee: Edward R. Becker
Gregory W. Carman
Joel M. Flaum
Thomas F. Hogan
D. Brock Hornby
Boyce F. Martin, Jr.
Leonidas Ralph Mecham
John M. Walker, Jr.

Attachment

May 1, 2003

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 16-17, 2003
Phoenix, Arizona
Draft Minutes

TABLE OF CONTENTS

ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona on Thursday and Friday, January 16-17, 2003. The following members were present:

Judge Anthony J. Scirica, Chair
David M. Bernick, Esquire
Charles J. Cooper, Esquire
Judge Sidney A. Fitzwater
Dean Mary Kay Kane
Mark R. Kravitz, Esquire
Patrick F. McCartan, Esquire
Judge J. Garvan Murtha
Judge A. Wallace Tashima
Deputy Attorney General Larry D. Thompson
Judge Thomas W. Thrash, Jr.
Chief Justice Charles Talley Wells

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 U.S. Courts; James N. Ishida, senior attorney in the secretary's office; Ned Diver, law clerk to Judge Scirica; Marie Leary of the Research Division of the Federal Judicial Center; Professor Mary P. Squiers, Director of the Local Rules Project; and Joseph F. Spaniol, Jr., Professor R. Joseph Kimble, and Professor Geoffrey C. Hazard, Jr., consultants to the committee.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Samuel A. Alito, Jr., Chair
Professor Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules —
Judge A. Thomas Small, Chair
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Judge David F. Levi, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Edward E. Carnes, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules —
Judge Jerry E. Smith, Chair
Professor Daniel J. Capra, Reporter

Also taking part in the meeting were: former committee member Judge Frank W. Bullock, Jr.; Judge Wm. Terrell Hodges, chair of the Judicial Panel on Multi-District Litigation and former chair of the Advisory Committee on Criminal Rules; Judge Lee H. Rosenthal, member of the Advisory Committee on Civil Rules; Judge Jack B. Schmetterer, member of the Federal-State Jurisdiction Committee; Judge Patrick E. Higginbotham, former chair of the Advisory Committee on Civil Rules; Judge Alfred M. Wolin; and Professors S. Elizabeth Gibson, Deborah R. Hensler, and Francis E. McGovern.

INTRODUCTORY REMARKS

Judge Scirica presented a plaque to Judge Bullock, whose term on the committee had just expired, and he thanked him for six years of distinguished and productive service to the committee. He also remembered with great fondness Justice Alan C. Sundberg, former member of the committee, who had passed away recently.

Judge Scirica reported that the Judicial Conference in September 2002 had approved all the committee's proposed rule amendments, including changes to FED. R. CIV. P. 23 (class actions), FED. R. CIV. P. 51 (jury instructions), FED. R. CIV. P. 53 (special masters), FED. R. EVID. 608 (character evidence), FED. R. BANKR. P. 7007.1 (corporate ownership statement), and several other bankruptcy rules and forms addressing privacy, social security numbers, multilateral clearing banks, and disclosure of compensation paid to a petition preparer. He pointed out that the only issue placed on the Conference's discussion calendar was the provision in proposed FED. R. CIV. P. 23(e)(3) authorizing a court to give class members a second opportunity to "opt out" of a (b)(3) class if settlement is proposed after expiration of the original opportunity to request exclusion. He noted that the Conference had approved the proposal unanimously.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on June 10-11, 2002. It also agreed to expand the discussion in the minutes regarding a court's authority under proposed FED. R. CIV. P. 23(b)(3).

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported that the Administrative Office was monitoring several pieces of legislation impacting the federal rules. He noted that Congress had restored, at the committee's request, two provisions in FED. R. CRIM. P. 16 inadvertently omitted from the package of restyled criminal rules that took effect on December 1, 2002.

Mr. Rabiej stated that Congress had enacted the Multiparty, Multiforum Trial Jurisdiction Act of 2002 creating minimal-diversity federal jurisdiction over actions involving a single mass accident. But, he pointed out, the Act did not include a provision endorsed by the Judicial Conference addressing the transfer problem raised in *Lexicon Inc. v. Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26 (1998).

Mr. Rabiej reported that the Homeland Security Act of 2002 included a provision directly amending FED. R. CRIM. P. 6 to authorize the government to share certain grand jury information with appropriate federal, state, local, or foreign officials. He pointed out that the statutory language had incorrectly amended an outdated version of Rule 6 and that Congressional staff had been notified of the problem.

Mr. Rabiej reported that omnibus bankruptcy reform legislation had not yet been enacted, but it would be promoted again in the new Congress. Judge Small added that the

Advisory Committee on Bankruptcy Rules had completed a good deal of preliminary work on appropriate rules and forms to implement the omnibus legislation.

Mr. Rabiej said that Judge Carnes had testified before a House Judiciary subcommittee in opposition to the proposed Bail Bond Fairness Act. The legislation would amend FED. R. CRIM. P. 46(e) to prohibit a judge from forfeiting a bond for any condition other than the defendant's failure to appear. He added that the Administrative Office was in the process of compiling statistics for Congress on bail forfeitures.

Mr. Rabiej reported that Senator Kohl had asked the Judicial Conference to consider appropriate changes in FED. R. CIV. P. 26 regarding protective orders and sealing orders.

Mr. Rabiej noted that Judge Alito had testified on behalf of the judiciary at a House Judiciary subcommittee oversight hearing addressing the precedential value of "unpublished" appeals court decisions.

Finally, Mr. Rabiej reported that the new E-Government Act will require courts to post on the Internet all local rules, court opinions, docket information, and documents filed with the court electronically. He added that a provision had been inserted in the legislation at the last moment requiring the judiciary to promulgate national rules under the Rules Enabling Act to protect privacy, security, and public availability of documents filed with the courts electronically.

Mr. McCabe reported that the Administrative Office had successfully tested and installed a new, state-of-the-art electronic document management system to handle the vital records of the rules process.

REPORT OF THE FEDERAL JUDICIAL CENTER

Ms. Leary pointed out that the agenda book for the committee meeting contained a status report on the educational and research projects of the Federal Judicial Center. (Agenda Item 4) She added that the Center anticipated publication of an updated version of the complex litigation manual by mid-summer 2003.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Alito presented the report of the advisory committee, as set forth in his memorandum and attachments of December 6, 2002. (Agenda Item 5)

Judge Alito reported that the advisory committee did not have any action items to present, but it had approved some amendments for presentation to the Standing Committee at a later date as part of a package of amendments. He also said that the advisory committee had approved in principle: (1) a new Rule 32.1 requiring courts to permit the citation of "unpublished" or "non-precedential" opinions; and (2) an amendment to Rule 35(a) specifying how to calculate "a majority of the circuit judges who are in regular active service" needed for an en banc hearing when one or more judges are disqualified. He noted that these changes will likely be presented to the Standing Committee at its June 2003 meeting.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Small and Professor Morris presented the report of the advisory committee, as set forth in Judge Small's memorandum and attachments of December 11, 2002. (Agenda Item 6)

Amendments for Publication

Judge Small reported that the advisory committee was seeking authority to publish three amendments for public comment.

FED. R. BANKR. P. 3004

Judge Small pointed out that Rule 3004 (filing of claims by debtor or trustee) was being amended to conform the rule to § 501(c) of the Bankruptcy Code. The statute provides that a debtor or trustee may file a proof of claim for a creditor if the creditor fails to "timely file" a proof of claim. The existing rule, however, permits the debtor or trustee to file a claim on behalf of the creditor *before* expiration of the creditor's filing period. It also provides that if the debtor or creditor files a claim, the creditor may then file a superseding claim.

The proposed amendment would prohibit a debtor or trustee from filing a proof of claim until after the creditor's opportunity to file expires. It would also delete the provision in the current rule authorizing a creditor to file a superseding claim.

Professor Morris said that there are occasions when it may be reasonable for a debtor or trustee to file a proof of claim for the creditor before the filing deadline. Nevertheless, he said, the rule is simply inconsistent with the statute. There is, moreover, no need to specify in the rule that the creditor may file an amendment to the proof of claim, as that matter is better addressed by development of the case law.

A committee member expressed reservations about the proposed amendments. He noted that the effect of the revised rule is to prevent a debtor in a chapter 11 case from filing a proof of claim on behalf of a creditor until 30 days after the bar date set by the court for filing claims. He described a chapter 11 case in which the debtor had filed a proof of claim on behalf of mass tort claimants in order to bring those claims before the court for adjudication. He said that this early filing of proof of the creditors' claims was consistent with § 501 of the Code because the word "timely" in the statute can be interpreted to mean within the time the court needs to effectively resolve matters essential to the case.

He suggested that the proposed amendment to Rule 3004 would limit a court's ability to manage chapter 11 cases and could result in unnecessary delay and notice costs. He recommended that the proposal be amended to begin with language such as: "Except as otherwise ordered by the court." This would allow the court to maintain greater control over the case and permit the debtor or trustee to file a claim on behalf of creditors without having to establish either a general or specific bar date for filing claims in the case.

Judge Small recommended that the suggestion be considered by the advisory committee at its April 2003 meeting. Therefore, he asked that the advisory committee's request to publish the rule be deferred until the next Standing Committee meeting.

FED. R. BANKR. P. 3005

Judge Small reported that the proposed changes to FED. R. BANKR. P. 3005 (filing of claim by co-debtor) are similar to those proposed in Rule 3004 and would likewise be deferred until the next committee meeting.

FED. R. BANKR. P. 4008

Judge Small said that the proposed amendment to Rule 4008 (discharge and reaffirmation hearing) would establish a deadline for filing reaffirmation agreements. Section 524 of the Code requires that reaffirmation agreements be filed with the court. It also sets a number of other requirements that must be met before a reaffirmation agreement may be approved, including a hearing before the court when the debtor is not represented by counsel. The current Rule 4008 fixes the time and notice for discharge and reaffirmation hearings, but it does not impose a deadline for filing reaffirmation agreements.

Judge Small noted that most courts close their cases quickly. But this creates administrative problems when parties ask the court to reopen a case for the purpose of filing a reaffirmation agreement. The proposed rule resolves the problem by requiring that the agreements be filed by a date certain — 30 days after entry of the order granting a

discharge (or the order confirming a plan in a chapter 11 individual debtor case). He explained that filing reaffirmation agreements by a certain deadline has the additional benefit of informing the court of the need to hold a hearing under § 524, *i.e.*, when the agreement is not accompanied by a statement of counsel.

Judge Small added that the proposed rule would give the court broad discretion to permit a late filing. It would also delete the provisions in the current rule regarding timing of the discharge and reaffirmation hearing, thereby giving the court discretion to set the hearing at a time appropriate for the particular circumstances presented in a case.

The committee by voice vote and without objection approved the proposed amendment for publication.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Levi and Professor Cooper presented the report of the advisory committee, as set forth in Judge Levi's memorandum and attachments of December 3, 2002. (Agenda Item 7)

Amendments for Publication

Professor Cooper reported that the advisory committee was seeking authority to publish amendments to two admiralty rules for public comment.

ADMIRALTY RULE B(1)(a)

Professor Cooper noted that Rule B(1) (in personam actions — attachment and garnishment) authorizes attachment of a defendant's property in a maritime *in personam* action when the defendant is not "found" within a district. A defendant who is not physically present in the district, and who has no agent in the district to receive service of process, is not "found" there, even though the defendant may be subject to personal jurisdiction on some other basis. Professor Cooper explained that Rule B(1) serves two purposes: (1) it establishes a form of quasi-in-rem jurisdiction that substitutes for personal jurisdiction; and (2) it provides a pre-judgment security device in some cases where the district court has personal jurisdiction over the defendant

Professor Cooper explained that the proposed amendment incorporates the decision of the Fifth Circuit in *Heidmar, Inc. v. Anomina Ravennate di Armamento Sp.A. of Ravenna*, 132 F.3d 264 (5th Cir. 1998), by fixing the time for determining whether a defendant is "found" in the district as the time when the verified complaint praying for attachment and the accompanying affidavit are filed with the court. It will prevent a

defendant from defeating attachment and evading a security device by waiting until a complaint is filed before appointing an agent to receive service of process. The amendment, he said, will make it easier for bench and bar to apply Rule B(1), and it enjoys the support of the Maritime Law Association.

ADMIRALTY RULE C(6)(b)(i)(A)

Professor Cooper explained that Rule C(6) (in rem proceedings) had been amended in 2000 to create separate, parallel provisions for civil forfeiture actions and maritime proceedings. Under the revised rule, a person asserting a property interest has a longer period to file a verified statement of right or interest under the forfeiture provision than under the maritime provision.

Professor Cooper said that the attempt in 2000 to achieve parallelism in the two subdivisions had created a drafting problem in the subparagraph governing maritime proceedings. The reference to publication of notice under Rule C(4) works in forfeiture actions, but not in maritime proceedings because execution of process always occurs before publication in maritime proceedings. Professor Cooper stated that the proposed amendment would delete meaningless language in subparagraph (b) referring to publication of notice, thereby restoring the rule for maritime purposes to its pre-2000 status.

Professor Cooper stated that the proposed amendment was essentially technical in nature, and it might be adopted without publication and comment. But, he said, it would be helpful to the admiralty bar to include it for public comment with the proposed amendment to Rule B(1)(a).

The committee by voice vote without objection approved the proposed amendments to the admiralty rules for publication.

Information Items

Judge Levi reported that the comprehensive restyling of the Federal Rules of Civil Procedure is the major project before the advisory committee. He noted that the committee had spent one full day of its October 2002 meeting discussing plans for managing the project. The committee, he said, had divided itself into two subcommittees, each of which will assume responsibility for half the rules. The subcommittees, chaired by Judges Kelly and Russell, will review drafts of the rules prepared by the Standing Committee's Style Subcommittee. Additional expert assistance will be provided to the project by Professors Richard Marcus and Thomas Rowe, and by Jeffrey Hennemuth, Deputy Assistant Director at the Administrative Office.

Judge Scirica said that the restyling project is off to a great start, thanks to the impressive drafts prepared by the Style Subcommittee, chaired by Judge Murtha. He specified that deference in matters of style should be given to the Style Subcommittee, and deference in matters of substance should be given to the advisory committee. He also cautioned that changes in the rules should be stylistic only, since the precise wording of the civil rules have generated enormous amounts of case law over the years. If any substantive changes are to be made, he said, they must be clearly identified as such and placed in a different package.

Judge Levi reported that the advisory committee continues to be interested in multi-state class actions and mass torts litigation. To that end, he said, it has endorsed legislation in principle permitting minimal-diversity federal jurisdiction. But, he added, the Federal-State Jurisdiction Committee of the Judicial Conference has opposed that approach and favors retaining cases in the state courts. He pointed out that the rules committees had been communicating with the federal-state committee in an effort to present a common legislative position to the Judicial Conference.

Judge Levi noted that the advisory committee had worked cooperatively with the Bankruptcy Committee of the Conference in reviewing proposals by the National Bankruptcy Review Commission for legislation to address problems raised by future mass tort claims in bankruptcy.

Judge Levi reported that the Discovery Subcommittee of the advisory committee is actively monitoring developing practices associated with discovery of information in electronic form. He said that the committee had conducted conferences with the bar and had received invaluable research assistance from the Federal Judicial Center. In addition, he noted, Professor Marcus informally had circulated a memorandum soliciting comments on whether there is a need for rule changes to address distinctive features of discovery of electronic materials. Judge Levi said that the advisory committee had not yet decided whether rules amendments are necessary.

Judge Levi reported that the advisory committee would consider proposed rule amendments dealing with civil forfeitures. He noted that the Department of Justice favored the changes and the criminal defense bar is opposed.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Carnes presented the report of the advisory committee, as set forth in his memorandum and attachment of December 11, 2002. (Agenda Item 8)

Judge Carnes noted that the restyled body of criminal rules had taken effect on December 1, 2002. He added that Congress had enacted legislation amending FED. R. CRIM. P. 16 (discovery and inspection) to replace language inadvertently deleted in the restyling project.

Judge Carnes reported that the advisory committee is continuing to study amendments to FED. R. CRIM. P. 35 (correcting or reducing a sentence). The rule permits a court to correct an error in a sentence within 7 days after "sentencing." He pointed out that there is a difference of opinion as to whether the term "sentencing" should mean the judge's oral pronouncement of sentence or the entry of judgment. The advisory committee, he said, would present an amendment in June 2003 specifying that "sentencing" for purposes of Rule 35 means the oral pronouncement of a sentence.

Judge Carnes noted that the advisory committee had decided to propose a rule, akin to Civil Rule 72, that would govern appeals from magistrate judges' rulings on nondispositive and dispositive matters in criminal cases. But, he said, the committee is not certain whether it should include language in the rule addressing the taking of guilty pleas by magistrate judges in felony cases. He explained that a plurality of the circuits has held that if a magistrate judge takes a guilty plea in a felony case and files a report and recommendation, the plea becomes final if no objection is made within 10 days. He added that the proposed amendment had been presented to the Magistrate Judges Committee of the Judicial Conference for comment.

One participant cautioned against copying Civil Rule 72(a). He said that the rule is not well drafted and has created a number of problems. Judge Carnes responded that the advisory committee's proposed rule is parallel to, but does not copy, the civil rule. He added that the proposal specifies that the defendant must make any objection to the district judge before an appeal may lie to the court of appeals.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith presented the report of the advisory committee, as set forth in his memorandum and attachment of December 5, 2002. (Agenda Item 9)

Judge Smith reported that the advisory committee had no action items to present. He noted that a revised amendment to FED. R. EVID. 804(b)(3) had been published, modifying the hearsay exception for declarations against penal interest. The committee, he said, would review the public comments at its next meeting and decide whether to proceed with the proposal.

Judge Smith pointed out that the advisory committee is continuing to review case law, scholarship, and other sources to determine whether any rules of evidence need amendment. He added that the committee would continue to exercise considerable restraint in proposing any changes to the evidence rules, and it will bundle any amendments into a single package for joint publication and approval.

Judge Smith noted that the advisory committee has been working on a long-term project to prepare provisions stating, in rule form, the federal common law of privileges. He emphasized that the committee would not propose any privilege rules as amendments to the Federal Rules of Evidence (which must be enacted directly by Congress). But, he said, the committee needs to be prepared to respond to legislative initiatives dealing with privileges. Judge Scirica stated that the approach taken by the advisory committee is very sensible.

LOCAL RULES PROJECT

Professor Coquillette reported that both Congress and the organized bar have complained about the number and nature of local court rules. Congress, he said, has expressed particular concern over local rules that are inconsistent with federal statutes and rules — thereby avoiding the congressional scrutiny provided for in the Rules Enabling Act process. The American Bar Association, he added, is concerned about the proliferation of local rules and the tendency of local rules to undermine unity of procedure in the federal courts.

Professor Coquillette stated that the current Local Rules Project has three goals: (1) to identify problematic local rules that conflict with uniform federal law; (2) to identify sound and successful local rules and bring them to the attention of other courts; and (3) to identify areas of local rulemaking that may be appropriate for uniform national rules. He said that the committee was being asked at this meeting only to "accept" the report of the project and refer it to the rules reporters for review and comment.

Professor Coquillette said that the report, including the reporters' comments, will be considered at the committee's June 2003 meeting. At that time, he said, the committee will be asked to address a number of policy questions, such as: (1) whether a set of model local rules should be prepared; (2) how much of the report should be transmitted to each district court; and (3) what specific response should be requested from each court.

Judge Scirica said that the committee should also address the numbering of local rules. He noted that he had telephoned the chief judges of the remaining courts that had not yet renumbered their local rules in accordance with FED. R. CIV. P. 83. He and other

members expressed a strong preference for taking a "soft" approach and seeking voluntary compliance by the courts.

The participants engaged in an extended discussion of the advantages and disadvantages of local court rules. Among other things, the participants advised that local rules can be very beneficial in: (1) filling gaps in the national rules; (2) accounting for genuine geographic and demographic differences among districts; (3) promoting procedural experimentation and innovation; (4) adjusting to new phenomena, such as technological developments, before the rules committees are ready to promulgate national rules; and (5) promoting uniform practices among the judges of a court.

Judge Scirica and Professor Coquillette complimented Professor Squiers for her enormous efforts and extraordinary report.

ATTORNEY CONDUCT

Professor Coquillette noted that attorney conduct in the federal courts is governed by hundreds of local court rules, and many of them are inconsistent with the rules of the states in which the courts are located. He explained that this situation is complicated by the "McDade Amendment," which specifies that federal government attorneys must comply with the conduct rules of the respective states. In addition, he said, the recent Homeland Security Act and Sarbanes-Oxley Act contain attorney-conduct provisions. The Sarbanes-Oxley Act, he noted, has spawned a set of far-reaching attorney rules proposed by the Securities and Exchange Commission. The proposed rules are different from the model ABA attorney-conduct rules, the rules of many states, and the rules of the federal courts.

Professor Coquillette briefly described the work of the committee's attorney-conduct task force, noting that it had focused on two issues of particular interest to the Department of Justice: (1) contact by government attorneys with represented parties; and (2) confidentiality of client conversations with grand juries. But, he said, the task force and the committee had deferred further action in light of the various legislative events. Judge Scirica added that the rules committee is not the central player in this difficult area, and it cannot propose national rules as a practical matter unless there is a consensus among the Department of Justice, the ABA, and the Conference of Chief Justices. He suggested that the Department consider initiating further dialogue with the other interested parties.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Professor Capra presented the report of the Technology Subcommittee. He reported that the Court Administration and Case Management Committee had taken initial steps to adapt the model local rules for electronic filing of civil cases to address the electronic filing of documents in criminal cases.

Professor Capra pointed out that several district courts have issued local rules making electronic filing of documents mandatory. The national rules, however, require consent. The Technology Subcommittee, he said, was working to resolve this inconsistency. He also pointed out that the electronic signature provisions of the model electronic filing rules may need to be modified.

Finally, Professor Capra reported that the Advisory Committee on Evidence Rules is examining the evidence rules to determine whether any changes are needed to deal with the impact of information technology.

MASS CLAIMS LITIGATION

Judge Scirica asked each of six invited panelists — Professor Hensler, Judge Hodges, Professor Gibson, Judge Higginbotham, Judge Wolin, and Professor McGovern — to offer personal observations on the current state of mass claims litigation.

Professor Hensler emphasized that it is critical to recognize that there are several different categories of mass claims litigation, each of which must be analyzed separately. Asbestos litigation, she said, is the easiest category of mass claims cases for the federal courts to address at this point. Most of the cases consolidated by the Multi-District Litigation Panel have now been closed, and only about 10 percent of asbestos cases are now filed in, or removed to, the federal courts. Moreover, most of the action in the federal courts is now found in the bankruptcy courts following the recent surge in chapter 11 filings by corporate defendants.

Professor Hensler said that many observers had predicted a drop in class action filings would occur after the decisions in *Ortiz* and *Amchem.* Filings, however, have actually increased substantially in the federal and state courts. She mentioned that a RAND study in the late 1990s estimated that about 60% of the class action cases were in the state courts.

Professor Hensler said that competing and overlapping class actions are a serious problem, but it is difficult to obtain reliable data on them. Nevertheless, she said, her recent examination of a small sample of settled cases revealed that most had parallel or

competing class actions. She observed that there is a tendency among law firms to file competing class actions for fear that other firms will file them first. Often the firm filing first gains an advantage in obtaining certification and being named as class counsel.

She observed that the pending minimal-diversity legislation could bring a number of mass tort cases into the federal courts and reduce the phenomenon of duplicative and overlapping class actions. But, she added, consumer class actions will continue in the state courts and be litigated one state at a time.

Professor Hensler noted that much of the current settlement and litigation dynamics are fostered by a system of easy jurisdiction and venue that allows attorneys to move from one court to another. The system facilitates development of cases by competing groups of attorneys and creates opportunities for defendants to negotiate settlements with the lawyers most willing to deal with them. She said that the proposed recent changes to FED. R. CIV. P. 23 will be beneficial and help reduce abuses, but they do not address the central jurisdictional problem. Thus, if a federal judge refuses to approve a settlement, the attorneys will still be able to move their case to another venue.

In addition, she noted, many mass tort cases are never certified as class actions, and certification is not a prerequisite to settlement. A review of the dockets of the multi-district litigation panel, for example, reveals a substantial increase in motions to consolidate during the 1990s, and a substantial number of global settlements occurring in mass tort cases that have been consolidated but not certified. On the other hand, in small consumer cases, class action certification is crucial to the viability of the litigation.

Professor Hensler said that the central challenge for the judiciary is to manage large numbers of cases efficiently while still: (1) assuring due process to the plaintiffs in mass settlements; (2) providing fairness to the defendants; and (3) not encouraging the mass filing of additional, weak cases. She said that federal and state judges have been very effective in disposing of individual cases, but they have experienced difficulties in resolving mega cases.

Judge Hodges provided a history of the Judicial Panel on Multi-District Litigation panel and described its operations. He noted, among other things, that the panel scrupulously avoids the merits of litigation and focuses exclusively on consolidation and the appropriate location for cases. He also pointed out that the problems of overlapping and duplicative class actions are dealt with by the transferee judges, rather than the panel.

Professor Gibson described the typical progress of a mass tort bankruptcy case and identified a number of key issues and problems. She noted that when Congress enacted the Bankruptcy Code in 1978, it did not have in mind that it would be used for

mass tort litigation. Nevertheless, it is understandable that businesses facing elimination or ruin would inevitably turn to bankruptcy.

Bankruptcy, she said, is attractive to the mass tort debtor for three major reasons. First, all litigation is consolidated in one court, and the automatic stay stops all other litigation and prevents the filing of future litigation. The bankruptcy court obtains exclusive jurisdiction over all property of the debtor, and all attempts to collect from the debtor are ended unless the bankruptcy court lifts the stay. Claims against related debtors can also be consolidated, and wrongful death and personal injury claims may be transferred into the district where the bankruptcy case is filed.

Second, a "claim" is defined broadly in the Bankruptcy Code as a right to payment. Thus, a holder of a claim may not be able to file a civil suit against the debtor, but may still press a claim in bankruptcy even though it may be contingent, unliquidated, or not yet mature. This enables the debtor to receive a comprehensive discharge of its liabilities in the bankruptcy case.

Third, she said, bankruptcy is attractive to debtors because of the broad discharge granted at the conclusion of the case. The debtor is relieved of all debts except those specified in the plan.

Professor Gibson explained that bankruptcy jurisdiction is vested by statute in the district court and normally referred on a blanket basis to the bankruptcy court. Some matters, however, have to be decided by a district judge, and on occasion district judges withdraw the reference to the bankruptcy court. Thus, it is possible for both a bankruptcy judge and a district judge to preside over a case.

Professor Gibson noted that committees of creditors are appointed at the outset of a chapter 11 case. In mass tort cases, one or more committees are appointed to represent mass tort claimants, and futures claimants may be represented by a lawyer appointed by the court, although the Bankruptcy Code is silent on this procedure.

The bankruptcy court, she said, is asked to set a bar date by which all claims must be filed against the estate or be barred. This process defines the universe of present claimants able to vote on the plan, and it also allows the lawyers to gather information about the claimants, their injuries, and their financial conditions. It helps the attorneys assess the value of the claims and determine the amount of the case. Efforts may also be undertaken, such as through publication, to ascertain whether there are other potential claimants. Debtors, she said, may try to disallow or litigate the merits of claims against them, either on an individual or categorical basis, but courts generally refrain from litigating the claims, preferring to have the attorneys negotiate and settle them.

Once the claims are filed, she said, the various lawyers and committees negotiate the terms of a plan specifying how the debts are to be paid off. Normally, the value of the tort claims is settled by negotiation, but the court may have to hold valuation hearings. Disputes may arise as to the amount of money set aside for present tort claimants vis a vis future claimants, for property damage vis a vis personal injuries, and between claimants with malignant conditions and those with non-malignant conditions.

The court may order establishment of a trust funded by security of the debtor, and it may issue channeling injunctions requiring that claimants seek payment exclusively through the trust. The legal representative of the future claimants may be actively involved in negotiating these arrangements.

Professor Gibson stated that the system of handling mass torts in bankruptcy is working because judges and lawyers make it work. Nevertheless, she pointed to three main concerns.

First, she said, the Bankruptcy Code was not written with mass torts in mind (except for the 1994 asbestos amendments). Accordingly, many of the procedures fashioned by the courts are not specified in the Code or rules.

Second, the process of handling mass tort cases in bankruptcy is slow, and it may take several years to establish a trust and begin payments. She said that ways should be explored to expedite the process and begin negotiations and payments earlier.

Third, she said, there looms the intractable issue of the constitutionality of discharging the claims of future claimants. It is questionable whether due process is fully satisfied by the appointment of a futures representative to determine the interests of people who do not receive notice and do not participate personally.

Judge Higginbotham observed that the 1966 amendments to FED. R. CIV. P. 23 were intended to address the narrow and well-defined problems of school desegregation cases. The amended rule, however, took on a life of its own and has now attracted a vast array of litigation and special interests. The Advisory Committee on Civil Rules, he said, has initiated a number of beneficial reforms in the rule, but virtually every proposed change has met with organized opposition.

One of the weaknesses, he said, is that there is no body of federal common law, and the shape of the rule prevents healthy future development of the law. There is, moreover, not much more effective reform that can be accomplished by rule. Additional changes will require legislation. The rules committees, he said, have developed considerable expertise and credibility, and they can play a vital role in defining the appropriate shape of legislative reforms.

Judge Higginbotham said that large class actions are never tried. In effect, the courts essentially facilitate settlements. The trial courts, thus, effect, have become an arm of government to aid in resolving disputes that cannot be tried. The trial is a disappearing phenomenon, as judges essentially process papers and manage settlements. Many cases, moreover, do not have real clients, but are filed as competing groups of lawyers round up clients. Unfortunately, this system does not adequately protect the rights of injured future claimants.

The bottom line, he said, entails making a choice between an "opt-in" system and an "opt-out" system. It would be better, he said, to abandon the current class action structure and advise Congress to establish an "opt-in" model that requires real clients, real interests, and real consent.

Judge Higginbotham said that minimal-diversity federal jurisdiction makes a great deal of sense. The federal courts are the appropriate forum for resolving multi-state disputes. These multi-state cases should be brought into the federal system and assigned through the multi-district litigation panel process.

Judge Wolin described his experiences in handling a huge chapter 11 asbestos case. He pointed out, among other things, that he had formed a management committee, had worked closely with the bankruptcy judges in Delaware, and had met personally with each of the lawyers and interested executives. He emphasized the importance of speaking individually and in small groups with the participants because people are reluctant, or unable, to speak candidly in large gatherings in the presence of attorneys and opponents.

Judge Wolin observed that negotiation and deal-making are an inherent part of the bankruptcy culture — more so than in the non-bankruptcy world of civil litigation. Nevertheless, he said, issues and cases do get tried, and there are skirmishes all along the way that are brought to the court's attention. He added that debtors have an incentive to preserve equity, escape chapter 11 as soon as possible, attract needed capital, emerge with investment-grade security, and carry out their business plans.

Professor McGovern pointed out that there is a possibility that Congress will enact a legislative solution to the asbestos problem. One of the approaches under consideration, he said, involves establishing a private trust fund paid for by the industry and insurance companies. Injured claimants would receive payment from the fund, rather than through the tort system, but an exit to the tort system would be allowed in certain cases without punitive damages. He added that the only way that companies can now be discharged from their asbestos liability is through § 524(g) of the Bankruptcy Code, which requires that 75 percent of the tort claimants approve the plan.

Professor McGovern pointed out that Professor Gibson is working on a manual for handling complex cases in bankruptcy, which should be very helpful. He added that some of the committees appointed in mass tort bankruptcy cases are counterproductive. Therefore, an education program for U.S. trustees on mass torts would also be very beneficial.

Professor McGovern noted that there is considerable concern among lawyers regarding the multi-district litigation panel process. The MDL system, he said, is slow, and there are major variations among the practices of the transferee judges. This causes confusion among state judges and the bar. He suggested that the committee consider working with the MDL panel, either on amendments to the rules or additions to the complex litigation manual — focusing particularly on the need for coordination between the federal and state courts

One member emphasized the importance of preserving the status quo in litigation while the MDL process is being pursued. He noted that while the panel deliberates the issue of consolidation, important legal decisions take place in the state courts that cannot later be undone.

He added that there is great promise for using the bankruptcy system to resolve appropriate cases because of its consolidation of jurisdiction, broad definition of claims, and final discharge of debts. But, he said, there is great ambiguity in the bankruptcy litigation process, particularly with regard to estimation of claims. He suggested that the bankruptcy rules be amended to clarify a number of important matters involving estimation — such as when an estimation should be conducted, what procedure should be followed in making an estimation, what evidence can be used, and what the binding effect of an estimation should be.

He suggested the need for rules amendments to address claims litigation. He explained that an objection to a claim creates a contested matter under the bankruptcy rules, thereby invoking the litigation process and many of the civil rules. But if a proof of claim is not filed, and if no claims bar date is set, there is simply no basis for litigation. The bankruptcy rules, moreover, are silent with regard to handling future litigation. In addition, he said, class actions under FED. R. CIV. P. 23 are available in bankruptcy, but the timing of a certification decision in a chapter 11 case is not specified. He also suggested that it would be beneficial to provide for interlocutory review over certain key decisions materially affecting the outcome of a case.

Professor McGovern suggested that one of the most serious problems that parties face in mass tort cases is the difficulty of obtaining final resolution of cases. In many cases, settlements cannot withstand appeal, and objectors are bought off to achieve finality. Another pitfall of a class action settlement is its undemocratic nature, as it may

be driven by lawyers without real clients. He suggested that consideration be given to importing some of the beneficial features of the bankruptcy process and reopen the debate over "opt-out" classes versus "opt-in" classes.

The focus, he said, should be on fashioning a remedy that allows real cases to proceed under the civil rules. A separate rule might be fashioned to deal with settlements, including certification of classes for settlement purposes only.

Several other participants argued that legislative solutions are needed to address the problems posed by mass claims litigation. They suggested, among other things, that: (1) some of the statutory advantages of the bankruptcy system should be replicated for use in non-bankruptcy litigation; and (2) personal injury claims litigation should be treated separately from other kinds of litigation.

There was very strong agreement among the participants that the rules committees should continue to study the problems associated with mass claims litigation, maintain their dialogue with the various interested parties, and work towards achieving consensus for appropriate legislative solutions. They also encouraged the committees to continue their review without regard to the constraints of the Rules Enabling Act, at least on an initial basis. They said that the committees could be instrumental in identifying the best ways to achieve meaningful reforms, even if those reforms can be accomplished only through legislation.

Finally, there was agreement that the rules committees should hold additional conferences with experts and interested parties and work closely with other committees of the Judicial Conference. Judge Scirica agreed and suggested that a conference might be convened in the fall or winter of 2003.

NEXT COMMITTEE MEETING

The next meeting of the committee is scheduled on June 9-10, 2003, in Philadelphia.

Respectfully submitted,

Peter G. McCabe,
Secretary

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 19, 2003

MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Legislative Report*

Twenty bills were introduced in the 108th Congress that affect the Federal Rules of Practice and Procedure. A list of the relevant pending legislation is attached. Since the last Committee meeting, we have been focusing on the following bills.

Class Action

On February 4, 2003, Senator Grassley introduced the "Class Action Fairness Act of 2003." (S. 274.) Representative Goodlatte introduced a similar measure — the "Class Action Fairness Act of 2003" (H.R. 1115) — in the House on March 6, 2003. The bills are similar to legislation introduced in the previous Congress. (The House version differs from the Senate version in that it would require appellate review of orders granting or denying class certification under Civil Rule 23 on a party's request. In addition, all discovery would be stayed pending the outcome of any such appeal unless the court finds that specific discovery is necessary to preserve evidence or to prevent undue prejudice. On May 12, 2003, Judge Scirica sent a letter to Chairman Sensenbrenner, calling attention to two provisions in H.R. 1115 that conflict with Civil Rule 23. See attached. Judge Scirica sent a similar letter to Chairman Hatch on May 19, 2003, regarding S. 274. See attached.) As introduced, the bills would, among other things, give the district courts original jurisdiction over class actions involving more than 100 persons in which the amount in controversy exceeds $2 million. The bills also authorize removing a class action case to a federal court based on minimal diversity of citizenship.

On March 18, 2003, the Judicial Conference approved a resolution carefully worked out among this Committee, the Advisory Committee on Civil Rules, and the Committee on Federal-State Jurisdiction. The committees did not, however, reach agreement on the conditions for maintaining an in-state class action where the plaintiff class members are from the same state. The resolution adopted by the Judicial Conference recognized that the use of minimal diversity jurisdiction in multi-state class-action litigation may be appropriate, but it was deliberately silent as to what constitutes an appropriate in-state class action and the quality of contacts a defendant must have with the forum state.

On March 26, 2003, Director Mecham, as Secretary to the Judicial Conference, sent letters to Chairman Hatch and Chairman Sensenbrenner, advising them of the Conference's resolution. (See attached.)

In April 2003, the Senate Judiciary Committee held several markup hearings on S. 274. It eventually reported the bill, with two amendments, by a vote of 12-7. Under the first amendment, the amount in controversy must be at least $5 million (as compared to $2 million in the original bill). As part of this amendment, federal courts will have discretion to exercise jurisdiction over class actions in which between one-third and two-thirds of the plaintiffs are from the same state as the primary defendant. In class actions in which more than two-thirds of the plaintiffs are from the same state, federal courts cannot exercise jurisdiction over the class actions. The second amendment deleted language from the bill that classified "private attorney general" suits as class actions.

On April 9 and 11, 2003, Senator Leahy wrote to Secretary Mecham, asking that the Judicial Conference provide the Senate Judiciary Committee with proposed legislative language implementing the Conference's resolution on class-action litigation. A draft reply was prepared by the Committee on Federal-State Jurisdiction. The rules committees did not concur in the reply. The Executive Committee was asked to address this matter. In its report, the Executive Committee described its action as follows:

> The Federal-State Jurisdiction Committee was requested to draft a combined response to Senator Leahy's letters. In view of the Rules Committee's involvement in the preparation of the Conference's resolution, the Rules Committee chair was consulted regarding the draft response. The Rules Committee chair disagreed with the approach taken in the draft response, advising that he thought that it went beyond the Conference's resolution. The Executive Committee was asked to review the matter.
>
> The Executive Committee considered not only the draft response prepared by the Federal-State Jurisdiction Committee, but also an alternative response prepared by the chair of the Rules Committee. The Executive Committee decided to utilize the Rules Committee's approach with some modifications. The overriding consideration of the Executive Committee was to be faithful to the Conference's resolution and not extend it beyond what the Conference had adopted.

S. 274 has not yet been brought before the entire Senate for a vote. The House has taken no further action on H.R. 1115.

E-Government Act

Section 205(c) of the E-Government Act of 2002 (Pub. L. No. 107-347) requires, among other things, the Judicial Conference to promulgate rules under the Rules Enabling Act to protect the privacy and security of documents filed electronically. Section 205(c) also authorizes the Judicial Conference to issue interim rules and "interpretive statements" relating to the application of such rules.

On March 18, 2003, Representative Lamar Smith introduced H.R. 1303, which would amend Section 205(c) to provide that the Judicial Conference *may* promulgate rules to protect privacy and security interests pertaining to electronically filed documents. The House Judiciary Committee's Subcommittee on Courts, the Internet, and Intellectual Property held a markup and voted to forward the bill to the full committee. The House Judiciary Committee had scheduled a markup on May 7, 2003, but that session was postponed and has not been rescheduled.

"John Doe" DNA Indictments

The "Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 or PROTECT Act" took effect on April 30, 2003. Section 610 of the Act amends Criminal Rule 7(c)(1) to permit the naming of an unknown defendant in an indictment so long as that defendant has a particular DNA profile as defined in 18 U.S.C. § 3282.

Crime Victim Allocution

On April 7, 2003, Senator Leahy introduced the "Crime Victims Assistance Act of 2003." (S. 805.) The bill, among other things, amends Criminal Rule 11 by directing the district court, before entering judgment following a guilty plea from the defendant, to ask the government whether the victim has been consulted on the guilty plea and whether the victim has any views on the plea. The bill also amends Criminal Rule 32 by affording victims an "enhanced" opportunity to be heard at sentencing.

On January 1, 2003, Senator Kyl introduced S.J. Res. 1, a proposal to amend the United States Constitution to protect the rights of crime victims. The resolution would, among other things, give victims of violent crimes the constitutional right to appear and be heard at proceedings involving the defendant's release, plea, sentencing, reprieve, or pardon. The Senate Judiciary Committee held a hearing on the resolution on April 8, 2003. No further action has been taken on the legislation.

Privileges

Senator Hatch introduced the "Comprehensive Child Protection Act of 2003" on March 18, 2003. (S. 644.) The bill adds a new section to Title 28 that would make the marital communication privilege and adverse spousal privilege inapplicable in any federal proceeding in which one spouse is charged with a crime against a child of either spouse or a child under the custody or control of either spouse. No further action has been taken on the bill.

On February 5, 2003, Representative Andrews introduced the "Parent-Child Act of 2003." (H.R. 538.) The bill amends Article V of the Federal Rules of Evidence by establishing a new parent-child privilege. Under the proposal, neither a parent nor a child may be compelled to give adverse testimony against the other in a civil or criminal proceeding or disclose any confidential communication between the parent and child. No further action has been taken on this bill.

Bankruptcy Reform

On March 19, 2003, the House passed H.R. 975, the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2003," by a vote of 315 - 113. The bill, like previous bills introduced in past Congresses, would substantially revise major portions of the Bankruptcy Code and would require extensive amendments to the Bankruptcy Rules and Official Forms.

It was reported on May 7, 2003, that Chairman Hatch intends to bypass the Senate Judiciary Committee and bring the bill directly to the floor of the Senate for a vote. Senator Schumer indicated he will offer an amendment that will prevent abortion opponents who are fined under the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248, from discharging their fines under the bankruptcy laws. This amendment is identical to the one that prevented enactment of the earlier bankruptcy reform bill in the 107th Congress.

Bail Bond Forfeitures

On October 8, 2002, Judge Carnes testified before the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security at a hearing on the "Bail Bond Fairness Act of 2001." (H.R. 2929.) The bill would amend, among other things, Criminal Rule 46(e)(1) to provide that judges may declare bail bonds forfeited only when the defendant actually fails to appear before the court as ordered. On behalf of the Judicial Conference, Judge Carnes testified opposing the legislation. The existing rule permits a judge to forfeit a bail bond if a defendant fails to abide by any release condition. During the hearing, Chairman Coble asked Judge Carnes for additional bail bond statistics.

On March 17, 2003, Judge Carnes wrote to Chairman Coble, providing him with additional statistics showing that it is relatively rare for a federal judge to order a corporate surety

bond forfeited for any reason, including failure to appear. Judges forfeited a much smaller number of corporate surety bonds for failing to abide by a condition of release, other than the failure to appear. Moreover, the statistics also indicate that the posting of corporate surety bonds, though relatively modest, is increasing. As such, Judge Carnes pointed out that the minuscule number of corporate bonds forfeited as a result of the defendant violating a condition of release other than for failure to appear belies the contention that corporate surety bonds posted in federal court are subject to substantially enhanced risks of forfeiture because of conditions other than failure to appear. (See attached.)

Sealed Settlement Orders

On April 8, 2003, Senator Kohl reintroduced the "Sunshine in Litigation Act of 2003." (S. 817.) The bill provides that a court may not enter an order that would, among other things, approve a settlement agreement that limits the disclosure of that agreement unless the court makes specific findings concluding that the litigants' privacy interests outweigh the public's interest in safety and public health. Although Senator Kohl requested a hearing on the bill, no further action has been taken.

Appellate Court Opinions

Representative Paul introduced the "Openness in Justice Act" (H.R. 700) on February 11, 2003. The bill amends the Federal Rules of Appellate Procedure by creating a new Appellate Rule 49 that requires the courts to issue written opinions in certain cases. No further action has been taken on the bill.

James N. Ishida

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

SAMUEL A. ALITO, JR.
APPELLATE RULES

A. THOMAS SMALL
BANKRUPTCY RULES

DAVID F. LEVI
CIVIL RULES

EDWARD E. CARNES
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

May 12, 2003

Honorable F. James Sensenbrenner, Jr.
Chair
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515-6216

Dear Chairman Sensenbrenner:

On March 26, 2003, the Director of the Administrative Office of the United States Courts, Leonidas Ralph Mecham, advised you of the March 18, 2003, Judicial Conference resolution recognizing "that the use of minimal diversity of citizenship may be appropriate to the maintenance of significant multi-state class action litigation in the federal courts, while continuing to oppose class action legislation that contains jurisdictional provisions that are similar to those in the bills introduced in the 106th and 107th Congresses." I am writing you about two specific provisions of the "Class Action Fairness Act of 2003" (H.R. 1115), which are not affected by the Judicial Conference resolution but which directly affect Rule 23 of the Federal Rules of Civil Procedure and are inconsistent with the Rules Enabling Act rulemaking process. (28 U.S.C. §§ 2072-2077.)

The first provision requires courts of appeals to rule on all interlocutory appeals of class-action certification decisions. It directly conflicts with Rule 23(f). The second provision imposes extensive plain-English requirements on settlement notices. It overlaps with amendments to Rule 23(c)(2)(B) approved by the Supreme Court that are presently before the Congress and will take effect on December 1, 2003, unless Congress acts otherwise. We respectfully request your committee to withdraw both provisions from H.R. 1115.

Party Entitled to Interlocutory Appeal of Class-Action Certification Decision

Section 6 of H.R. 1115 amends 28 U.S.C. § 1292(a) and would provide a party the right to an interlocutory appeal of a court's decision granting or denying class-action certification, if an appeal notice is filed within 10 days. The provision also stays all discovery and other proceedings during the pendency of the appeal.

Rule 23(f) was added by the Supreme Court in 1998. It provides courts of appeals with discretion to permit an appeal from an order granting or denying class-action certification. This provision also gives the district court and court of appeals discretion to stay proceedings in the district court pending outcome of the appeal.

Rule 23(f) was promulgated as a result of an exhaustive study of class-action practices by the Advisory Committee on Civil Rules. In its study of Rule 23, the committee considered hundreds of public comments, empirical studies, discussions at several major conferences of practitioners and judges well experienced in class actions, and statements given at public hearings at which witnesses from major corporations, law firms, and law schools testified. The final Rule 23(f) was reviewed and approved by the Advisory Committee on Civil Rules, Committee on Rules of Practice and Procedure, Judicial Conference of the United States, and Supreme Court of the United States before it was transmitted to the United States Congress in accordance with the Rules Enabling Act.

Rule 23(f) made the necessary changes to reduce unwarranted procedural obstacles in obtaining appellate review of a district court's class-action certification decision. At the same time, however, it addressed concerns expressed by many judges and lawyers that interlocutory appeals are often unnecessary and would be abused as a procedural tactic to delay proceedings and unfairly increase litigation expense in many class actions. These concerns would be heightened by an automatic-stay provision, which could disrupt the district court's ability to manage the case. Providing an appeal as of right might tempt a party to file an interlocutory appeal solely for tactical reasons. Staying discovery and other proceedings in the district court would only increase the tactical advantages of filing an interlocutory appeal, particularly because resolution of the appeal may not occur for 12 to 18 months.

Interlocutory appeals in general have been traditionally disfavored because they can cause unwarranted, expensive, and wasteful interruptions. Rule 23(f) vests discretion in the appellate judges to permit interlocutory appeal of class-action certifications in appropriate cases and gives both the district court and the appellate court discretion to decide whether to stay proceedings pending appeal. It has been working well, as evidenced by a significant and growing body of appellate law. The courts of appeals have announced detailed criteria to guide practitioners in deciding whether to seek leave to appeal. And the decisions that have granted leave to appeal are developing much-needed guidance on class action certification. The rules committees are unaware of any dissatisfaction expressed by the bench and bar with the rule. Moreover, the rule was only recently promulgated. Any consideration of amending it should be deferred until the bench and bar have had more experience with it.

Plain-English Settlement Notice Requirement

Section 3 of H.R. 1115 adds a new § 1715 to title 28, United States Code, prescribing detailed requirements governing the contents of proposed class-action settlement notices. On March 27, 2003, the Supreme Court transmitted to Congress amendments to Rule 23, which take effect on December 1, 2003, unless Congress acts otherwise. The amendments prescribe the contents of class-certification notices and also require that the court direct notice of a proposed settlement in a reasonable manner to all class members. The matters addressed by these amendments overlap to a certain extent with § 1715. We also believe that in its present form § 1715 may undermine the bill's stated objectives by requiring notices so elaborate that most class members will not even attempt to read them. Moreover, if H.R. 1115 is enacted without revision before December 1, 2003, reconciling any differences between the bill's notice provisions and the notice provisions in Rule 23 that are due to take effect in December 2003 may generate unnecessary confusion and litigation.

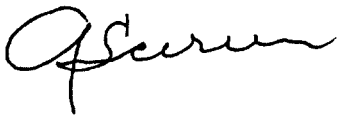
In the course of our Rule 23 study, we examined proposals that would have required extensive notices, but found that requiring detailed information in a class notice would be counterproductive, resulting in more complicated and unclear notices. It would defeat the goal of providing clearer and simpler information to putative class members. H.R. 1115's settlement-notice requirements are detailed and would likely encounter the same types of problems. Moreover, H.R. 1115's provisions are directed primarily at settlement notices, while the Rule 23 amendments address not only settlement notices but also the class-certification notice in which putative class members are first notified of the action and, when appropriate, given an opportunity to exercise their right to opt out of the class. The interface between Rule 23 and § 1715 is complicated by the growing number of "prepackaged" class actions that combine the first notice of class certification, including the opportunity to opt out, with notice of proposed settlement provisions.

At our request, the Federal Judicial Center worked with expert communications and linguistics consultants to develop sample plain-English class-action certification and settlement notices in products liability and securities cases. These notices are available on the Center's web site at <http://www.fjc.gov>. The illustrative forms were subjected to consumer testing by representative focus groups. The forms were well publicized and appeared in Law Week and BNA's Class Action Reporter. The Center's sample notices together with the Rule 23 amendments represent the culmination of many years of intensive study and work addressing the problems raised by unclear class-action notices. It is our belief that these models will significantly improve class-action notices.

At the same time, the rules committees do not consider that their class-action work has ended with the Rule 23 amendments. They will continue to monitor the status of class-action practice, including the use of class-action notices.

We recommend that section 6 and new § 1715 as added by H.R. 1115 be withdrawn. Thank you for considering our request.

Sincerely,



Anthony J. Scirica
United States Court of Appeals

cc: Honorable John Conyers, Jr., Ranking Democrat
Members of the House Judiciary Committee
Honorable David F. Levi, Chair, Advisory Committee on Civil Rules

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

SAMUEL A. ALITO, JR.
APPELLATE RULES

A. THOMAS SMALL
BANKRUPTCY RULES

DAVID F. LEVI
CIVIL RULES

EDWARD E. CARNES
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

May 19, 2003

Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510-6275

Dear Chairman Hatch:

On March 26, 2003, the Director of the Administrative Office of the United States Courts, Leonidas Ralph Mecham, advised you of the March 18, 2003, Judicial Conference resolution recognizing "that the use of minimal diversity of citizenship may be appropriate to the maintenance of significant multi-state class action litigation in the federal courts, while continuing to oppose class action legislation that contains jurisdictional provisions that are similar to those in the bills introduced in the 106th and 107th Congresses." I am writing you about a specific provision of the "Class Action Fairness Act of 2003" (S. 274), which is not affected by the Judicial Conference resolution but which directly affects Rule 23 of the Federal Rules of Civil Procedure and is inconsistent with the Rules Enabling Act rulemaking process. (28 U.S.C. §§ 2072-2077.)

Section 3 of S. 274 adds a new § 1716 to title 28, United States Code, which imposes extensive plain-English requirements on settlement notices. It overlaps with amendments to Rule 23(c)(2)(B) approved by the Supreme Court that are presently before the Congress and will take effect on December 1, 2003, unless Congress acts otherwise. We respectfully request your committee to withdraw the provision from S. 274.

On May 12, 2003, I wrote a letter to Representative F. James Sensenbrenner, chairman of the House Judiciary Committee, expressing similar concerns with the Class Action Fairness Act of 2003 introduced in the House (H.R. 1115). Unlike S. 274, section 6 of H.R. 1115 also provides a party the right to a mandatory interlocutory appeal of a court's decision granting or denying class-action certification and stays all discovery and other proceedings during the pendency of the appeal. Section 6 of H.R. 1115 is inconsistent with the Rules Enabling Act and would cause serious problems for the courts of appeals. Although not a part of S. 274, I believe that it is important to bring these concerns to your attention as the issue may arise in future deliberations of S. 274.

Plain-English Settlement Notice Requirement

The new § 1716 provision contained in section 3 of S. 274 prescribes detailed requirements governing the contents of proposed class-action settlement notices. On March 27, 2003, the Supreme Court transmitted to Congress amendments to Rule 23, which take effect on December 1, 2003, unless Congress acts otherwise. The amendments prescribe the contents of class-certification notices and also require that the court direct notice of a proposed settlement in a reasonable manner to all class members. The matters addressed by these amendments overlap to a certain extent with § 1716. We also believe that in its present form § 1716 may undermine the bill's stated objectives by requiring notices so elaborate that most class members will not even attempt to read them. Moreover, if S. 274 is enacted without revision before December 1, 2003, reconciling any differences between the bill's notice provisions and the notice provisions in Rule 23 that are due to take effect in December 2003 may generate unnecessary confusion and litigation.

In the course of our Rule 23 study, we examined proposals that would have required extensive notices, but found that requiring detailed information in a class notice would be counterproductive, resulting in more complicated and unclear notices. It would defeat the goal of providing clearer and simpler information to putative class members. S. 274's settlement-notice requirements are detailed and would likely encounter the same types of problems. Moreover, S. 274's provisions are directed primarily at settlement notices, while the Rule 23 amendments address not only settlement notices but also the class-certification notice in which putative class members are first notified of the action and, when appropriate, given an opportunity to exercise their right to opt out of the class. The interface between Rule 23 and § 1716 is complicated by the growing number of "prepackaged" class actions that combine the first notice of class certification, including the opportunity to opt out, with notice of proposed settlement provisions.

At our request, the Federal Judicial Center worked with expert communications and linguistics consultants to develop sample plain-English class-action certification and settlement notices in products liability and securities cases. These notices are available on the Center's web site at <http://www.fjc.gov>. The illustrative forms were subjected to consumer testing by representative focus groups. The forms were well publicized and appeared in Law Week and BNA's Class Action Reporter. The Center's sample notices together with the Rule 23 amendments represent the culmination of many years of intensive study and work addressing the problems raised by unclear class-action notices. It is our belief that these models will significantly improve class-action notices.

At the same time, the rules committees do not consider that their class-action work has ended with the Rule 23 amendments. They will continue to monitor the status of class-action practice, including the use of class-action notices.

Party Entitled to Interlocutory Appeal of Class-Action Certification Decision Under Section 6 of H.R. 1115

Section 6 of H.R. 1115 amends 28 U.S.C. § 1292(a) and would provide a party the right to an interlocutory appeal of a court's decision granting or denying class-action certification, if an appeal notice is filed within 10 days. The provision also stays all discovery and other proceedings during the pendency of the appeal.

Rule 23(f) was added by the Supreme Court in 1998. It provides courts of appeals with discretion to permit an appeal from an order granting or denying class-action certification. This provision also gives the district court and court of appeals discretion to stay proceedings in the district court pending outcome of the appeal.

Rule 23(f) was promulgated as a result of an exhaustive study of class-action practices by the Advisory Committee on Civil Rules. In its study of Rule 23, the committee considered hundreds of public comments, empirical studies, discussions at several major conferences of practitioners and judges well experienced in class actions, and statements given at public hearings at which witnesses from major corporations, law firms, and law schools testified. The final Rule 23(f) was reviewed and approved by the Advisory Committee on Civil Rules, Committee on Rules of Practice and Procedure, Judicial Conference of the United States, and Supreme Court of the United States before it was transmitted to the United States Congress in accordance with the Rules Enabling Act.

Rule 23(f) made the necessary changes to reduce unwarranted procedural obstacles in obtaining appellate review of a district court's class-action certification decision. At the same time, however, it addressed concerns expressed by many judges and lawyers that interlocutory appeals are often unnecessary and would be abused as a procedural tactic to delay proceedings and unfairly increase litigation expense in many class actions. These concerns would be heightened by an automatic-stay provision, which could disrupt the district court's ability to manage the case. Providing an appeal as of right might tempt a party to file an interlocutory appeal solely for tactical reasons. Staying discovery and other proceedings in the district court would only increase the tactical advantages of filing an interlocutory appeal, particularly because resolution of the appeal may not occur for 12 to 18 months.

Interlocutory appeals in general have been traditionally disfavored because they can cause unwarranted, expensive, and wasteful interruptions. Rule 23(f) vests discretion in the appellate judges to permit interlocutory appeal of class-action certifications in appropriate cases and gives both the district court and the appellate court discretion to decide whether to stay proceedings pending appeal. It has been working well, as evidenced by a significant and growing body of appellate law. The courts of appeals have announced detailed criteria to guide practitioners in deciding whether to seek leave to appeal. And the decisions that have granted leave to appeal are developing much-needed guidance on class action certification. The rules committees are

unaware of any dissatisfaction expressed by the bench and bar with the rule. Moreover, the rule was only recently promulgated. Any consideration of amending it should be deferred until the bench and bar have had more experience with it.

We recommend that new § 1716 on class-action settlement notices, as added by S. 274, be withdrawn. Although not under immediate consideration by your committee, it is important that we advise you of our objections with the interlocutory appeal of a class-action certification decision and stay-of-discovery provision in section 6 of H.R. 1115, because it may arise in future discussions of S. 274. We respectfully recommend that this provision not be added to the legislation.

Thank you for considering our request.

Sincerely,

Anthony J. Scirica
United States Court of Appeals

cc: Honorable Patrick J. Leahy, Ranking Democrat
Members of the Senate Judiciary Committee

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

March 26, 2003

Honorable F. James Sensenbrenner, Jr.
Chair
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515-6216

Dear Chairman Sensenbrenner:

I write to provide you with the recently adopted views of the Judicial Conference of the United States, the policy-making body for the federal judiciary, on class action legislation, including H.R. 1115, the "Class Action Fairness Act of 2003," introduced by you and other co-sponsors.

On March 18, 2003, the Judicial Conference unanimously adopted the following recommendation:

> That the Judicial Conference recognize that the use of minimal diversity of citizenship may be appropriate to the maintenance of significant multi-state class action litigation in the federal courts, while continuing to oppose class action legislation that contains jurisdictional provisions that are similar to those in the bills introduced in the 106th and 107th Congresses. If Congress determines that certain class actions should be brought within the original and removal jurisdiction of the federal courts on the basis of minimal diversity of citizenship and an aggregation of claims, Congress should be encouraged to include sufficient limitations and threshold requirements so that federal courts are not unduly burdened and states' jurisdiction over in-state class actions is left undisturbed, such as by employing provisions to raise the jurisdictional threshold and to fashion exceptions to such jurisdiction that would preserve a role for the state courts in the handling of in-state class actions. Such exceptions for in-state class actions may appropriately include such factors as whether substantially all members of the class are citizens of a single state, the relationship of the defendants to the forum state, or whether the claims arise from death, personal injury, or physical property damage within the state. Further, the Conference should continue to explore additional approaches to the consolidation and coordination of overlapping or duplicative class actions that do not unduly intrude on state courts or burden federal courts.

CNG-328

The Conference in 1999 opposed the class action provisions in legislation then pending (H.R. 1875; S. 353, 106th Cong.). That opposition was based on concerns that the provisions would add substantially to the workload of the federal courts and are inconsistent with principles of federalism. The March 2003 position makes clear that such opposition continues to apply to similar jurisdictional provisions.

The Conference recognizes, however, that Congress may decide to base a statutory approach to remedy current problems with class action litigation by using minimal diversity jurisdiction. The Conference position recognizes that the use of minimal diversity may be appropriate to the maintenance of significant multi-state class action litigation in the federal courts. The use of the term "significant multi-state class action litigation" focuses on the possibility of multi-state membership within the plaintiff class. The actions to which this term applies are nationwide class actions, as well as class actions whose members include claimants from states within a smaller region or section of the country. Minimal diversity in these cases would facilitate the disposition of litigation that affects the interests of citizens of many states and, through their citizens, affects the many states themselves.

Parallel in-state class actions in which the plaintiff class is defined as limited to the citizens of the forum state are not included within the term "significant multi-state class action litigation." Parallel in-state class actions might share common questions of law and fact with similar in-state actions in other states, but would not, as suggested herein, typically seek relief in one state on behalf of citizens living in another state. Accordingly, parallel in-state class actions would not present, on a broad or national scale, the problems of state projection of law beyond its borders and would present few of the choice of law problems associated with nationwide class action litigation. In addition, to the extent problems arise as a result of overlapping and duplicative in-state class actions within a particular state, the state legislative and judicial branches could address the problem if they were to create or utilize an entity similar to the Judicial Panel on Multidistrict Litigation, as some states have done.

Further, the position seeks to encourage Congress to include sufficient limitations and threshold requirements so as not to unduly burden the federal courts and to fashion exceptions to the minimal diversity regime that would preserve a role for the state courts in the handling of in-state class actions. The position identifies three such factors that may be appropriately considered in crafting exceptions to minimal diversity jurisdiction for class actions. These factors are intended to identify those class actions in which the forum state has a considerable interest, and would not likely threaten the coordination of significant multi-state class action litigation through minimal diversity. (The factors do recognize certain situations where plaintiffs from another state may be included in an otherwise in-state action.)

The first factor would apply to class actions in which citizens of the forum state make up substantially all of the members of the plaintiff class. Such an in-state class action exception could include consumer class action claims, such as fraud and breach of warranty claims. The second factor would apply to a class action in which plaintiff class members suffered personal injury or physical property damage within the state, as in the case of a serious environmental disaster. It would apply to all individuals who suffered personal injuries or losses to physical property, whether or not they were citizens of the state in question. The third factor recognizes that it may be appropriate to consider the relationship of the defendants to the forum state. Such consideration is not intended to embrace the term "primary defendants" (or a similar term), which language has been used in past and present class action bills as part of an exception to minimal diversity. Such a reading could extend minimal diversity jurisdiction to cases in which a single important defendant lacked in-state citizenship. While the relationship of the defendant to the forum may have some bearing on state adjudicatory power, an insistence that all primary defendants maintain formal in-state citizenship is too limiting and may preclude in-state class actions where a defendant has sufficient contacts with the forum state, regardless of citizenship.

We would appreciate your consideration of these comments and the position of the Judicial Conference. Should you or your staff have any questions, please contact Michael W. Blommer, Assistant Director, Office of Legislative Affairs, Administrative Office of the U.S. Courts, at (202) 502-1700.

Sincerely,

Leonidas Ralph Mecham
Secretary

cc: Honorable John Conyers, Jr., Ranking Democrat
Members of the House Judiciary Committee

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

SAMUEL A. ALITO, JR.
APPELLATE RULES

A. THOMAS SMALL
BANKRUPTCY RULES

DAVID F. LEVI
CIVIL RULES

EDWARD E. CARNES
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

March 17, 2003

Honorable Howard Coble
Chairman, Subcommittee on Crime
Terrorism and Homeland Security
Committee on the Judiciary
United States House of Representatives
207 Cannon House Office Building
Washington, D.C. 20515-6223

Dear Chairman Coble:

I am pleased to provide you with some additional bail bond statistics of the type requested during my testimony on H.R. 2929, the "Bail Bond Fairness Act of 2001," before the Subcommittee on Crime, Terrorism, and Homeland Security on October 8, 2002. The bill would amend Federal Rule of Criminal Procedure 46(e) in order to remove a judge's power to forfeit a bail bond as a result of a defendant's violation of any release condition other than failing to appear.

Proponents of the bill contend that the bail bond industry is effectively prevented from doing business in federal courts because of the added risks associated with guaranteeing that a defendant abides by release conditions other than failing to appear. The statistics show conclusively, however, that corporate surety bonds are used in federal courts and that very few of them are forfeited as a result of a defendant violating any condition of release other than failing to appear. The statistics also show that the number of corporate surety bonds posted in federal court has increased consistently since 1995.

The data in the enclosed Table One is drawn from records maintained by the Administrative Office of the United States Courts. That table shows the total number of criminal defendants released on bond by a federal court during each of the ten fiscal years from 1993 through 2002, and it breaks those numbers down by type of bond, including recognizance, unsecured, cash, collateral, and corporate surety bonds. Mr. Richard Verrochi, representing the Professional Bail Agents of the United States, testified at the October 8 hearing that "since the *Vaccarro*[1] opinion, bail agents and corporate surety bail bond issuers have essentially been

---

[1] *United States v. Vacarro*, 51 F.3d 189 (9th Cir. 1995) (upholding a judge's authority to forfeit a bail bond as a result of a defendant's violation of a release condition that does not involve failing to appear).

eliminated from the federal pretrial system, for obvious excessive risk reasons." His assertion is contradicted by the facts. Not only has the use of corporate surety bonds not decreased, as he indicated, but the number of corporate surety bonds posted in the federal courts has actually gone up significantly since the *Vacarro* decision was released in 1995. As Table One shows, the number of corporate surety bonds posted in federal courts has climbed from 812 in fiscal year 1995 to 2,275 in fiscal year 2002, an increase of 180 percent. That compares with an increase of only 33 percent in the total number of defendants released on bond over the same period. So, not only has the number of corporate surety bonds used in federal court not decreased since the year the *Vacarro* decision was issued, it has increased substantially and the rate at which the use of corporate surely bonds has increased has outstripped the growth in the total number of defendants released on bond.

The Administrative Office does not maintain statistics on the number of corporate surety bonds forfeited as a result of a violation of a condition of release other than for failure to appear. At my request, however, the Administrative Office asked district court personnel to manually compile the numbers from the docket records in ten district courts that handle a substantial number of criminal cases, representing about a quarter of defendants released on bond nationally. The resulting statistics from those ten district courts, presented in Tables Two, Three, and Four, show that there were few occasions on which a corporate surety bond was even subject to forfeiture because a defendant violated a condition of release other than for failing to appear. The number of occasions on which a surety bond *was actually forfeited* as a result of a defendant violating a condition of release other than failing to appear was fewer still. For example, Table Two shows that during fiscal year 2002, in those ten districts a total of 1,128 defendants were released on corporate surety bonds, 269 were found to have violated conditions of release other than appearance, and only 19 corporate surety bonds were forfeited for violations of release conditions other than appearance. In other words, the percentage of corporate surety bonds forfeited in those ten districts during fiscal year 2002 because of violation of a condition of release other than appearance is only about 2 percent of the total number of corporate surety bonds issued during that year in those districts.

The minuscule number of corporate bonds forfeited as a result of a defendant violating a condition of release other than for failing to appear belies the contention that corporate surety bonds posted in federal courts are subject to substantially enhanced risks of forfeiture because of conditions other than failure to appear. On the contrary, the statistics show that it is relatively rare for a federal court to forfeit a corporate surety bond as a result of violation of a condition of release other than for failing to appear. Moreover, the posting of corporate surety bonds in federal courts, though relatively modest, is trending upward. I believe that these statistics support the comments I made during your subcommittee's hearing and the position of the Judicial Conference that federal courts should retain their authority to forfeit a bail bond as a result of a defendant's violation of a condition of release other than failing to appear.

We continue to encourage you and the subcommittee to oppose legislation amending Rule 46(e) and to support the conclusions and recommendations expressed in my statement on behalf of the Judicial Conference. Rule 46(e) should not be amended.

Sincerely yours,

Ed Carnes
United States Circuit Judge

Enclosures

cc: Committee on the Judiciary

TABLE 1
Types of Bonds Set for Defendants Released
For the Twelve Month Period Ending September 30th

Fiscal Year	Cases Closed*	Defendants Released**	Total Def. Released on Bond	Def. Released on Personal Recognizance Bond	Def. Released on Unsecured Bond	Defendants Released on Cash Bond	Defendants Released on Collateral Bond	Defendants Released on Corporate Surety Bond	Defendants Released with No Bond Set***
1993	50,284	29,694	19,584	6,964	6,509	2,895	2,478	1,149	10,110
1994	52,357	30,835	27,472	8,322	13,639	3,102	2,281	956	3,363
1995	52,108	29,522	27,403	8,793	13,894	2,893	2,172	812	2,119
1996	57,184	31,008	29,549	9,658	15,201	2,926	2,013	1,030	1,459
1997	63,599	33,909	32,197	9,947	16,817	3,161	2,098	1,391	1,712
1998	69,693	35,698	33,353	11,007	16,832	3,141	2,064	1,538	2,345
1999	75,348	37,850	34,999	11,254	18,148	3,311	2,053	1,715	2,851
2000	77,675	38,096	34,948	11,034	17,846	3,396	1,933	1,929	3,148
2001	79,129	38,588	34,879	10,879	17,708	3,195	1,989	1,985	3,709
2002	83,553	40,060	36,419	11,375	18,354	3,325	1,997	2,275	3,641

* Includes cases dismissed

** Includes defendants released at any time before a case is closed, including cases that have been dismissed. A defendant may have more than one type of release before disposition.

*** Includes defendants who may have had a bond set at a prior hearing, but were not released until a subsequent hearing; includes cases dismissed.

TABLE 2
Number of Corporate Surety Bonds Forfeited as a Result of a Violation of Condition of Release in Criminal Cases (Other than Failure to Appear)
Fiscal Year 2002

District	Pretrial Services Cases Closed in Fiscal Year 2002*	Criminal Defendants Released in a Case Closed In Fiscal Year 2002**	Defendants Released on Bond	Defendants Released on Corporate Surety Bond***	Defendants Found to Have Violated Conditions on Corporate Surety Bond Other than Appearance	Corporate Surety Bonds Forfeited for Violation of Conditions Other than Appearance
California Southern	5,475	1,821	771	72	30	1
Florida Southern	2,297	974	932	210	44	2
Geogia Northern	984	476	472	178	34	0
Massachusetts	737	366	365	5	2	0
Missouri Eastern	849	438	419	34	11	0
New Mexico	2,738	851	849	121	47	7
New York Eastern	2,095	1,039	1,039	221	13	0
South Carolina	1,306	804	782	130	35	0
Texas Northern	1,661	741	575	41	12	0
Texas Western	5,092	2,278	2,172	116	41	9
Total	23,234	9,788	8,376	1,128	269	19

* Includes cases dismissed.

** Includes defendants released at any time before the case is closed, including cases that have been dismissed.

*** Available data does not reflect whether these bonds included only an appearance release condition or whether they also included release conditions other than appearance.

TABLE 3
Number of Corporate Surety Bonds Forfeited as a Result of a Violation of Condition of Release (Other than Failure to Appear)
Fiscal Year 2001

District	Pretrial Services Cases Closed in Fiscal Year 2001*	Criminal Defendants Released in a Case Closed in Fiscal Year 2001**	Defendants Released on Bond	Defendants Released on Corporate Surety Bond***	Defendants Found to Have Violated Conditions on Corporate Surety Bond Other than Appearance	Corporate Surety Bonds Forfeited for Violation of Conditions Other than Appearance
California Southern	6,001	2,109	840	63	13	0
Florida Southern	2,179	1,030	990	183	41	0
Geogia Northern	1,014	495	488	162	31	0
Massachusetts	628	345	342	3	0	0
Missouri Eastern	647	323	314	20	5	0
New Mexico	2,111	725	723	107	32	10
New York Eastern	1,797	955	952	174	21	0
South Carolina	1,106	734	724	98	25	0
Texas Northern	1,704	802	650	66	21	1
Texas Western	5,105	2,234	2,173	79	33	3
Total	22,292	9,752	8,196	955	222	14

* Includes cases dismissed.

** Includes defendants released at any time before the case is closed, including cases that have been dismissed.

*** Available data does not reflect whether these bonds included only an appearance release condition or whether they also included release conditions other than appearance.

TABLE 4
Number of Corporate Surety Bonds Forfeited as a Result of a Violation of Condition of Release (Other than Failure to Appear)
Fiscal Year 2000

District	Pretrial Services Cases Closed in Fiscal Year 2000*	Criminal Defendants Released in a Case Closed in Fiscal Year 2000**	Defendants Released on Bond	Defendants Released on Corporate Surety Bond***	Defendants Found to Have Violated Conditions on Corporate Surety Bond Other than Appearance	Corporate Surety Bonds Forfeited for Violation of Conditions Other than Appearance
California Southern	4,787	1,591	772	58	11	0
Florida Southern	2,435	1,032	988	202	56	3
Geogia Northern	944	435	430	136	33	0
Massachusetts	722	398	398	7	0	0
Missouri Eastern	845	450	439	25	15	0
New Mexico	2,369	845	844	89	30	7
New York Eastern	1,951	1,031	1,025	161	20	0
South Carolina	1,129	739	718	134	30	0
Texas Northern	1,572	764	611	55	7	0
Texas Western	4,848	2,162	2,058	104	40	13
Total	21,602	9,447	8,283	971	242	23

* Includes cases dismissed.

** Includes defendants released at any time before the case is closed, including cases that have been dismissed.

*** Available data does not reflect whether these bonds included only an appearance release condition or whether they also included release conditions other than appearance.

LEGISLATION AFFECTING THE FEDERAL RULES OF PRACTICE AND PROCEDURE[1]
108th Congress

SENATE BILLS

- S. 151 - *Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003*
  - Introduced by: Hatch
  - Date Introduced: 1/13/03
  - Status: Read twice and referred to the Senate Committee on the Judiciary (1/13/03). Senate Judiciary Committee reported favorably with amendments (1/30/03). Report No. 108-2 filed (2/11/03). Passed Senate by a vote of 84-0 (2/24/03). Referred to House Judiciary Committee (2/25/03). Referred to House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security (3/6/03). House inserted own version of bill. Chairman Sensenbrenner requested conference (3/27/03). Conferees appointed (3/27/03, 3/31/03, 4/3/03). Conference report 108-66 filed (4/9/03). House agreed to conference report by a vote of 400-25 (4/10/03). Senate agreed to conference report by a vote of 98-0 (4/10/03). Signed by President (4/30/03) (Pub. L. 108-21).
  - Related Bills: S. 885
  - Key Provisions:
    — Section 610 amends **Criminal Rule 7(c)(1)** to permit the naming of an unknown defendant in an indictment so long as that defendant has a particular DNA profile as defined in 18 U.S.C. § 3282.

- S. 274 - *Class Action Fairness Act of 2003*
  - Introduced by: Grassley
  - Date Introduced: 2/4/03
  - Status: Read twice and referred to the Senate Committee on the Judiciary (2/4/03). Judiciary Committee approved the bill with two amendments by a vote of 12-7 and ordered it reported out of committee (4/11/03).
  - Related Bills: None
  - Key Provisions:
    — Section 3 amends **Part V of title 28, U.S.C.**, to include a new chapter on Consumer Class Action Bill of Rights and Improved Procedures for Interstate Class Actions. The new chapter includes provisions on judicial review and approval of noncash settlements, prohibition on the payment of bounties, review

[1]The Congress has authorized the federal judiciary to prescribe the rules of practice, procedure, and evidence for the federal courts, subject to the ultimate legislative right of the Congress to reject, modify, or defer any of the rules. The authority and procedures for promulgating rules are set forth in the Rules Enabling Act. 28 U.S.C. §§ 2071-2077.

and approval of proposed settlements (protection against loss by class members and prohibition against discrimination based on geographic location), publication of settlement information in plain English, and notification of proposed settlement to appropriate state and federal officials.
— Section 4 amends **section 1332 of title 28, U.S.C.**, to give district courts original jurisdiction of any civil action in which the amount in controversy exceeds $2 million, exclusive of interest and costs, and is a class action in which (1) any plaintiff class member is a citizen of a state different from any defendant, (2) any plaintiff class member is a foreign state or subject of a foreign state and any defendant is a citizen of a state, or (3) any plaintiff class member is a citizen of a state and any defendant is a foreign state or a subject of a foreign state. The above provisions do not apply in any civil action where (a) the substantial majority of the plaintiff class and the primary defendants are citizens of the state where the action was originally filed, and the claims asserted will be governed primarily by the laws of the state where the action was originally filed; (b) the primary defendants are states, state officials, or other governmental entities; or (c) the number of all members of all proposed plaintiff classes in the aggregate is less than 100.
— Section 5 provides for removal of interstate class actions to a United States district court and for review of orders remanding class actions to State courts.
— Section 6 directs the Judicial Conference of the United States to submit reports to the Senate and House Judiciary Committees on class action settlements. In these reports, the Judicial Conference shall include the following: (1) recommendations on the "best practices" that courts can use to ensure that settlements are fair; (2) recommendations to ensure that the fees and expenses awarded to counsel in connection with a settlement appropriately reflect the time, risk, expense, and risk that counsel devoted to the litigation; (3) recommendations to ensure that class members are the primary beneficiaries of settlement; (4) the actions that the Judicial Conference will take to implement its recommendations.

[As amended, only class actions involving at least $5 million would be eligible for federal court. Further, in class actions where more than two-thirds of the plaintiffs are from the same state, the case would remain in state court automatically. In class actions where between one-third and two-thirds of the plaintiffs are from the same state as the defendant, the court has the discretion to accept removal or remand the case back to state court based on five specified factors. The second amendment deleted language from Section 4 that classified "private attorney general" as class actions.]

- S. 413 - *Asbestos Claims Criteria and Compensation Act of 2003*
  - Introduced by: Nickles
  - Date Introduced: 2/13/03
  - Status: Read twice and referred to the Senate Committee on the Judiciary (2/13/03).

- Related Bills: H.R. 1586
- Key Provisions:

  — Section 4 states that no person shall file a civil action alleging a nonmalignant asbestos claim unless the person makes a prima facie showing that he or she suffers from a medical condition to which exposure to asbestos was a substantial contributing factor.

  — Section 5 provides that a court may consolidate for trial any number and type of asbestos claims with the consent of all parties. Without such consent, the court may consolidate for trial only those claims relating to the same exposed person and that person's household.

  — Section 5 also provides that a plaintiff may file a civil action in the state of his or her domicile or in the state where the plaintiff was exposed to asbestos, such exposure being a substantial contributing factor to the physical impairment upon which plaintiff bases his or her claim.

  — Section 5 further directs that any party may remove the action to federal court if the state court fails to comply with the procedural requirements in section 5. The federal court shall have jurisdiction of all civil actions removed, without regard to the amount in controversy and without regard to the citizenship or residence of the parties.

- S. 554 - *A bill to allow media coverage of court proceedings*
  - Introduced by: Grassley
  - Date Introduced: 3/6/03
  - Status: Referred to the Senate Judiciary Committee (3/6/03).
  - Related Bills: None
  - Key Provisions:

    — Section 2 states that the presiding judge of an appellate or district court has the discretionary authority to allow the photographing, electronic recording, broadcasting, or televising to the public of any court proceedings over which that judge presides.

    — Section 2 also directs the presiding district court judge to inform each non-party witness that the witness has the right to request that his or her image and voice be obscured during the witness's testimony.

    — Section 2 specifies that the Judicial Conference may promulgate advisory guidelines on the management and administration of media access to court proceedings.

    — Section 3 contains a "sunset" provision that terminates the authority of district court judges to allow media access three years after the date the Act is enacted.

- S. 644 - *Comprehensive Child Protection Act of 2003*
  - Introduced by: Hatch
  - Date Introduced: 3/18/03
  - Status: Referred to the Senate Judiciary Committee (3/18/03).

- Related Bills: None
- Key Provisions:

  — Section 6 amends **Evidence Rule 414(a).** The amendment would allow the admission of evidence, in a child molestation case, that the defendant had committed the offense of possessing sexually explicit materials involving a minor. Section 6 also amends the definition of a "child" to include those persons below the age of 18 (instead of the current age of 14).

  — Section 7 amends **28 U.S.C. chapter 119** by adding a new section 1826A that would make the marital communication privilege and the adverse spousal privilege inapplicable in any federal proceeding in which one spouse is charged with a crime against (a) a child of either spouse, or (b) a child under the custody or control of either spouse.

- S. 805 - *Crime Victims Assistance Act of 2003*
  - Introduced by: Leahy
  - Date Introduced: 4/7/03
  - Status: Read twice and referred to the Senate Judiciary Committee (4/7/03).
  - Related Bills: None
  - Key Provisions:

    — Section 103 amends **Criminal Rule 11** by inserting a new subdivision that requires the court, before entering judgment following a guilty plea from the defendant, to ask whether the victim has been consulted on the guilty plea and whether the victim has any views on the plea. Section 103 also directs the Judicial Conference to submit a report to Congress, within 180 days after enactment, recommending amendments to the **Criminal Rules** that give victims the opportunity to be heard on whether the court should accept the defendant's guilty or no contest plea.

    — Section 105 amends **Criminal Rule 32 of the Federal Rules of Criminal Procedure** by affording victims an "enhanced" opportunity to be heard at sentencing. Section 105 also directs the Judicial Conference to submit a report to Congress, within 180 days after enactment, recommending amendments to the **Criminal Rules** that give victims enhanced opportunities to participate "during the pre-sentencing and sentencing phase of the criminal process."

- S. 817 - *Sunshine in Litigation Act of 2003*
  - Introduced by: Kohl
  - Date Introduced: 4/8 /03
  - Status: Read twice and referred to the Senate Judiciary Committee (4/8/03).
  - Related Bills: None
  - Key Provisions:

    — Section 2 amends **28 U.S.C. chapter 111** by inserting a new section 1660. New section 1660 states that a court shall not enter an order pursuant to **Civil Rule 26(c)** that (1) restricts the disclosure of information through discovery, (2)

approves a settlement agreement that would limit the disclosure of such agreement, or (3) restricting access to court records in a civil case unless the court conducts a balancing test that weighs the litigants' privacy interests against the public's interest in health and safety.
— Section 3 provides that the amendments shall take effect (1) 30 days after the date of enactment, and (2) apply only to orders entered in civil actions or agreements entered into after the effective date.

- S. 885 - *Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003*
  - Introduced by: Kennedy
  - Date Introduced: 4/10/03
  - Status: Read twice and referred to the Senate Committee on the Judiciary (4/10/03).
  - Related Bills: S. 151
  - Key Provisions:
    — Section 610 amends **Criminal Rule 7(c)(1)** to permit the naming of an unknown defendant in an indictment so long as that defendant has a particular DNA profile as defined in 18 U.S.C. § 3282.

HOUSE BILLS

- H.R. 538 - *Parent-Child Privilege Act of 2003*
  - Introduced by: Andrews
  - Date Introduced: 2/5/03
  - Status: Referred to the House Committee on the Judiciary (2/5/03).
  - Related Bills: None
  - Key Provisions:
    — Section 2 amends **Article V of the Federal Rules of Evidence** by establishing a parent-child privilege. Under proposed **new Evidence Rule 502(b)**, neither a parent or a child shall be compelled to give adverse testimony against the other in a civil or criminal proceeding. Section 2 also provides that neither a parent nor a child shall be compelled to disclose any confidential communication made between that parent and that child.

- H.R. 637 - *Social Security Number Misuse Prevention Act*
  - Introduced by: Sweeney
  - Date Introduced: 2/5/03
  - Status: Referred to the House Committees on the Judiciary and Ways and Means (2/5/03). Referred to the House Ways and Means' Subcommittee on Social Security (2/19/03). Referred to the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security (3/6/03).
  - Related Bills: None
  - Key Provisions:
    — Section 3 amends **chapter 47 of title 18, U.S.C.**, to prohibit the sale, public

display, or purchase of a person's social security number without that person's affirmatively expressed consent.

— Section 4 states that the above prohibition does not apply to a "public record." Section 4 defines "public record" to mean "any governmental record that is made available to the public." (One exception to section 4 is public records posted on the Internet: "Section 1028A shall apply to any public record first posted onto the Internet or provided in an electronic medium by, or on behalf of a government entity after the date of enactment of this section, except as limited by the Attorney General[.]")

— Section 4 also provides that the Comptroller of the United States, in consultation with the Administrative Office of the U.S. Courts, shall conduct a study and prepare a report on the use of social security numbers in public records.

- H.R. 700 - *Openness in Justice Act*
  - Introduced by: Paul
  - Date Introduced: 2/11/03
  - Status: Referred to the House Committee on the Judiciary (2/11/03). Referred to the House Judiciary's Subcommittee on Courts, the Internet, and Intellectual Property (3/6/03).
  - Related Bills: None
  - Key Provisions:

    — Section 2 inserts a new Rule 49 in the Federal Rules of Appellate Procedure. Proposed Rule 49(a) would require the courts to issue a written opinion in the following cases: (1) a civil action removed from state court, (2) a diversity jurisdiction case in which the amount in controversy exceeds $100,000, and (3) any appeal involving the use of the court's inherent powers. In addition, any party on direct appeal may request a written opinion under proposed Rule 49(b).

- H.R. 781 - *Privacy Protection Clarification Act*
  - Introduced by: Biggert
  - Date Introduced: 2/13/03
  - Status: Referred to the House Committee on Financial Services (2/13/03). Referred to the House Financial Services' Subcommittee on Financial Institutions and Consumer Credit (3/10/03).
  - Related Bills: None
  - Key Provisions:

    — Section 2 amends the Gramm-Leach-Bliley Financial Modernization Act (Pub. L. No. 106-102) to exempt attorneys from the privacy provisions of the Act. Specifically, section 2 defines "financial institution" to exclude attorneys who are subject to, and are in compliance with, client-confidentiality provisions under their state, district, or territory's professional code of conduct.

- H.R. 975 - *Bankruptcy Abuse Prevention and Consumer Protection Act of 2003*

• Introduced by: Sensenbrenner
• Date Introduced: 2/27/03
• Status: Referred to the House Committees on the Judiciary and Financial Services (2/27/03). Referred to the House Judiciary Committee Subcommittee on Commercial and Administrative Law (2/28/03). Subcommittee hearings held (3/4/03). Subcommittee discharged (3/7/03). Committee consideration and mark-up session held. Committee ordered bill to be reported by a vote of 18-11 (3/12/03). House Report 108-40 filed (3/18/03). Passed the House with several amendments by a vote of 315-113 (3/19/03). Received in the Senate, read the first time, and placed on Senate Legislative Calendar (3/20/03). Read the second time and placed on Senate Legislative Calendar (3/21/03).
• Related Bills: None
• Key Provisions:

— Section 221 amends **11 U.S.C. § 110** by inserting a new provision that allows the Supreme Court to promulgate rules under the Rules Enabling Act or the Judicial Conference to prescribe guidelines that establish a maximum allowable fee chargeable by a bankruptcy petition preparer.

— Section 315 states that within 180 days after the bill is enacted, the Director of the Administrative Office of the U.S. Courts shall establish procedures for safeguarding the confidentiality of any tax information required to be provided under this section. Section 315 also directs the Director to prepare and submit a report to Congress on, among other things, the effectiveness of said procedures.

— Section 319 expresses the sense of Congress that **Bankruptcy Rule 9011** should be amended to require the debtor or debtor's attorney to verify that information contained in all documents submitted to the court or trustee be (a) well grounded in law and (b) warranted by existing law or a good-faith argument for extension, modification, or reversal of existing law.

— Section 419 directs the Advisory Committee on Bankruptcy Rules to propose amendments to the **Bankruptcy Rules** and **Bankruptcy Forms** that require Chapter 11 debtors to disclose certain information by filing and serving periodic financial reports. The required information shall include the value, operations, and profitability of any closely held corporation, partnership, or any other entity in which the debtor holds a substantial or controlling interest.

— Section 433 directs the Advisory Committee on Bankruptcy Rules to, within a reasonable time after the date of enactment, propose new **Bankruptcy Forms** on disclosure statements and plans of reorganization for small businesses.

— Section 434 adds **new section 308 to 11 U.S.C. chapter 3** (debtor reporting requirements). Section 434 also stipulates that the effective date "shall take effect 60 days after the date on which rules are prescribed under section 2075 of title 28, United States Code, to establish forms to be used to comply with section 308 of title 11, United States Code, as added by subsection (a)."

— Section 435 directs the Advisory Committee on Bankruptcy Rules to propose amendments to the **Bankruptcy Rules** and **Bankruptcy Forms** to assist small business debtors in complying with the new uniform national reporting

requirements.

— Section 601 amends **chapter 6 of 28 U.S.C.,** to direct: (1) the clerk of each district court (or clerk of the bankruptcy court if certified pursuant to section 156(b) of this title) to compile bankruptcy statistics pertaining to consumer credit debtors seeking relief under Chapters 7, 11, and 13; (2) the Director of the Administrative Office of the U.S. Courts to make such statistics available to the public; and (3) the Director of the Administrative Office of the U.S. Courts to prepare and submit to Congress an annual report concerning the statistics collected. This report is due no later than June 1, 2005.

— Section 604 expresses the sense of Congress that: (1) it should be the national policy of the United States that all public data maintained by the bankruptcy clerks in electronic form should be available to the public and released in usable electronic form subject to privacy concerns and safeguards as developed by Congress and the Judicial Conference.

— Section 716 expresses the sense of Congress that the Advisory Committee on Bankruptcy Rules should, as soon as practicable after the bill is enacted, propose amendments to the **Bankruptcy Rules** regarding an objection to the confirmation plan filed by a governmental unit and objections to a claim for a tax filed under Chapter 13.

— Section 1232 amends **28 U.S.C. § 2075** to insert: "The bankruptcy rules promulgated under this section shall prescribe a form for the statement required under section 707(b)(2)(C) of title 11 and may provide general rules on the content of such statement."

— Section 1233 amends **28 U.S.C. § 158** to provide for direct appeals of certain bankruptcy matters to the circuit courts of appeals.

- H.R. 1115 - *Class Action Fairness Act of 2003*
  - Introduced by: Goodlatte
  - Date Introduced: 3/6/03
  - Status: Referred to the House Committee on the Judiciary (3/6/03). House Judiciary Committee held hearing (5/15/03).
  - Related Bills: S. 274
  - Key Provisions:

— Section 3 amends **Part V of title 28, U.S.C.,** to include a new chapter on Consumer Class Action Bill of Rights and Improved Procedures for Interstate Class Actions. The new chapter includes provisions on judicial review and approval of noncash settlements, prohibition on the payment of bounties, review and approval of proposed settlements (protection against loss by class members and against discrimination based on geographic location), and the publication of settlement information in plain English.

— Section 4 amends **section 1332 of title 28, U.S.C.,** to give district courts original jurisdiction of any civil action in which the amount in controversy exceeds $2 million, exclusive of interest and costs, and is a class action in which

(1) any plaintiff class member is a citizen of a state different from any defendant, (2) any plaintiff class member is a foreign state or subject of a foreign state and any defendant is a citizen of a state, or (3) any plaintiff class member is a citizen of a state and any defendant is a foreign state or a citizen or subject of a foreign state. These provisions do not apply in any civil action where (a) the substantial majority of the plaintiff class and the primary defendants are citizens of the state where the action was originally filed, and the claims asserted will be governed primarily by the laws of the state where the action was originally filed; (b) the primary defendants are states, state officials, or other governmental entities; or (c) the number of proposed plaintiff class members is less than 100.

— Section 5 provides for removal of interstate class actions to a federal district court and for review of orders remanding class actions to state courts.

— Section 6 amends **section 1292(a) of title 28, U.S.C.**, to allow appellate review of orders granting or denying class certification under Civil Rule 23. Section 6 also provides that discovery will be stayed pending the outcome of the appeal.

● H.R. 1303 - *To amend the E-Government Act of 2002 with respect to rulemaking authority of the Judicial Conference.*

• Introduced by: Smith

• Date Introduced: 3/18/03

• Status: Referred to the House Committee on the Judiciary (3/18/03). Referred to the House Subcommittee on Courts, the Internet, and Intellectual Property (3/19/03). Subcommittee held mark-up session and subsequently voted to forward the bill to the full committee (3/20/03).

• Related Bills: None

• Key Provisions:

— Section 1 amends Section 205(c) of the E-Government Act of 2002 by providing that the Judicial Conference *may* promulgate rules to protect privacy and security interests pertaining to documents filed electronically with the courts.

● H.R. 1586 - *Asbestos Compensation Fairness Act of 2003*

• Introduced by: Cannon

• Date Introduced: 4/3/03

• Status: Referred to the House Committee on the Judiciary (4/3/03).

• Related Bills: S. 413

• Key Provisions:

— Section 3 states that no person shall file a civil action alleging a nonmalignant asbestos claim unless the person makes a prima facie showing of physical impairment resulting from a medical condition to which exposure to asbestos was a substantial contributing factor.

— Section 4 provides that a court may consolidate for trial any number and type of asbestos claims with the consent of all parties. Without such consent, the court may consolidate for trial only those claims relating to the same exposed person

and that person's household.

— Section 4 also provides that a plaintiff must file a civil action in the state of his or her domicile or in the state where the plaintiff was exposed to asbestos, such exposure being a substantial contributing factor to the physical impairment upon which plaintiff bases his or her claim.

— Section 4 further directs that any party may remove the action to federal court if the state court fails to comply with the procedural requirements in section 4. The federal court shall have jurisdiction of all civil actions removed, without regard to the amount in controversy and without regard to the citizenship or residence of the parties.

- H.R. 1768 - *Multidistrict Litigation Restoration Act of 2003*
  - Introduced by: Sensenbrenner
  - Date Introduced: 4/11/03
  - Status: Referred to the House Committee on the Judiciary (4/11/03).
  - Related Bills: None.
  - Key Provisions:

    — Section 2 amends **28 U.S.C. § 1407** to permit the transferee court in a multidistrict-litigation case to retain jurisdiction over the case for trial. The transferee court may also retain jurisdiction to determine compensatory and punitive damages.

SENATE RESOLUTIONS

- S.J. Res. 1 - *Proposing an Amendment to the Constitution of the United States to Protect the Rights of Crime Victims*
  - Introduced by: Kyl
  - Date Introduced: 1/7/03.
  - Status: Referred to the Senate Committee on the Judiciary (1/7/03). Judiciary Committee held hearing (4/8/03).
  - Related Bills: H.J. Res. 10, H.J. Res. 48
  - Key Provisions:

    — Section 2 provides that a victim of a violent crime shall have the constitutional right to (1) reasonable and timely notice of any public proceeding involving the crime and any release or escape of the accused; (2) appear at such proceedings and to be heard on matters such as the release, plea, sentencing, reprieve, and pardon of the accused; and (3) adjudicative decisions that consider the victim's safety, interest in avoiding unnecessary delay, and interest in fair and timely claims to restitution from the accused. These rights shall not be restricted except as dictated by public safety, compelling necessity, or the administration of justice.

HOUSE RESOLUTIONS

● H.J. Res. 10 - *Proposing an Amendment to the Constitution of the United States to Protect the Rights of Crime Victims*

- Introduced by: Royce
- Date Introduced: 1/7/03.
- Status: Referred to the House Committee on the Judiciary (1/7/03).
- Related Bills: S.J. Res. 1, H.J. Res. 48
- Key Provisions:

— Section 2 provides that a victim of a violent crime shall have the constitutional right to (1) reasonable and timely notice of any public proceeding involving the crime and any release or escape of the accused; (2) appear at such proceedings and to be heard on matters such as the release, plea, sentencing, reprieve, and pardon of the accused; and (3) adjudicative decisions that consider the victim's safety, interest in avoiding unnecessary delay, and interest in fair and timely claims to restitution from the accused. These rights shall not be restricted except as dictated by public safety, compelling necessity, or the administration of justice.

● H.J. Res. 48 - *Proposing an Amendment to the Constitution of the United States to Protect the Rights of Crime Victims*

- Introduced by: Chabot
- Date Introduced: 4/10/03.
- Status: Referred to the House Committee on the Judiciary (4/10/03).
- Related Bills: S.J. Res. 1, H.J. Res. 10
- Key Provisions:

— Section 2 provides that a victim of a violent crime shall have the constitutional right to (1) reasonable and timely notice of any public proceeding involving the crime and any release or escape of the accused; (2) appear at such proceedings and to be heard on matters such as the release, plea, sentencing, reprieve, and pardon of the accused; and (3) adjudicative decisions that consider the victim's safety, interest in avoiding unnecessary delay, and interest in fair and timely claims to restitution from the accused. These rights shall not be restricted except as dictated by public safety, compelling necessity, or the administration of justice.

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, 2003

MEMORANDUM TO THE STANDING 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.

Automation Project (Documentum)

Our new web-based electronic document-management system (Documentum 4i) continues to work well. We are using Documentum 4i to review and edit all rules documents, process comments and suggestions, prepare acknowledgment letters, organize and search for documents using enhanced indexing and search capabilities, and track different versions of documents to ensure the quality and accuracy of work product. Other soon-to-come improvements include expeditious intake and processing of e-mails and attachments, distributing agenda books in electronic form, and installing "redlining" software.

Next year, we plan to upgrade to the latest version of the software — Documentum 5. Potential enhancements include the following: users will be able to review and edit documents simultaneously; committee members, reporters, and staff will have remote access to the database; we will be able to publish documents on the Internet; we will have improved search capability; the data will be easier to read; and we will be able to archive documents directly to the National Archives and Records Administration. Funding for the upgrade may be an issue because of budget shortfalls.

(See attached, ***Documentum: A Critical Tool in Supporting the Federal Rulemaking Process***.)

Internet

We continue to update, modify, and expand the Judiciary's "Federal Rulemaking" Internet web site (http://www.uscourts.gov). We are also working to make the web site easier for a user to find, research, and track proposed rules amendments as they proceed through the rulemaking process.

Last year, the Administrative Office began using statistical software to track usage on the J-Net, AOWeb, and USCourts.gov web sites. Over the seven-month period from October 2002 through April 2003, the tracking software recorded an average of 477 "visits" to the rules web site per month. (A "visit" is defined as a user loading a page on the web site for the first time.) (See attached.)

The statistical software also revealed that most users went to the rulemaking web site's home page for information. With that in mind, we redesigned the home page to include more information on the status of proposed rule amendments and rules committees' activities. We also reformatted the home page to make it easier for the user to see and navigate through the additional material.

Furthermore, with the exception of one bankruptcy court that has no Internet web site, our web site has links to every court of appeals, district court, and bankruptcy court's web site in the country. And with the exception of three courts that do not have local rules posted on their web site, our web site has access to the local rules for every court in the country.

Finally, we continue to receive comments on the proposed rule amendments through the web site. The number of comments submitted via the Internet remains modest.

Committee and Subcommittee Meetings

For the period from December 1, 2002, through May 9, 2003, the office staffed nine meetings, including one Standing Committee meeting, four advisory committee meetings, and four subcommittee meetings. The office has also arranged and participated in numerous conference calls involving rules committees or subcommittees.

The docket sheets of all suggested amendments for Bankruptcy, Civil, Criminal, and Evidence Rules have been updated to reflect the committees' recent respective actions. Every suggested amendment along with its source, status, and disposition is listed. The docket sheets are updated after each committee meeting, and they are included in each agenda book. The docket sheets are also posted on our web site.

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. 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 records from 1935 through 1996 have been entered on microfiche and indexed. The records from 1997 to the present will eventually also be stored on microfiche. The microfiche collection continues to prove useful to us and the public in researching prior committee positions. In addition, many of these records are already filed in Documentum 4i. Recently, a high-capacity scanner was purchased and installed. Training has been completed and staff is now using the scanner to input rules-related records into Documentum.

Manual Tracking

Our manual system of tracking comments continues to work well. For the recent public-comment period, the office has received, acknowledged, forwarded, and followed up on approximately 50 comments. 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, with a follow-up mailing of a complete hardcopy set of all comments received. We found that this process allows 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 53 state bars designating a point-of-contact.

The points-of-contact list was updated in time to include the new names in *The Request for Comment* pamphlet on proposed amendments published in August 2002. 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.

Mailing List

The Administrative Office's new automated mailing list system – called DIRECT EXPRESS – continues to work well. The rules office maintains a large mailing list exclusively for rules-related mailings. Maintaining the list requires frequent and extensive updating, which in the past has been particularly tedious and time consuming. DIRECT EXPRESS is operated by an AO administrator and allows for immediate changes to the mailing list, which has facilitated our updating. Information on DIRECT EXPRESS can be obtained through the agency's internal AOWeb site.

Miscellaneous

In March 2003, the Supreme Court approved proposed amendments to the Federal Rules of Appellate, Bankruptcy, and Civil Procedure, and the Federal Rules of Evidence that were approved by the Judicial Conference at its September 2002 session. The amendments were transmitted to Congress and will become effective on December 1, 2003, unless Congress enacts legislation to reject, modify, or defer the amendments.

We are currently testing a new software program that is designed to log, track, and record all incoming correspondence and requests for information. Our goal is to keep track of incoming requests so that they are processed timely.

James N. Ishida

Attachments

DOCUMENTUM:

A CRITICAL TOOL IN SUPPORTING THE FEDERAL RULEMAKING PROCESS

The following is a brief description of Documentum and the critical role it plays in supporting the federal rulemaking process.

What is Documentum?

Documentum is a web-based document-management system that is versatile, easy to use, and extremely powerful. Documentum is a complete document-management tool that offers the following capabilities in one integrated system: document management, records management, web-content management, collaboration on documents, security for documents, and business-process automation through what are called "workflows."[1] Documentum is used by some of the largest law firms, corporations, and governmental entities in the country, including the federal government's new E-Rulemaking initiative. Documentum has won numerous awards, and several years ago it was selected as a pilot program for the Administrative Office of the U.S. Courts. The pilot program was successfully completed, and the AO's Office of Judges Programs is now using Documentum.

Why is Documentum Critical to the Rulemaking Process?

The Assistant Director for the Office of Judges Programs currently serves as secretary to the Judicial Conference Committee on Rules of Practice and Procedure, and coordinates the operational aspects of the federal rulemaking process and maintains the records of the rules committees. The AO's Rules Committee Support Office provides the day-to-day administrative and legal support for the secretary and the rules committees.

About seven years ago, the secretary recognized that a technological solution was necessary to meet the rigorous and growing demands of the rulemaking process, improve record keeping, and support the work of the Rules Committee Support Office. Some of the critical functions that were identified include:

- Assuring the complete accuracy of all rules-related records,
- Meeting urgent publication deadlines,

---

[1] A "workflow" is basically a process that automates the creation of a document from beginning to end. For example, a workflow can be made to automate the process of creating an agenda item for a committee meeting, taking it through the creation, review, approval, execution, and archiving stages.

- Providing a safe and secure repository for all rules-related materials,

- Facilitating timely research by retrieving relevant documents quickly,

- Enabling a small staff to review, edit, and format a large volume of documents,

- Providing for simultaneous access to documents for multiple users,

- Maintaining, retrieving, and distributing official records in response to requests from committee members and the public, and

- Tracking and responding promptly to all correspondence.

Although the office had previously used another document-management system, the demanding and exacting needs of the rulemaking process quickly overwhelmed the former system. A search was begun for a system that is more powerful, flexible, and easy-to-use. That search led to Documentum.

What can Documentum do?

Some of the main features of Documentum include:

Document management. The Documentum software provides a secure, central repository for storing, searching, updating, and managing all rules-related records. Because documents can be entered into the system quickly and easily, vital rules records can be preserved immediately. Powerful search, display, and indexing capabilities allow users to find relevant documents promptly. And once the documents are located, Documentum can deliver them quickly, easily, and electronically via internet, e-mail, or facsimile.

"Version Control." A key feature of Documentum, "version control" allows users to edit the same document, while still retaining each "version" or revision of the document for historical, reference, or archive purposes. Users can see what was included in each version of a document, who edited that particular version, and when the version was revised. This assures that the most up-to-date version of a document is clearly identified.

"Access Control." Documentum also allows users to assign various "permissions" to a document that allow or prevent a user from doing certain things to the document. For example, the permissions may be set so that certain users are prohibited from deleting a particular document.

What are the Future Improvements to Documentum?

Next year, the office plans to upgrade to the latest edition of the Documentum software — version 5. Some of the anticipated improvements to the system include:

Collaboration. A powerful feature that will enable geographically scattered users to have remote access to documents in the system. Users can therefore work faster and more efficiently. During the coming year, the office would like to make the rules records available to committee members and reporters via the internet.

Improved Search and Display Capabilities. The software's search and display capabilities will have a more familiar look similar to commercial databases such as Lexis and Westlaw. For example, search queries will be highlighted within each document, enabling users to determine the relevancy of search results quickly.

"Redlining" Capability. New "redlining" software that works with Documentum 5 will highlight the changes that were made between each version of a document. This will enable users to compare changes between versions expeditiously.

Web-Content Management. Documentum 5 has a robust ability to create, manage, customize, and deliver documents to the internet quickly and easily. The system has a very intuitive feel so that even non-technical users can post accurate and up-to-date materials to the internet. This will allow users to post documents to the Federal Rulemaking web site timely, easily, and efficiently.

Expanding Rules-Related Materials in Collection. The system currently has all standing and advisory rules committees' minutes dating back to 1992. The office will be expanding its collection of rules-related materials, including agenda books and other rules records. The office is working towards building an authoritative collection of key rules–related documents in the electronic document-management system.

OJP-AD&RULES

Type: Cabinet

Contents

Judges Personnel Records folders for a judge (nominee/incumbent)	Properties	Actions
Agenda Books folders for committees agenda books	Properties	Actions
AO Forms-Templates travel, budget template/completed	Properties	Actions
AO Publications manuals, books/pamphlets/brochures	Properties	Actions
Articles-Speeches newspaper/magazine, articles, presentations	Properties	Actions
Corr-Incoming general, director/controlled, rules suggestion	Properties	Actions
Corr-Outgoing general, director/controlled, rules suggestion acknowledgement	Properties	Actions
Lists OJP-AD (rosters, vacancies), RCSO (docket, membership)	Properties	Actions
Minutes notes/draft/final rules, other committees	Properties	Actions
Procedures-Rules-Statutes legislation, statute, rule, official form	Properties	Actions
Reports AO (annual), Rules (Gap), committee reports, documentation	Properties	Actions
Trash documents to be deleted	Properties	Actions

Top of Page

Search

Criteria Results
Category Searches

Criteria for Minutes Search

AND of the following:

File Name				
Document Description				
Special Subject Area				
Document Owner				
Keywords				
Created	on or after			
	on or before			
Meeting Start Date	on or after			
	on or before			
Rules Minutes				
Group	Standing Rules Comm.			
Agenda Book Item				
Status				
Modified By	contains			

And:

Text contains

Start the Search Clear

Top of Page

Search

Criteria Results
Category Searches

Criteria for All Category Search

of the following:

File Name	
Document Description	
Special Subject Area	
Document Owner	
Keywords	
Created	on or before

And:

Text contains

Top of Page

Search

Criteria Results
Category Searches

Results of Last Search

Found in docbase OJP_DocSystem

Standing Rules Comm. January 2003 (Draft) Properties Actions Edit
Document Category Minutes
Meeting Start Date 01/16/2003
Group Standing Rules Comm.

Standing Rules Comm. December 1992 (Notes) Properties Actions Edit
Document Category Minutes
Meeting Start Date 12/17/1992
Group Standing Rules Comm.

Standing Rules Comm. June 2002 Properties Actions Edit
Document Category Minutes
Meeting Start Date 06/10/2002
Group Standing Rules Comm.

Standing Rules Comm. January 1998 Properties Actions Edit
Document Category Minutes
Meeting Start Date 01/08/1998
Group Standing Rules Comm.

Standing Rules Comm. June 1996 Properties Actions Edit
Document Category Minutes
Meeting Start Date 06/19/1996
Group Standing Rules Comm.

Standing Rules Comm. June 1994 Properties Actions Edit
Document Category Minutes
Meeting Start Date 06/23/1994
Group Standing Rules Comm.

Standing Rules Comm. January 2002 Properties Actions Edit
Document Category Minutes
Meeting Start Date 01/10/2002
Group Standing Rules Comm.

Standing Rules Comm. January 1998 (Executive Session) Properties Actions Edit
Document Category Minutes
Meeting Start Date 06/09/1998
Group Standing Rules Comm.

Standing Rules Comm. June 1998 Properties Actions Edit
Document Category Minutes
Meeting Start Date 06/18/1998
Group Standing Rules Comm.

Standing Rules Comm. January 1996 Properties Actions Edit
Document Category Minutes
Meeting Start Date 01/12/1996
Group Standing Rules Comm.

Standing Rules Comm. January 1997 Properties Actions Edit
Document Category Minutes
Meeting Start Date 06/09/1997
Group Standing Rules Comm.

Standing Rules Comm. June 1997 Properties Actions Edit
Document Category Minutes
Meeting Start Date 06/19/1997
Group Standing Rules Comm.

Standing Rules Comm. January 1999 Properties Actions Edit
Document Category Minutes
Meeting Start Date 01/07/1999
Group Standing Rules Comm.

Standing Rules Comm. June 1999 Properties Actions Edit

Minutes
Type: Folder

Contents

Appellate Rules Comm. May 1992 (May 26, 1992, Telephone Conference re Item 90-4, Proposed Amendments to Appellate Rule 3(c)) — Properties Actions Edit
Document Category Minutes
Meeting Start Date 05/26/2092
Group Appellate Rules Comm.

Appellate Rules Comm. April 1992 (Excerpt Minutes re Item 90-4, Proposed Amendments to Appellate Rule 3(c)) — Properties Actions Edit
Document Category Minutes
Meeting Start Date 04/30/1992
Group Appellate Rules Comm.

Civil Rules Comm. October 2002 — Properties Actions Edit
Document Category Minutes
Meeting Start Date 04/30/2003
Group Civil Rules Comm.

Standing Rules Comm. January 2003 (Draft) — Properties Actions Edit
Document Category Minutes
Meeting Start Date 01/16/2003
Group Standing Rules Comm.

SAS Meeting 14 - April 9, 2003 — Properties Actions Edit
Document Category Minutes
Meeting Start Date 04/09/2003
Group SAS Task Force

SAS Meeting 13 - March 12, 2003 — Properties Actions Edit
Document Category Minutes
Meeting Start Date 03/12/2003
Group SAS

Bankruptcy Rules Comm. October, 2002 — Properties Actions Edit
Document Category Minutes
Meeting Start Date 10/10/2002
Group Bankruptcy Rules Comm.

Draft Minutes Evidence Comm. October 2002 — Properties Actions Edit
Document Category Minutes
Meeting Start Date 10/18/2002
Group Evidence Rules Comm.

The Third Branch - March 2003 — Properties Actions Edit
Document Category Minutes
Meeting Start Date 02/03/2003
Group Appellate Rules Comm.

SAS Meeting 11 - January 29, 2003 — Properties Actions Edit
Document Category Minutes
Meeting Start Date 01/29/2003
Group SAS Team

SAS Meeting 12 - February 19, 2003 — Properties Actions Edit
Document Category Minutes
Meeting Start Date 02/19/2003
Group SAS Working Group

STYLE 146: Advisory Comm Reporter's notes on meeting of Subcomm B on restyling of Civil Rules 8-15 — Properties Actions Edit
Document Category Minutes
Meeting Start Date 01/25/2003
Group Civil Rules Subcomm.

STYLE 145: Advisory Comm Reporter's notes on meeting of Civil Rules Subcomm A on — Properties Actions Edit

Standing Rules Comm. Meeting June 2003

Properties Actions Permissions Contents

Type: Folder

Contents

Update on Electronic Case Filing, May 2003 — Properties Actions Edit
Document Category Reports
Report Year 2003
Report Month/Day or Period 05/08
Recipient Organization/Group Standing Rules Comm.

RCSO Report to the Standing Comm. re Administrative Actions Taken, May 2003 — Properties Actions Edit
Document Category Reports
Report Year 2003
Report Month/Day or Period 05/09
Recipient Organization/Group Standing Rules Comm.

RCSO Report to Standing Comm. re Legislative Issues, May 2003 — Properties Actions Edit
Document Category Reports
Report Year 2003
Report Month/Day or Period 05/19
Recipient Organization/Group Standing Rules Comm.

Summary Report of the Long-Range Planning Meeting March 2003 — Properties Actions Edit
Document Category Reports
Report Year 2003
Report Month/Day or Period 03/17
Recipient Organization/Group Standing Rules Comm.

Report of the Evidence Rules Comm. to Standing Rules Comm. May 2003 — Properties Actions Edit
Document Category Reports
Report Year 2003
Report Month/Day or Period 05/05
Recipient Organization/Group Standing Rules Comm.

Draft Evidence Rules Comm. April 2003 — Properties Actions Edit
Document Category Minutes
Meeting Start Date 04/25/2003
Group Evidence Rules Comm.

Rules Subcommittee Membership List — Properties Actions Edit
Document Category Agenda Books
Meeting Start Date 06/02/2003
Group Standing Rules Comm.

Rules Committee Membership List — Properties Actions Edit
Document Category Agenda Books
Meeting Start Date 06/02/2003
Group Standing Rules Comm.

Top of Page

Search

Criteria Results
Category Searches

Results of Last Search

Found in docbase OJP_DocSystem

List of Working Drafts and Related Documents for the Civil Rules Style Project — Properties Actions Edit
Document Category Lists
Revised Date 05/18/2003

Scirica to Kimble re Mission and Methods of Civil Style Project — Properties Actions Edit
Document Category Outgoing Correspondence
Letterhead Date 02/04/2003
Recipient First Name P. Joseph
Recipient Last Name Kimble

STYLE 267: ABA Litigation Section representative (Loren Kieve) comments on style drafts of Civil Rules 16-22 & 23.1-25, global issues table, and Judge Scheindlin's comments on style drafts of Rules 8-15 and 23.1-25 — Properties Actions Edit
Document Category Incoming Correspondence
Letterhead Date 04/29/2003
Author First Name Loren
Author Last Name Kieve

STYLE 261A: Cooper memo and handmarked style draft showing where to footnote comments on Kimble-Spaniol style draft of Civil Rules 31-37 and 45 — Properties Actions Edit
Document Category Reports
Report Year 2003
Report Month/Day or Period 04/25
Recipient Organization/Group Other

Agenda 4 - Supplemental Materials re Shira Scheindlin's Comments on Restyle Draft of Civil Rule 8 (STYLE 252) — Properties Actions Edit
Document Category Agenda Books
Meeting Start Date 04/30/2003
Group Civil Rules Comm.

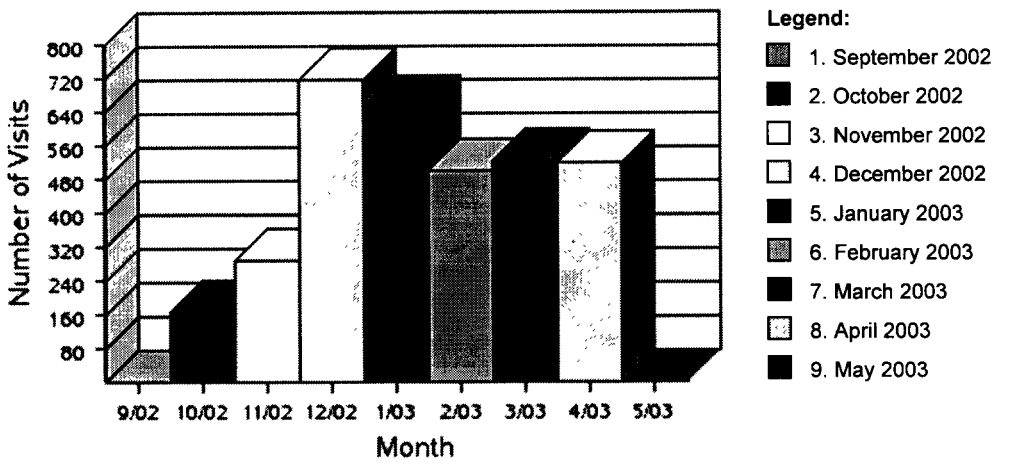
Agenda 4 - Supplemental Material re Shira Scheindlin's Comments re Revised Civil Rules 9-11 (STYLE 257) — Properties Actions Edit
Document Category Agenda Books
Meeting Start Date 04/30/2003
Group Civil Rules Comm.

Agenda 4 - Supplemental Material re Civil Rules Style Project - Global Drafting Issues (STYLE 259) — Properties Actions Edit
Document Category Agenda Books
Meeting Start Date 04/30/2003
Group Civil Rules Comm.

Agenda 4 - Supplemental Materials re Shira Scheindlin's Comments on Restyle Draft of Civil Rules 23.1-25 (STYLE 250) — Properties Actions Edit
Document Category Agenda Books
Meeting Start Date 04/30/2003
Group Civil Rules Comm.

Agenda 4 - Supplemental Materials re Shira — Properties Actions Edit

Monthly Breakdown



Month	Views	Visits	Views per Year	Visits per Year
May 2003	0 (0.0%)	0 (0.0%)	112,945	2,177
April 2003	32,805 (0.8%)	516 (4.3%)		
March 2003	26,045 (0.7%)	521 (4.3%)		
February 2003	23,506 (0.6%)	495 (4.1%)		
January 2003	30,589 (0.8%)	645 (5.4%)		
December 2002	39,431 (1.0%)	715 (6.0%)	120,035	1,163
November 2002	31,647 (0.8%)	285 (2 4%)		
October 2002	48,957 (1.3%)	163 (1.4%)		
September 2002	0 (0.0%)	0 (0.0%)		

Views represented: 232,980 out of 3,869,576 (6.0%)
Visits represented: 3,340 out of 11,994 (27.8%)
Average views per month: 32,974
Average visits per month: 473

Page Help

This report lets you see traffic to your site on any given date. Use this report to analyze the reach and visitor acquisition rate of marketing campaigns that occur on a specific date as well as follow the life cycle of those campaigns (by analyzing the visitor acquisition rate on the following dates).

Month - A month for which you have data.

Views - The number of views of your site in the month.

Visits - The number of visits to your site in the month.

Views per Year - The number of views of your site during the year that contains the month.

Visits per Year - The number of visits to your site during the year that contains the month.

BANKRUPTCY RULES SUGGESTIONS DOCKET
(By Rule Number)

ADVISORY COMMITTEE ON BANKRUPTCY RULES

The docket sets forth suggested changes to the Federal Rules of Bankruptcy Procedure considered by the Advisory Committee since 1997. The suggestions are set forth in order by: (1) bankruptcy rule number, (2) form number, and where there is no rule or form number (or several rules or forms are affected), (3) alphabetically by subject matter.

Suggestion	Docket No., Source & Date	Status
	BANKRUPTCY RULES	
Rule 2002(g) Allow entity to designate address for purpose of receiving notices.	02-BK-A Bankruptcy Clerk Joseph P. Hurley, for the BK Noticing Working Group 2/4/02 00-BK-A Raymond P. Bell, Esq., Fleet Credit Card Services, L.P. 1/18/00	2/02 - Referred to chair and reporter 3/02 - Committee considered 4/03 - Committee considered **PENDING FURTHER ACTION**
Rule 3002(c) Provide exception for Chapters 7 and 13 corporate cases where debtor not an individual.	01-BK-F Judge Paul Mannes 6/23/00	6/00 - Referred to chair, reporter, and committee **PENDING FURTHER ACTION**
Rule 3017.1 Eliminate rule extension number.	00-BK-013 01-BK-C Patricia Meravi 1/22/01	2/01 - Referred to chair and reporter **PENDING FURTHER ACTION**

Rule 4003 Impose burden of proof upon the debtor.	01-BK-D Judge Barry Russell 4/4/01	4/01 - Referred to chair and reporter 3/02 - Committee considered and deferred decision **PENDING FURTHER ACTION**
Rule 4008 Provide a deadline for filing reaffirmation agreement.	01-BK-E Francis F. Szczebak, Esq., for the BK Judges Advisory Group 11/30/01	1/02 - Referred to chair and reporter 3/02 - Committee considered and deferred decision. Referred to subcommittee. 10/02 - Committee approved for publication 1/03 - Standing Committee approved for publication **PENDING FURTHER ACTION**
Rule 6007(a) Require the trustee to give notice of specific property he intends to abandon.	99-BK-I Physa Griffith South, Esq. 10/13/99	12/99 - Referred to chair, reporter, and committee **PENDING FURTHER ACTION**
Rule 7023.1 Eliminate rule extension number.	00-BK-013 01-BK-C Patricia Meravi 1/22/01	2/01 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 7026 Eliminate mandatory disclosure of information in adversary proceedings.	00-BK-008 01-BK-A Jay L. Welford, Esq.and Judith G. Miller, Esq., for the Commercial Law League of America 1/26/01 00-BK-009 01-BK-B Judy B. Calton, Esq. 1/12/01	2/01 - Referred to chair and reporter **PENDING FURTHER ACTION**

Rule 9011 Make grammatical correction.	97-BK-D John J. Dilenschneider, Esq. 5/30/97	6/97 - Referred to chair, reporter, and committee **PENDING FURTHER ACTION**
Rule 9014 Allow local districts the option of amending rule.	02-BK-E Thomas J. Yerbich, Esq. 2/22/02	5/02 - Referred to chair and reporter 8/02 - Draft excepting provisions of Civil Rule 26 in contested matters published for comment 4/03 - Committee approved **PENDING FURTHER ACTION**
Rule 9036 State that notice by electronic means is complete upon transmission.	02-BK-A Bankruptcy Clerk Joseph P. Hurley, for the BK Noticing Working Group 2/1/02	2/02 - Referred to reporter, chair and committee **PENDING FURTHER ACTION**
	BANKRUPTCY FORMS	
Official Form 1 Amend Exhibit C to the Voluntary Petition.	02-BK-D Gregory B. Jones, Esq. 2/7/02	2/02 - Referred to reporter, chair, and committee **PENDING FURTHER ACTION**
Official Form 9 Direct that information regarding bankruptcy fraud and abuse be sent to the United States trustee.	97-BK-B US Trustee Marcy J.K. Tiffany 3/6/97	3/97 - Referred to reporter, chair, and committee **PENDING FURTHER ACTION**
Official Form B9C Provide less confusing notice of commencement of bankruptcy form to debtors and creditors.	00-BK-E Ali Elahinejad 2/23/00	5/00 - Referred to reporter, chair, and committee **PENDING FURTHER ACTION**
	SUBJECT MATTER	

Fraud Amend the rules to protect creditors from fraudulent bankruptcy claims and the mishandling of cases by trustees.	02-BK-B Dr. & Mrs. Glen Dupree 2/4/02	2/02 - Referred to chair and reporter **PENDING FURTHER ACTION**
Small Claims Procedure Establish a "small claims" procedure.	00-BK-D Judge Paul Mannes 3/13/00 (see also 98-BK-A)	5/00 - Referred to reporter, chair, and committee **PENDING FURTHER ACTION**

CIVIL RULES SUGGESTIONS DOCKET

ADVISORY COMMITTEE ON CIVIL RULES

The docket sets forth suggested changes to the Federal Rules of Civil Procedure considered by the Advisory Committee since 1992. The suggestions are set forth in order by (1) civil rule number, (2) form number, and where there is no rule or form number (or several rules or forms are affected), (3) alphabetically by subject matter.

Suggestion	Docket Number, Source, and Date	Status
	CIVIL RULES	
Rule 4(c)(1) Accelerating 120-day service provision	Joseph W. Skupniewitz	4/94 - Committee deferred as premature **DEFERRED INDEFINITELY**
Rule 4(d) To clarify waiver-of-service provision	97-CV-R John J. McCarthy 11/21/97	12/97 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee to accumulate for periodic revision **PENDING FURTHER ACTION**
Rule 4(m) Extends time to serve pleading after initial 120 days expires	Judge Edward Becker	4/95 - Committee considered **DEFERRED INDEFINITELY**
Rule 4 To provide for sanctions against the willful evasion of service	97-CV-K Judge Joan Humphrey Lefkow 8/12/97	10/97 - Referred to chair, reporter, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommended accumulation for periodic revision **PENDING FURTHER ACTION**
Rule 5 Clarifies that a document is deemed filed upon delivery to an established courier	00-CV-C Lawrence A. Salibra, Senior Counsel 6/5/00	6/00 - Referred to chair, reporter, and agenda subcommittee **PENDING FURTHER ACTION**
Rule 5(d) Does non-filing of discovery material affect privilege	Standing Committee 6/99	10/99 - Committee considered **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
New Rule 5.1 Requires litigant to notify U.S. Attorney when the constitutionality of a federal statute is challenged and when United States is not a party to the action	00-CV-G Judge Barbara B. Crabb 10/5/00	10/00 - Referred to reporter and chair 1/02 - Committee considered 10/02 - Committee considered 5/03 - Committee considered and approved **PENDING FURTHER ACTION**
Rule 6 Clarifies when three calendar days are added to deadline when service is by mail	00-CV-H Roy H. Wepner, Esq. (via Appellate Rules Committee) 11/27/00	12/00 - Referred to reporter and chair 5/02 - Committee considered 10/02 - Committee considered 5/03 - Committee considered and approved for publication **PENDING FURTHER ACTION**
Rule 6(e) Clarify the method for extending time to respond after service	Appellate Rules Committee 4/02	4/02 - Referred to Committee 10/02 - Committee considered 5/03 - Committee considered and approved for publication **PENDING FURTHER ACTION**
Rule 8(a)(2) Require "short and plain statement of the claim" that allege facts sufficient to establish a *prima* facie case in employment discrimination	02-CV-E Nancy J. Smith, Esq. 6/17/02	6/02 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 12 To conform to *Prison Litigation Act of 1996* that allows a defendant sued by a prisoner to waive right to reply	97-CV-R John J. McCarthy 11/21/97	12/97 - Referred to chair, reporter, and Agenda Subcommittee 3/99 - Agenda Subcommittee considered 4/99 - Committee considered and deferred action **DEFERRED INDEFINITELY**
Rule 12(f) Provide guidance for the clerk when the court strikes a pleading	02-CV-J Judge D. Brock Hornby 10/02	10/02 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 15(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 - Committee considered 11/95 - Committee considered and deferred **DEFERRED INDEFINITELY**

Suggestion	Docket Number, Source and Date	Status
Rule 15(c)(3)(B) Clarifying extent of knowledge required in identifying a party	98-CV-E Charles E. Frayer, Law student 9/27/98	9/98 - Referred to chair, reporter, and Agenda Subcommittee 3/99 - Agenda Subcommittee rec. accumulate for periodic revision (1) 4/99 - Committee considered and retained for future study 5/02 - Committee considered along with J. Becker suggestion in 266 F.3d 186 (3rd Cir. 2001). 10/02 - Committee referred to subcommittee for further consideration **PENDING FURTHER ACTION**
Rule 15(c)(3)(B) Amendment to allow relation back	Judge Edward Becker, 266 F.3d 186 (3rd Cir. 2001)	10/01 - Referred to chair and reporter 1/02 - Committee considered 5/02 - Committee considered 10/02 - Committee referred to subcommittee for further consideration **PENDING FURTHER ACTION**
Rule 19 Clarify language regarding dismissal of actions	02-CV-F Prof. Bradley Scott Shannon 5/30/02	7/02 - Referred to chair and reporter 10/02 - Referred to Style Consultant **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source and Date	Status
Rule 23 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 Committee 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 Standing Committee for submission to Judicial Conference 6/96 - Approved for publication by Standing Committee 8/96 - Published for comment 10/96 - Discussed by Committee 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 Standing Committee; changes to 23(c)(1) were recommitted to Advisory Committee 10/97 - Considered by Committee 3/98 - Considered by Committee, deferred pending mass torts working group deliberations 3/99 - Agenda Subcommittee recommended referral to other Committee 4/00 - Committee considered 10/00 - Committee considered 4/01 - Request for publication 6/01 - Standing Committee approved for publication 8/01 - Published for public comment 10/01 - Committee considered 1/02 - Committee considered 5/02 - Committee approved 6/02 - Standing Committee approved 9/02 - Judicial Conference approved 3/03 - Supreme Court approved **PENDING FURTHER ACTION**

Suggestion	Docket Number - Source and Date	Status
Rule 23 Standards and guidelines for litigating and settling consumer class actions	97-CV-T Patricia Sturdevant, for National Association for Consumer Advocates 12/10/97	12/97 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommended referral to other Committee 4/00 - Committee considered 10/00 - Committee considered 4/01 - Request for publication 6/01 - Standing Committee approved for publication 8/01 - Published for public comment 10/01 - Committee considered 1/02 - Committee considered 5/02 - Committee approved 6/02 - Standing Committee approved 9/02 - Judicial Conference approved 3/03 - Supreme Court approved **PENDING FURTHER ACTION**
Rule 23(e) Amend to include specific factors court should consider when approving settlement for monetary damages under 23(b)(3)	97-CV-S Beverly C. Moore, Jr., for Class Action Reports, Inc. 11/25/97	12/ 97 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommended referral to other Committee 4/00 - Committee considered 10/00 - Committee considered 4/01 - Request for publication 6/01 - Standing Committee approved for publication 8/01 - Published for public comment 10/01 - Committee considered 1/02 - Committee considered 5/02 - Committee approved 6/02 - Standing Committee approved 9/02 - Judicial Conference approved 3/03 - Supreme Court approved **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source and Date	Status
Rule 23(e) Require all "side-settlements," including attorney's fee components, to be disclosed and approved by the district court	99-CV-H Brian Wolfman, for Public Citizen Litigation Group 11/23/99	12/99 - Referred to reporter, chair, and Agenda Subcommittee 4/00 - Referred to Class Action Subcommittee 10/00 - Committee considered 4/01 - Request for publication 6/01 - Standing Committee approved for publication 8/01 - Published for public comment 10/01 - Committee considered 1/02 - Committee considered 5/02 - Committee approved 6/02 - Standing Committee approved 9/02 - Judicial Conference approved 3/03 - Supreme Court approved **PENDING FURTHER ACTION**
Rule 23 Class action attorney fee		10/00 - Committee considered 4/01 - Request for publication 6/01 - Standing Committee approved for publication 8/01 - Published for public comment 10/01 - Committee considered 1/02 - Committee considered 5/02 - Committee approved 6/02 - Standing Committee approved 9/02 - Judicial Conference approved 3/03 - Supreme Court approved **PENDING FURTHER ACTION**
Rule 26 Interviewing former employees of a party	John Goetz	4/94 - Declined to act **DEFERRED INDEFINITELY**
Rule 26 Does inadvertent disclosure during discovery waive privilege	Discovery Subcommittee	10/99 - Discussed **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 26 Electronic discovery		10/99 - Referred to Discovery Subcommittee 3/00 - Discovery Subcommittee considered 4/00 - Committee considered 10/00 - Committee considered 4/01 - Committee considered 5/02 - Committee considered 10/02 - Committee and Discovery Subcommittee considered 5/03 - Committee considered Discovery Subcommittee's report **PENDING FURTHER ACTION**
Rule 26 Interplay between work-product doctrine under Rule 26(b)(3) and the disclosures required of experts under Rules 26(a)(2) and 26 (b)(4)	00-CV-E Gregory K. Arenson, Chair, NY State Bar Association Committee on Federal Procedure 8/7/00	8/00 - Referred to reporter, chair, and Agenda Subcommittee **PENDING FURTHER ACTION**
Rule 26(a) To clarify and expand the scope of disclosure regarding expert witnesses	00-CV-I Prof. Stephen D. Easton 11/29/00	12/00 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 30(b) Give notice to deponent that deposition will be videotaped	99-CV-J Judge Janice M. Stewart 12/8/99	12/99 - Referred to reporter, chair, Agenda Subcommittee, and Discovery Subcommittee 4/00 - Referred to Discovery Subcommittee **PENDING FURTHER ACTION**

Suggestion	Docket Number, Submitter and Date	Status
Rule 32 Use of expert witness testimony at subsequent trials without cross examination in mass torts	Honorable Jack Weinstein 7/31/96	7/31/96 Referred to chair and reporter 10/96 - Committee considered. Federal Judicial Center to conduct study 5/97 - Reporter recommended that it be considered part of discovery project 3/99 - Agenda Subcommittee recommended referral to other committee **PENDING FURTHER ACTION**
Rules 33 & 34 Require submission of a floppy disc version of document	99-CV-E Jeffrey K. Yencho 7/22/99	7/99 - Referred to Agenda Subcommittee 8/99 - Agenda Subcommittee recommended referral to other Subcommittee **PENDING FURTHER ACTION**
Rule 40 Precedence given elderly in trial setting	00-CV-A Michael Schaefer 1/19/00	2/00 - Referred to chair, reporter, and Agenda Subcommittee **PENDING FURTHER ACTION**
Rule 41(a) Makes it explicit that actions *and* claims may be dismissed	02-CV-F Bradley Scott Shannon 5/30/02	7/02 - Referred to chair and reporter 10/02 - Referred to Style Consultant **PENDING FURTHER ACTION**
Rule 50(b) Eliminate the requirement that a motion for judgment be made "at the close of all the evidence" as a prerequisite for making a post-verdict motion, if a motion for judgment had been made earlier	03-CV-A New York State Bar Association Committee on Federal Procedure of the Commercial and Federal Litigation Section 2/25/03	3/03 - Referred to chair and reporter 5/03 - Committee considered **PENDING FURTHER ACTION**
Rule 50(b) When a motion is timely after a mistrial has been declared	97-CV-M Judge Alicemarie Stotler 8/26/97	8 /97 - Referred to chair and reporter 10/97 - Referred to Agenda Subcommittee 3/99 - Agenda Subcommittee to accumulate for periodic revision **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source and Date	Status
Rule 51 Jury instructions filed before trial	96-CV-E Judge Stotler 97-CV-V Gregory B. Walters, Circuit Executive, Office of the Circuit Executive, U.S. Courts for Ninth Circuit 12/4/97	11/8/96 Referred to chair 5/97 - Reporter recommended consideration of comprehensive revision 1/98 - Referred to reporter, chair, and Agenda Subcommittee 3/98 - Committee considered 11/98 - Committee considered 3/99 - Agenda Subcommittee recommended full Committee consideration 4/99 - Committee considered 10/99 - Committee considered 4/00 - Committee considered 10/00 - Committee considered 4/01 - Committee considered 1/02 - Committee held public hearing 5/02 - Committee approved amendments 6/02 - Standing Committee approved 9/02 - Judicial Conference approved 3/03 - Supreme Court approved **PENDING FURTHER ACTION**
Rule 53 Provisions regarding pretrial and post-trial masters	Judge Wayne Brazil	5/93 - Committee considered 10/93 - Committee considered 4/94 - Committee considered draft amendments to Civil Rule 16.1 regarding "pretrial masters" 10/94 - Committee considered draft amendments 11/98 - Subcommittee appointed 3/99 - Agenda Subcommittee recommended referral to other Committee 10/99 - Committee considered and requested Federal Judicial Center to conduct survey 4/00 - Committee considered FJC preliminary report 1/02 - Committee held public hearing 5/02 - Committee approved amendments 6/02 - Standing Committee approved 9/02 - Judicial Conference approved 3/03 - Supreme Court approved **PENDING FURTHER ACTION**
Rule 55(a) Amend rule to provide that a default may also be entered against a defending party "for failure to comply with these rules or any order of court."	Prof. Bradley Scott Shannon 1/14/03 (02-CV-F Addendum)	1/03 - Referred to reporter and chair **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 56 To clarify cross-motion for summary judgment	John J. McCarthy 11/21/97	12/97 - Referred to reporter, chair, and Agenda Subcommittee **PENDING FURTHER ACTION**
Rule 56(a) Clarification of timing	97-CV-B Scott Cagan 2/27/97	3/97 - Referred to reporter, chair, and Agenda Subcommittee 5/97 - Reporter recommended no action 3/99 - Agenda Subcommittee to accumulate for periodic revision **PENDING FURTHER ACTION**
Rule 56(c) Time for service and grounds for summary adjudication	Judge Judith N. Keep 11/21/94	4/95 - Committee considered 11/95 - Committee considered 3/99 - Agenda Subcommittee to accumulate for periodic revision 1/02 - Committee considered and set for further discussion **PENDING FURTHER ACTION**
Rule 62.1 Proposed new rule governing "Indicative Rulings"	Appellate Rules Committee 4/01	1/02 - Committee considered 5/03 - Committee considered **PENDING FURTHER ACTION**
Rule 68 Party may make a settlement offer that raises the stakes of the offeree who would continue the litigation	96-CV-C Agenda book for 11/92 meeting; Judge Swearingen 10/30/96 S. 79 Civil Justice Fairness Act of 1997 and § 3 of H.R. 903 02-CV-D Gregory K. Arenson 4/19/02	1/93 - Unofficial solicitation of public comment 5/93 - Committee considered 10/93 - Committee considered 4/94 - Committee considered. Federal Judicial Center to study rule 10/94 - Committee deferred for further study 1995 - Federal Judicial Center completes its study **DEFERRED INDEFINITELY** 10/96 - Referred to reporter, chair, and Agenda Subcommittee (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 recommended continued monitoring 3/99 - Agenda Subcommittee recommended removal from agenda 10/99 - Consent calendar removed from agenda **COMPLETED** 5/02 - Referred to reporter and chair 10/02 - Committee considered and agreed to carry forward suggestion **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 81 To add injunctions to the rule	John J. McCarthy 11/21/97	12/97 - Referred to reporter, chair, and Agenda Subcommittee **PENDING FURTHER ACTION**
Rule 81(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 recommended that it be included in next technical amendment package 3/99 - Agenda Subcommittee to accumulate for periodic revision 4/99 - Committee considered **PENDING FURTHER ACTION**
Rule 83(a)(1) Uniform effective date for local rules and transmission to AO		3/98 - Committee considered 11/98 - Committee considered 3/99 - Agenda Subcommittee recommends referral to other Committee (3) 4/00 - Committee considered **DEFERRED INDEFINITELY**
Rule 83 Have a uniform rule making Federal Rules of Civil Procedure consistent with Federal Rules of Appellate Procedure with respect to attorney admission	02-CV-H Frank Amador, Esq. 9/19/02	9/02 - Referred to reporter and chair **PENDING FURTHER ACTION**
FORMS		
CV Form 1 Standard form AO 440 should be consistent with summons Form 1	98-CV-F Joseph W. Skupniewitz, Clerk 10/2/98	10/98 - Referred to chair, reporter, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommended full Committee consideration **PENDING FURTHER ACTION**
CV Form 17 Complaint form for copyright infringement	Professor Edward Cooper 10/27/97	10/97 - Referred to Committee 3/99 - Agenda Subcommittee recommends full Committee consideration 4/99 - Committee deferred for further study **PENDING FURTHER ACTION**
CV Forms 31 and 32 Delete the phrase, "that the action be dismissed on the merits" as erroneous and confusing	02-CV-F Prof. Bradley Scott Shannon 5/30/02	7/02 - Referred to chair and reporter 10/02 - Referred to Style Consultant **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
AO Forms 241 and 242 Amend to conform to changes under the Antiterrorism and Effective Death Penalty Act of 1997	98-CV-D Judge Harvey E. Schlesinger 8/10/98	8/98 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommends referral to other Committee **PENDING FURTHER ACTION**
SUBJECT MATTER		
Admiralty Rule B Clarify Rule B by establishing the time for determining when the defendant is found in the district	01-CV-B William R. Dorsey, III, Esq., President, The Maritime Law Association	6/00 - Referred to reporter, chair, and Mark Kasanin 11/01 - Committee considered 10/02 - Committee approved for publication 1/03 - Standing Committee approved for publication **PENDING FURTHER ACTION**
New Admiralty Rule Authorize immediate posting of preemptive bond to prevent vessel seizure	96-CV-D Magistrate Judge Roberts 9/30/96 #1450	12/96 - Referred to Admiralty and Agenda Subcommittee 3/99 - Agenda Subcommittee deferred action until more information available 5/02 - Committee discussed new rule governing civil forfeiture practice 5/03 - Committee considered new Admiralty Rule G **PENDING FURTHER ACTION**
Admiralty Rule C(4) Amend to satisfy constitutional concerns regarding default in actions *in rem*	97-CV-V Gregory B. Walters, Cir. Exec., for Jud. Council of Ninth Cir. 12/4/97	1/98 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommended deferral until more information available **PENDING FURTHER ACTION**
Court filing fee AO regulations on court filing fees should not be effective until adoption in the FRCP or Local Rules of Court	02-CV-C James A. Andrews 4/1/02, 5/13/02	4/02 - Referred to reporter and chair 6/02 - Referred second letter to reporter and chair **PENDING FURTHER ACTION**
***De Bene Esse* Depositions** Provide specifically for *de bene esse* depositions	02-CV-G Judge Joseph E. Irenas 6/7/02	7/02 - Referred to reporter and chair 10/02 - Solicited input from Evidence Rules Committee **PENDING FURTHER ACTION**
Electronic Filing To require clerk's office to date stamp and return papers filed with the court.	99-CV-I John Edward Schomaker, prisoner 11/25/99	12/99 - Referred to reporter, chair, Agenda Subcommittee, and Technology Subcommittee **PENDING FURTHER ACTION**

Suggestion	Docket Number, Commentator, Date	Status
Interrogatories on Disk	98-CV-C Michelle Ritz 5/13/98 See also 99-CV-E: Jeffrey Yencho suggestion re: Rules 3 and 34	5/98 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee received and referred to other Committee **PENDING FURTHER ACTION**
Plain English Make the language understandable to all	02-CV-I Conan L. Hom, law student 10/2/02	10/02 - Referred to reporter and chair 5/03 - Committee considered and approved restyled Civil Rules 1-15 **PENDING FURTHER ACTION**
Postal Bar Codes Prevent manipulation of bar codes in mailings, as in zip plus 4 bar codes	00-CV-D Tom Scherer 3/2/00	7/00 - Referred to reporter, chair, and incoming chair **PENDING FURTHER ACTION**
Pro Se Litigants To create a committee to consider the promulgation of a specific set of rules governing cases filed by pro se litigants	97-CV-I Judge Anthony J. Battaglia, on behalf of the Federal Magistrate Judge Assn. Rules Committee, to support proposal by Judge David Piester 7/17/97	7/97 - Referred to reporter and chair 10/97 - Referred to Agenda Subcommittee 3/99 - Agenda Subcommittee received schedule for further study **PENDING FURTHER ACTION**
Simplified Procedures Establish federal small claims procedures	Judge Niemeyer 10/00	10/99 - Committee considered, Subcommittee appointed 4/00 - Committee considered 10/00 - Committee considered **PENDING FURTHER ACTION**
Word Substitution Substitute term "action" for "case" and other similar words; substitute term "averment" for "allegation" and other similar words	02-CV-F Prof. Bradley Scott Shannon 5/30/02	7/02 - Referred to reporter and chair 10/02 - Referred to Style Consultant **PENDING FURTHER ACTION**

CRIMINAL RULES DOCKET

ADVISORY COMMITTEE ON CRIMINAL RULES

The docket sets forth suggested changes to the Federal Rules of Criminal Procedure considered by the Advisory Committee since 1991. The suggestions are set forth in order by (1) criminal rule number, or (2) where there is no rule number, or several rules may be affected — alphabetically by subject matter.

Suggestion	Docket Number, Source and Date	Status
	CRIMINAL RULES	
Rule 4 Clarify the ability of judges to issue warrants via facsimile transmission	01-CR-A Magistrate Judge Bernard Zimmerman 1/29/01	1/01 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 6 Allow grand jury witness to be accompanied by counsel (see Rule 6(d) below)	01-CR-B Robert D. Evans, Director, American Bar Association 3/2/01	3/01 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 7(b) Effect of tardy indictment	00-CR-B Congressional constituent 3/21/00	5/00 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 10 Guilty plea at an arraignment	Judge B. Waugh Crigler 10/94	10/94 - Committee considered **DEFERRED INDEFINITELY**
Rule 11 To expressly inquire prior to trial whether prosecution's proposed guilty plea agreement was communicated to defendant	02-CR-C Judge David D. Dowd, Jr. 5/20/02	6/02 - Referred to reporter & chair **PENDING FURTHER ACTION**
Rule 11 To direct a random number of plea-bargained cases be tried	03-CR-C Carl E. Person, Esq. 4/1/03	4/03 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 12.2(d) Sanction for defendant's failure to disclose results of mental examination	Roger Pauley 7/5/01	4/02 - Committee considered 9/02 - Committee considered **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source and Date	Status
Rule 16(a) and (b) Disclosure of witness names and statements before trial	99-CR-D William R. Wilson, Jr., Esq. 2/92 & 5/18/99	2/92 - Committee considered 10/92 - Committee considered 4/93 - Committee deferred action until 10/93 10/93 - Committee considered 4/94 - Committee considered and approved for amendment 6/94 - Standing Committee approved for publication 9/94 - Published for public comment 4/95 - Committee considered and approved 7/95 - Standing Committee approved 9/95 - Judicial Conference declined to take action **COMPLETED** 5/99 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 23(a) Address the issue of when a jury trial is authorized	00-CR-D Jeremy A. Bell 11/00	11/00 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 29 Extension of time for filing motion	02-CR-B Judge Paul L. Friedman 3/02	4/02 - Sent directly to chair and reporter 4/02 - Committee considered 9/02 - Committee deferred consideration until 4/03 meeting 4/03 - Committee considered and approved, with amendments, for publication **PENDING FURTHER ACTION**
Rule 29 Preserve the government's right to appeal a trial court's decision to grant a motion for judgment of acquittal	Department of Justice 3/31/03	3/03 - Sent directly to chair and reporter 4/02 - Committee considered and deferred consideration pending additional research by the FJC **PENDING FURTHER ACTION**
Rule 32 Victim allocution at sentencing	Judge Hodges Prior to 4/92 Pending legislation reactivated issue in 1997/98.	10/92 - Standing Committee approved for publication 12/92 - Published for public comment 4/93 - Committee considered 6/93 - Standing Committee approved 9/93 - Judicial Conference approved 4/94 - Supreme Court approved 12/94 - Effective **COMPLETED** 10/97 - Committee indicated that it was not opposed to addressing the legislation. Committee resolved to maintain Subcommittee to monitor/respond to the legislation. **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 32(c)(3)(E) Provide for victim allocution in all felony cases	Professor Jayne Barnard	8/02 - Referred to chair and reporter 9/02 - Committee considered 4/03 - Committee considered and approved, with amendments, for publication **PENDING FURTHER ACTION**
Rule 32(c)(5) Clerk required to file notice of appeal	00-CR-A Gino J. Agnello Clerk of Court, 7th Circuit 4/11/00	3/00 - Sent directly to chair 5/00 - Referred to reporter **PENDING FURTHER ACTION**
Rule 32.1(a)(5)(B)(i) Eliminate requirement that the government produce *certified* copies of the judgment, warrant, and warrant application	03-CR-B Judge Wm. F. Sanderson, Jr. 2/24/03	3/03 - Referred to reporter and chair 4/03 - Committee considered **PENDING FURTHER ACTION**
Rule 32.1 Pending victims rights/allocution litigation	Pending litigation 1997/98	10/97 - Committee indicated that it did not take a position on the litigation and resolved to maintain Subcommittee to monitor litigation **PENDING FURTHER ACTION**
Rule 32.1 Right of allocution before sentencing at revocation hearing	02-CR-D U.S. v. Frazier 2/25/02	3/02 - Referred to chair and reporter 4/02 - Committee considered 9/02 - Committee considered 4/03 - Committee considered and approved, with amendments, for publication **PENDING FURTHER ACTION**
Rule 33 Extension of time to file motion for new trial	02-CR-B Judge Paul L. Friedman 3/02	4/02 - Sent directly to chair and reporter 4/02 - Committee considered 9/02 - Committee deferred consideration until 4/03 meeting 4/03 - Committee considered and approved, with amendments, for publication **PENDING FURTHER ACTION**
Rule 34 Extension of time to file motion	02-CR-B Judge Paul L. Friedman 3/02	4/02 - Sent directly to chair and reporter 4/02 - Committee considered 9/02 - Committee deferred consideration until 4/03 meeting 4/03 - Committee considered and approved, with amendments, for publication **PENDING FURTHER ACTION**
Rule 35 Allow defendants to move for reduction of sentence	01-CR-B Robert D. Evans, American Bar Association 3/2/01	3/01 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 40(a) Authorize magistrate judge to set new conditions of release	03-CR-A Magistrate Judge Robert B. Collings 1/03	1/03 - Referred to chair and reporter **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source and Date	Status
Rule 41(c)(2)(D) Recording of oral search warrant	Judge Dowd 2/98	4/98 - Committee deferred until study reveals need for change **DEFERRED INDEFINITELY**
Rule 57 Uniform effective date for local rules	Standing Committee Meeting 12/97	4/98 - Committee considered and deferred action **DEFERRED INDEFINITELY**
New Rule 59 To provide counterpart to Civil Rule 72	U.S. v. Abonce-Barerra 7/20/01	4/02 - Committee considered 9/02 - Committee approved proposed amendment in principle 4/03 - Committee considered and approved, with amendments, for publication **PENDING FURTHER ACTION**
	SUBJECT MATTER	
Habeas Corpus Rule 8(c) Correct apparent mistakes in Rules Governing Section 2254 Cases and Section 2255 Proceedings	97-CR-F Judge Peter Dorsey 7/9/97	8/97 - Referred to chair and reporter 10/97 - Referred to Subcommittee 4/98 - Committee considered 10/98 - Committee considered 4/00 - Committee considered and approved for publication 6/00 - Standing Committee approved for publication 8/00 - Published for public comment 4/01 - Committee deferred pending further study 4/02 - Committee considered and approved for publication 6/02 - Standing Committee approved for publication 8/02 - Published for public comment 4/03 - Committee considered and approved, with amendments **PENDING FURTHER ACTION**
Model form for motions under 28 U.S.C. § 2255	00-CR-C Robert L. Byer, Esq. & David R. Fine, Esq. 8/11/00	8/00 - Referred to chair and reporter 4/02 - Committee approved 6/02 - Standing Committee approved for publication 8/02 - Published for public comment 4/03 - Committee considered and approved, with amendments **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source and Date	Status
Restyle Habeas Corpus Rules		10/00 - Committee considered 1/01 - Standing Committee authorizes restyle project to proceed 4/02 - Committee approved for publication 6/02 - Standing Committee approved for publication 8/02 - Published for public comment 4/03 - Committee considered and approved, with amendments **PENDING FURTHER ACTION**

EVIDENCE RULES DOCKET

ADVISORY COMMITTEE ON EVIDENCE RULES

The docket sets forth suggested changes to the Federal Rules of Evidence considered by the Advisory Committee since 1992. The suggestions are set forth in order by (1) evidence rule number, or (2) where there is no rule number, or several rules may be affected — alphabetically by subject matter.

Suggestion	Docket Number, Source, and Date	Status
	EVIDENCE RULES	
Rule 301 Presumptions in General Civil Actions and Proceedings (applies to evidentiary presumptions but not substantive presumption.)		5/94 - Committee decided not to amend (comprehensive review) 6/94 - Standing Committee approved for publication 9/94 - Published for public comment 11/96 - Committee deferred until completion of project by Uniform Rules Committee **PENDING FURTHER ACTION**
Rule 408 Compromise and Offers to Compromise		4/02 - Committee referred to reporter 10/02 - Committee considered 4/03 - Committee considered **PENDING FURTHER ACTION**
Rule 410 To protect statements and offers by the prosecution		4/02 - Committee referred to reporter 10/02 - Committee considered 4/03 - Committee considered **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 501 Privileges (codifies the federal law of privileges)		11/96 - Committee declined to take action 10/98 - Committee reconsidered and appointed a subcommittee to study the issue 4/99 - Committee deferred consideration pending further study 10/99 - Subcommittee appointed 4/00 - Committee considered subcommittee's proposals 4/01 - Committee considered subcommittee's proposals 4/02 - Committee considered consultant's "Survey of Privileges" 10/02 - Committee considered survey 4/03 - Committee considered survey **PENDING FURTHER ACTION**
Rule 606(b) To provide an exception for correcting errors in the rendering of the verdict		4/02 - Committee referred to reporter 10/02 - Committee considered 4/03 - Committee considered **PENDING FURTHER ACTION**
Rule 608(b) Inconsistent rulings on exclusion of extrinsic evidence		10/99 - Committee considered 4/00 - Committee directed reporter to prepare draft amendment 4/01 - Committee approved amendments 6/01 - Standing Committee approved for publication 8/01 - Published for public comment 4/02 - Committee approved amendments with revisions 6/02 - Standing Committee approved 9/02 - Judicial Conference approved 3/03 - Supreme Court approved **PENDING FURTHER ACTION**
Rule 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)		2/91 - Civil Rules Committee considered and deferred action 11/96 - Committee considered 4/97 - Committee considered and deferred action until CACM completes its study **PENDING FURTHER ACTION**
Rule 801(d)(1) Hearsay exception for prior consistent statement that would otherwise be admissible to rehabilitate a witness's credibility		4/98 - Committee considered and deferred action **DEFERRED INDEFINITELY**

Suggestion	Docket Number, Source, and Date	Status
Rule 804(b)(3) Degree of corroboration regarding declaration against penal interest		10/99 - Committee considered 4/00 - Committee directed reporter to prepare draft amendment 4/01 - Committee approved 6/01 - Standing Committee approved for publication 8/01 - Published for public comment 4/02 - Committee approved with substantive revisions. Committee requested re-publication for public comment 6/02 - Standing Committee approved re-publication 8/02 - Published for public comment 4/03 - Committee approved with amendments **PENDING FURTHER ACTION**
Rule 902(6) Extending applicability to news wire reports		10/98 - Committee considered 4/00 - Committee considered **PENDING FURTHER ACTION**
Rule 1001 Definitions (Cross references to automation changes)		10/97 - Committee considered **PENDING FURTHER ACTION**
	SUBJECT MATTER	
[Admissibility of Videotaped Expert Testimony]		11/96 - Committee declined to take action but will continue to monitor rule 1/97 - Standing Committee considered **PENDING FURTHER ACTION**
[Automation] — To investigate whether the Evidence Rules should be amended to accommodate changes in automation and technology		11/96 - Committee considered 4/97 - Committee considered 4/98 - Committee considered 10/02 - Committee considered **PENDING FURTHER ACTION**

Committee on the Rules of Practice and Procedure
June 2003
Informational

Update of Federal Judicial Center Programs and Activities

At each Committee meeting, the Federal Judicial Center provides an update on projects and activities that may be of interest to the Committee. The following briefly describes: (1) education programs that will be offered to judges and court personnel during the July-December 2003 time frame; (2) judicial monographs and publications recently completed or nearing completion; (3) information about educational activities for foreign judges and staff; and (4) the status of selected FJC history and research projects.

I. Educational Programs

The FJC presents most judicial education through in-person seminars. Most staff education is delivered through a variety of distance education methodologies that give individual court units greater flexibility in selecting topics and requesting in-house training for their staff. Judicial and court staff training activities developed in accordance with the Center's long-term program plan are described later in this report.

A. Federal Judicial Television Network

Center staff manages the Federal Judicial Television Network (FJTN) studios and produce the *FJTN Bulletin*, an electronic publication that lists broadcast calendars and synopses of upcoming programs from the Center, the Administrative Office, and the United States Sentencing Commission.

Twelve original broadcasts will be produced for court personnel from July to December 2003. Programs for clerk's office staff will discuss appellate case closing, updates to capital case issues, and processing multi-district litigation. Programs on sentencing, guidelines, domestic violence, safety issues associated with personal confrontations, and supervision issues concerning will be offered for probation and pretrial services officers. Management programs will explore succession planning and the challenge of supervising remaining staff in a downsized workforce. And new editions of *Court to Court,* the Center's television magazine for all court employees, will be released in July and October.

Three new programs are slated for judges, court attorneys, and chambers staff: the annual review of Supreme Court decisions, the annual orientation for new law clerks (which includes discussion of ethics and legal writing), and an employment law program for law clerks.

The Center's FJTN staff works with Administrative Office staff to broadcast Administrative Office programs on human resources and other operational matters, such as live interactive training programs and informational broadcasts on employee benefits, information technology, and case management/electronic case filing (CM/ECF).

B. Videoconferences, On-line Conferences, and Audio conferences for Court Staff

During October 2003, new court training specialists will participate in a five-part orientation program that will be conducted through videoconferences originating from the Center's studio. District court deputy clerks will have an opportunity to participate in one of two eight-week, asynchronous on-line conferences on the impact of technology on case flow management. New chief probation and pretrial services officers will be invited to "attend" an audio conference with experienced chiefs who will discuss leadership challenges new chiefs may encounter during their first year in the position.

C. Other Education for Court Staff

A small percentage of the Center's training budget for court staff is allocated for travel-based workshops. From July to December, the Center will conduct:

- a biennial national conference for U.S. Bankruptcy Court clerks, chief deputy clerks, bankruptcy administrators, and Bankruptcy Appellate Panel clerks;
- three leadership institutes for mid-level managers;
- two workshops on managing a capital construction project (with the Administrative Office);
- three national orientation seminars for probation and pretrial services officers;
- two train-the-trainer workshops for new Center-designed packaged programs on customer service in a CM/ECF environment and trust in the workplace; and
- a new train-the-trainer concept: a workshop to teach subject-matter experts in the courts how to develop curricula with Center assistance.

Several training products will be added to the Center's complement of distance education programs. Two new packaged programs will be delivered to court units on request: *Strategic Planning for Information Technology* and *Developing a CM/ECF Training Plan.* District courts will find the 2003 downloadable web-based program, *Electronic Case Filing Tutorial for*

Criminal Case Attorneys, to be useful in assisting law office staff. Bankruptcy court staff and law clerks will benefit from the updated and downloadable *Computer-Assisted Instructional Program on the Federal Rules of Bankruptcy Procedure,* which includes updates to the rules and statutory changes.

D. Other Education for Federal Judges

1. Seminars

The Center provides a variety of opportunities for new and experienced judges to attend programs that enhance their skills and knowledge through interaction with faculty and other participants. In the latter half of 2003, these will include:

- orientation programs (as necessary) and national workshops for bankruptcy and magistrate judges, respectively;
- a series of circuit-based workshops for court of appeals and district court judges;
- special topic programs on Section 1983 litigation and mediation skill; and
- in-court seminars on topics such as intellectual property and opinion writing.

In October, chief district judges and court unit executives will attend an executive institute that will explore contemporary parallels to the lessons of leadership derived from President Lincoln's experiences during the Civil War.

The Center also produces original videos to complement Center curricula or to use as stand-alone programs. Videos are currently in production for use in new judge orientation programs on criminal pretrial procedure, jury trials, and bankruptcy case management.

2. Judicial manuals and monographs

Center publications for judges span a broad range of topics. The third edition of the *Deskbook for Chief Judges of U.S. District Courts* was distributed to all judges and senior court managers in March. Works in progress include new monographs on admiralty law and the Employment Retirement Income Security Act and new editions of the Center's monographs on attorney's fees, securities litigation, copyright law, and employment law.

Staff is nearing completion on a project on managing state habeas cases, a companion resource to the Center's compilation and summary of procedures used in handling federal death penalty cases. The latter publication includes a description of the differences between these procedures and those used in more routine criminal litigation, sample jury questionnaires, instructions, verdict forms, scheduling orders, and other materials developed by judges who have handled death penalty cases. The capital habeas materials will be available soon in electronic

form on the Center's intranet and Internet web sites, as are the federal death penalty materials. Both will be revised as the courts' experiences warrant.

A new edition of the Center's *Manual for Complex Litigation* is in development and work continues on a bankruptcy debtor education handbook.

E. Education for Foreign Judges and Staff

Pursuant to a mandate in its statute, the Center coordinates informational briefings and longer format programs for delegations of judges and judicial personnel from foreign countries. Topics may include general overviews of the U.S. judicial system, discussions of the Center's work and strategies for delivering educational programs for judges and court staff, case management issues or court-annexed alternative dispute resolution (ADR) programs. For the period November 1, 2002 through May 31, 2003, there were 27 briefings for 197 judges and/or court officials from 51 countries.

II. Research and Judicial History Projects

District and Bankruptcy Court Case Weights. The Center's projects to update the current district court and bankruptcy court case weights are on schedule. In March 2003, the Center convened a technical advisory group meeting to assist staff with plans for collecting court docket entry data to update the district court case weights. The group included representatives from the programming and support divisions of the Administrative Office, and operations, systems, and clerk's office staff from several courts. At the end of April, the Center held the first meeting of the judge advisory group for the project; participants included members of this Committee and a Center Board representative. Project staff gave presentations on the design of the district court case weighting study to the Conference of District Judge Representatives to the Judicial Conference in March, the Administrative Office's Clerks' Advisory Group in April, and the District Court Chief Judges in April.

Beginning in early April through late May, Center and Administrative Office staff assisted a General Accounting Office team reviewing the workload measures on which the judgeship requests now before Congress are based.

Remote Public Access to Criminal Case Files. At the request of the Committee on Court Administration and Case Management (CACM), the Center is assessing the Judicial Conference's Criminal Case Files Pilot Program in which ten courts are providing remote public electronic access to documents filed in criminal cases. The Center is also studying the

experiences of four other courts that allowed remote electronic public access to criminal case files before the Judicial Conference's pilot; six courts that have never allowed remote public access (as comparison courts for the study); and the Eighth Circuit's experiences with allowing remote public access to electronic case files in criminal appeals. The results of the study will be presented at CACM's June 2003 meeting.

Bankruptcy Mega Chapter 11 Venue Conference. The Committee on the Administration of the Bankruptcy System created a subcommittee to study venue and case management aspects of mega cases that have multiple filings. The Center is assisting the subcommittee with its work. In January 2003, the Center organized a conference for a small number of judges and attorneys to clarify the research needed by the subcommittee. The Center subsequently prepared a conference follow-up report for the Committee.

Survey on Courtroom Technology. As a follow-up to the release of its manual (with the National Institute for Trial Advocacy) on the effective use of courtroom technology, the Center conducted a survey of district court clerks to determine the extent to which courtroom technology is used in each district court, the purpose and frequency of usage, and the types of equipment that are available. The survey also asked how the technology is managed at the local level and the resources required to do so. The survey is part of the Center's on-going project to develop information to help judges handle electronic evidence as they preside over cases and to help evaluate any need for procedural or evidentiary rule changes.

Study of the ADR Program of the Court of Federal Claims. At the request of the Court of Federal Claims, the Center is conducting an evaluation of the court's recently implemented ADR program. Although the Center does not typically conduct studies for individual courts, the Claims Court program provides an opportunity to examine the use of senior judges as the ADR providers and the use of ADR in cases where the government is a party. Lessons learned will be shared with other federal courts through publication of the evaluation findings.

Sealed Court Settlements. At the request of the Advisory Committee on Civil Rules, the Center is conducting an empirical study of the district courts' practice of entering orders to keep settlements confidential. The study will provide descriptive data on the incidence, nature, and reasons why such orders are entered. The Center has completed an analysis of local rules

governing filing of sealed setlements and has submitted a report on that segment of the study to the Advisory Committee on Civil Rules.

Class Action Filing Patterns: Attorney Survey. As a follow-up to its report analyzing class actions filed in 82 federal district courts, and at the request of the Advisory Committee on Civil Rules, the Center is surveying a national sample of attorneys who have been involved in class action litigation. The objective of this study is to obtain data and other information about any discernible effects of Supreme Court decisions on the rate and type of class action filings in federal district courts.

Judicial history Projects. The Center has initiated an educational project on illustrative cases in the history of the trial and intermediate appellate courts of the federal judiciary. The first unit, focused on the *Amistad* case, is available online on the Center's intranet web site and was released in conjunction with its FJTN educational video on the case. The next unit will concern several cases dealing with issues of loyalty and free speech.

A history of the office of district court clerk was published last year and the history section of the Center's home page has been revised to include more information on the history of judicial administration and courts of special jurisdiction.

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

SAMUEL A. ALITO, JR.
APPELLATE RULES

A. THOMAS SMALL
BANKRUPTCY RULES

DAVID F. LEVI
CIVIL RULES

EDWARD E. CARNES
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

MEMORANDUM

DATE: May 22, 2003

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

FROM: Judge Samuel A. Alito, Jr., Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on May 15, 2003, in Washington, D.C. At its meeting, the Advisory Committee approved three proposed amendments, removed two proposals from its study agenda, and agreed to continue to study several other proposals. Detailed information about the Advisory Committee's activities can be found in the minutes of the May 15 meeting and in the Advisory Committee's study agenda, both of which are attached to this report.

II. Action Items

Pursuant to the request of the Standing Committee, the Advisory Committee has not forwarded proposed amendments to the Standing Committee in a piecemeal fashion, but instead has collected proposed amendments to present to the Standing Committee at one time. The last group of proposed amendments to the Appellate Rules were published in August 2000 and took effect in December 2002. The Advisory Committee now seeks the Standing Committee's approval to publish another group of proposed amendments in August 2003.

A. Rule 4(a)(6)

Rule 4(a)(6) provides a safe harbor for litigants who fail to bring timely appeals because they do not receive notice of the entry of judgments against them. A district court is authorized to reopen

the time to appeal a judgment if the district court finds that several conditions have been satisfied, including that the appellant did not receive notice of the entry of the judgment within 21 days and that the appellant moved to reopen the time to appeal within 7 days after learning of the judgment's entry.

The Advisory Committee proposes to amend Rule 4(a)(6) to clarify what type of notice must be absent before an appellant is eligible to move to reopen the time to appeal. That issue has been cast into doubt by the 1998 restyling of the Appellate Rules. Prior to 1998, it was clear that a party was precluded from moving to reopen the time to appeal a judgment only when the party received formal notice of that judgment under Civil Rule 77(d). Under restyled Rule 4(a)(6), it appears that *some* kind of notice, in addition to Civil Rule 77(d) notice, precludes a party from later moving to reopen, but the rule does not make clear *what* kind of notice qualifies. The proposed amendment to Rule 4(a)(6) would restore pre-1998 clarity on this issue.

The Advisory Committee also proposes to amend Rule 4(a)(6) to specify what type of notice triggers the 7-day period to move to reopen the time to appeal. As the Committee Note discusses, a four-way circuit split has developed over this issue. The proposed amendment would provide that only written notice triggers the 7-day period, and the Committee Note would define "written" broadly to include, for example, notice observed by checking a court docket or a website.

The Advisory Committee unanimously approved this amendment at our May 2003 meeting.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

* * * * *

(6) **Reopening the Time to File an Appeal.** The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

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

(B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives or observes written notice of the entry from any source, whichever is earlier;

~~(B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry;~~ and

(C) the court finds that no party would be prejudiced.

* * * * *

Committee Note

Rule 4(a)(6) has permitted a district court to reopen the time to appeal a judgment or order upon finding that four conditions were satisfied. First, the district court had to find that the appellant did not

receive notice of the entry of the judgment or order from the district court or any party within 21 days after the judgment or order was entered. Second, the district court had to find that the appellant moved to reopen the time to appeal within 7 days after the appellant received notice of the entry of the judgment or order. Third, the district court had to find that the appellant moved to reopen the time to appeal within 180 days after the judgment or order was entered. Finally, the district court had to find that no party would be prejudiced by the reopening of the time to appeal.

Rule 4(a)(6) has been amended to specify more clearly what kind of "notice" of the entry of a judgment or order precludes a party from later moving to reopen the time to appeal. In addition, Rule 4(a)(6) has been amended to address confusion about what kind of "notice" triggers the 7-day period to bring a motion to reopen. Finally, Rule 4(a)(6) has been reorganized to set forth more logically the conditions that must be met before a district court may reopen the time to appeal.

Subdivision (a)(6)(A). Former subdivision (a)(6)(B) has been redesignated as subdivision (a)(6)(A), and one important substantive change has been made.

Prior to 1998, former subdivision (a)(6)(B) permitted a district court to reopen the time to appeal if it found "that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry." The rule was clear that the "notice" to which it referred was the notice required under Civil Rule 77(d), which must be served by the clerk pursuant to Civil Rule 5(b) and may also be served by a party pursuant to that same rule. In other words, prior to 1998, former subdivision (a)(6)(B)

was clear that, if a party did not receive formal notice of the entry of a judgment or order under Civil Rule 77(d), that party could later move to reopen the time to appeal (assuming that the other requirements of subdivision (a)(6) were met).

In 1998, former subdivision (a)(6)(B) was amended to change the description of the type of notice that would preclude a party from moving to reopen the time to appeal. As a result of the amendment, former subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive "*such* notice" — that is, the notice required by Civil Rule 77(d) — but instead referred to the failure of the moving party to receive "*the* notice." And former subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive notice from "the *clerk* or any party," both of whom are explicitly mentioned in Civil Rule 77(d). Rather, former subdivision (a)(6)(B) referred to the failure of the moving party to receive notice from "the *district court* or any party."

The 1998 amendment meant, then, that the type of notice that precluded a party from moving to reopen the time to appeal was no longer limited to Civil Rule 77(d) notice. Under the 1998 amendment, *some* kind of notice, in addition to Civil Rule 77(d) notice, precluded a party. But the text of the amended rule did not make clear what kind of notice qualified. This was an invitation for litigation, confusion, and possible circuit splits.

To avoid such problems, former subdivision (a)(6)(B) — new subdivision (a)(6)(A) — has been amended to restore its pre-1998 simplicity. Under new subdivision (a)(6)(A), if the court finds that the moving party was not notified under Civil Rule 77(d) of the entry of the judgment or order that the party seeks to appeal within 21 days

after that judgment or order was entered, then the court is authorized to reopen the time to appeal (if all of the other requirements of subdivision (a)(6) are met). Because Civil Rule 77(d) requires that notice of the entry of a judgment or order be formally served under Civil Rule 5(b), any notice that is not so served will not operate to preclude the reopening of the time to appeal under new subdivision (a)(6)(A).

Subdivision (a)(6)(B). Former subdivision (a)(6)(A) has been redesignated as subdivision (a)(6)(B), and one important substantive change has been made.

New subdivision (a)(6)(B) makes clear that only *written* notice of the entry of a judgment or order will trigger the 7-day period for a party to move to reopen the time to appeal that judgment or order. However, all that is required is that a party receive or observe written notice of the entry of the judgment or order, not that a party receive or observe a copy of the judgment or order itself. Moreover, nothing in new subdivision (a)(6)(B) requires that the written notice be received from any particular source, and nothing requires that the written notice be served pursuant to Civil Rules 77(d) or 5(b). "Any written notice of entry received by the potential appellant or his counsel (or conceivably by some other person), regardless of how or by whom sent, is sufficient to open [new] subpart [(B)'s] seven-day window." *Wilkens v. Johnson*, 238 F.3d 328, 332 (5th Cir. 2001) (footnotes omitted). Thus, a person who checks the civil docket of a district court action and learns that a judgment or order has been entered has observed written notice of that entry. And a person who learns of the entry of a judgment or order by fax, by e-mail, or by viewing a website has also received or observed written notice. However, an oral communication is not written notice for purposes

of new subdivision (a)(6)(B), no matter how specific, reliable, or unequivocal.

Courts had difficulty agreeing upon what type of "notice" was sufficient to trigger the 7-day period to move to reopen the time to appeal under former subdivision (a)(6)(A). The majority of circuits held that only written notice was sufficient, although nothing in the text of the rule suggested such a limitation. *See, e.g., Bass v. United States Dep't of Agric.*, 211 F.3d 959, 963 (5th Cir. 2000). By contrast, the Ninth Circuit held that while former subdivision (a)(6)(A) did not require written notice, "the quality of the communication [had to] rise to the functional equivalent of written notice." *Nguyen v. Southwest Leasing & Rental, Inc.*, 282 F.3d 1061, 1066 (9th Cir. 2002). It appeared that oral communications could be deemed "the functional equivalent of written notice" if they were sufficiently "specific, reliable, and unequivocal." *Id.* Other circuits suggested in dicta that former subdivision (a)(6)(A) required only "actual notice," which, presumably, could have included oral notice that was not "the functional equivalent of written notice." *See, e.g., Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 464 (8th Cir. 2000). And still other circuits read into former subdivision (a)(6)(A) restrictions that appeared only in former subdivision (a)(6)(B) (such as the requirement that notice be received "from the district court or any party," *see Benavides v. Bureau of Prisons*, 79 F.3d 1211, 1214 (D.C. Cir. 1996)) or that appeared in neither former subdivision (a)(6)(A) nor former subdivision (a)(6)(B) (such as the requirement that notice be served in the manner prescribed by Civil Rule 5, *see Ryan v. First Unum Life Ins. Co.*, 174 F.3d 302, 305 (2d Cir. 1999)).

New subdivision (a)(6)(B) resolves this circuit split by making clear that only receipt or observation of *written* notice of the entry of

a judgment or order will trigger the 7-day period for a party to move to reopen the time to appeal.

B. Washington's Birthday Package: Rules 26(a)(4) and 45(a)(2)

During the 1998 restyling of the Appellate Rules, the phrase "Washington's Birthday" was replaced with "Presidents' Day." The Advisory Committee has concluded that this was a mistake. A federal statute — 5 U.S.C. § 6103(a) — officially designates the third Monday in February as "Washington's Birthday," and the other rules of practice and procedure — including the newly restyled Criminal Rules — use "Washington's Birthday."

The Advisory Committee proposes to amend Rules 26(a)(4) and 45(a)(2) to replace "Presidents' Day" with "Washington's Birthday." The Advisory Committee unanimously approved these amendments at our April 2002 meeting.

Rule 26. Computing and Extending Time

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

* * * * *

(4) As used in this rule, "legal holiday" means New Year's Day, Martin Luther King, Jr.'s Birthday,

~~Presidents' Day~~ Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

* * * * *

Committee Note

Subdivision (a)(4). Rule 26(a)(4) has been amended to refer to the third Monday in February as "Washington's Birthday." A federal statute officially designates the holiday as "Washington's Birthday," reflecting the desire of Congress specially to honor the first president of the United States. *See* 5 U.S.C. § 6103(a). During the 1998 restyling of the Federal Rules of Appellate Procedure, references to "Washington's Birthday" were mistakenly changed to "Presidents' Day." The amendment corrects that error.

Rule 45. Clerk's Duties

(a) **General Provisions.**

* * * * *

(2) **When Court Is Open.** The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order. 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. A court may provide by local rule or by order that the clerk's office be open for specified hours on Saturdays or on legal holidays other than New Year's Day, Martin Luther King, Jr.'s Birthday, ~~Presidents' Day~~ Washington's Birthday, Memorial Day, Independence Day, Labor

Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

* * * * *

Committee Note

Subdivision (a)(2). Rule 45(a)(2) has been amended to refer to the third Monday in February as "Washington's Birthday." A federal statute officially designates the holiday as "Washington's Birthday," reflecting the desire of Congress specially to honor the first president of the United States. *See* 5 U.S.C. § 6103(a). During the 1998 restyling of the Federal Rules of Appellate Procedure, references to "Washington's Birthday" were mistakenly changed to "Presidents' Day." The amendment corrects that error.

C. New Rule 27(d)(1)(E)

The Advisory Committee proposes to add a new subdivision (E) to Rule 27(d)(1) to make it clear that the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) apply to motion papers. Applying these restrictions to motion papers is necessary to prevent abuses — such as litigants using very small typeface to cram as many words as possible into the pages that they are permitted.

The Advisory Committee unanimously approved this amendment at our November 2002 meeting.

Rule 27. Motions

* * * * *

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

(1) **Format.**

(A) **Reproduction.** A motion, response, or reply may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.

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

(C) **Binding.** The document must be bound in any manner that is secure, does not obscure the text, and permits the document to lie reasonably flat when open.

(D) **Paper size, line spacing, and margins.** The document must be on 8½ by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(E) **Typeface and type styles.** The document must comply with the typeface requirements

of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6).

* * * * *

Committee Note

Subdivision (d)(1)(E). A new subdivision (E) has been added to Rule 27(d)(1) to provide that a motion, a response to a motion, and a reply to a response to a motion must comply with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6). The purpose of the amendment is to promote uniformity in federal appellate practice and to prevent the abuses that might occur if no restrictions were placed on the size of typeface used in motion papers.

D. Cross-Appeals Package: Rules 28(c) and 28(h), new Rule 28.1, and Rules 32(a)(7)(C) and 34(d)

The Appellate Rules say very little about briefing in cases involving cross-appeals. This omission has been a continuing source of irritation for judges and attorneys, and most courts have filled the national vacuum by enacting local rules regarding such matters as the number and length of briefs, the colors of the covers of briefs, and the deadlines for serving and filing briefs. Not surprisingly, there are many inconsistencies among these local rules.

The Advisory Committee proposes to add a new Rule 28.1 that would collect in one place the few existing provisions regarding briefing in cases involving cross-appeals and add several new

provisions to fill the gaps in the existing rules. Each of the new provisions reflects the practices of a large majority of circuits.

The Advisory Committee unanimously approved these amendments at our November 2002 meeting.

Rule 28. Briefs

* * * * *

(c) **Reply Brief.** The appellant may file a brief in reply to the appellee's brief. ~~An appellee who has cross-appealed may file a brief in reply to the appellant's response to the issues presented by the cross-appeal.~~ Unless the court permits, no further briefs may be filed. A reply brief must contain a table of contents, with page references, and a table of authorities — cases (alphabetically arranged), statutes, and other authorities — with references to the pages of the reply brief where they are cited.

* * * * *

~~**(h) Briefs in a Case Involving a Cross-Appeal.** If a cross-appeal is filed, the party who files a notice of appeal first is the appellant for the purposes of this rule and Rules 30, 31, and 34. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by agreement of the parties or by court order. With respect to appellee's cross-appeal and response to appellant's brief, appellee's brief must conform to the requirements of Rule 28(a)(1)-(11). But an appellee who is satisfied with appellant's statement need not include a statement of the case or of the facts.~~ [Reserved]

* * * * *

Committee Note

Subdivision (c). Subdivision (c) has been amended to delete a sentence that authorized an appellee who had cross-appealed to file a brief in reply to the appellant's response. All rules regarding briefing in cases involving cross-appeals have been consolidated into new Rule 28.1.

Subdivision (h). Subdivision (h) — regarding briefing in cases involving cross-appeals — has been deleted. All rules regarding such briefing have been consolidated into new Rule 28.1.

Rule 28.1. Cross-Appeals

(a) **Applicability.** This rule applies to a case in which a cross-appeal is filed. Rules 28(a)-(c), 31(a)(1), 32(a)(2), and 32(a)(7)(A)-(B) do not apply to such a case, except as otherwise provided in this rule.

(b) **Designation of Appellant.** The party who files a notice of appeal first is the appellant for the purposes of this rule and Rules 30 and 34. If notices are filed on the same day, the plaintiff in the proceeding below is the

appellant. These designations may be modified by agreement of the parties or by court order.

(c) **Briefs.** In a case involving a cross-appeal:

(1) **Appellant's Principal Brief.** The appellant must file a principal brief in the appeal. That brief must comply with Rule 28(a).

(2) **Appellee's Principal and Response Brief.** The appellee must file a principal brief in the cross-appeal and must, in the same brief, respond to the principal brief in the appeal. That appellee's brief must comply with Rule 28(a), except that the brief need not include a statement of the case or a statement of the facts unless the appellee is dissatisfied with the appellant's statement.

(3) **Appellant's Response and Reply Brief.** The appellant must file a brief that responds to the

principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal. That brief must comply with Rule 28(a)(2)–(9) and (11), except that none of the following need appear unless the appellant is dissatisfied with the appellee's statement in the cross-appeal:

(A) the jurisdictional statement;

(B) the statement of the issues;

(C) the statement of the case;

(D) the statement of the facts; and

(E) the statement of the standard of review.

(4) **Appellee's Reply Brief.** The appellee may file a brief in reply to the response in the cross-appeal. That brief must comply with Rule 28(a)(2)–(3) and (11). That brief must also be limited to the issues presented by the cross-appeal.

(5) **No Further Briefs.** Unless the court permits, no further briefs may be filed in a case involving a cross-appeal.

(d) Cover. Except for filings by unrepresented parties, the cover of the appellant's principal brief must be blue; the appellee's principal and response brief, red; the appellant's response and reply brief, yellow; and the appellee's reply brief, gray. The front cover of a brief must contain the information required by Rule 32(a)(2).

(e) Length.

(1) **Page Limitation.** Unless it complies with Rule 28.1(e)(2) and (3), the appellant's principal brief must not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

(2) **Type-Volume Limitation.**

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if:

(i) it contains no more than 14,000 words; or

(ii) it uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if:

(i) it contains no more than 16,500 words; or

(ii) it uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it contains no more than half of the type volume specified in Rule 28.1(e)(2)(A).

(3) **Certificate of Compliance.** A brief submitted under Rule 28(e)(2) must comply with Rule 32(a)(7)(C).

(f) **Time to Serve and File a Brief.** The appellant's principal brief must be served and filed within 40 days after the record is filed. The appellee's principal and response brief must be served and filed within 30 days after the appellant's principal brief is served. The appellant's response and reply brief must be served and filed within 30 days after the appellee's principal and response brief is served. The appellee's reply brief must be served and filed within 14 days after the appellant's response and reply brief is served, but the appellee's

reply brief must be filed at least 3 days before argument,

unless the court, for good cause, allows a later filing.

Committee Note

The Federal Rules of Appellate Procedure have said very little about briefing in cases involving cross-appeals. This vacuum has frustrated judges, attorneys, and parties who have sought guidance in the rules. More importantly, this vacuum has been filled by conflicting local rules regarding such matters as the number and length of briefs, the colors of the covers of briefs, and the deadlines for serving and filing briefs. These local rules have created a hardship for attorneys who practice in more than one circuit.

New Rule 28.1 provides a comprehensive set of rules governing briefing in cases involving cross-appeals. The few existing provisions regarding briefing in such cases have been moved into new Rule 28.1, and several new provisions have been added to fill the gaps in the existing rules. The new provisions reflect the practices of the large majority of circuits and, to a significant extent, the new provisions have been patterned after the requirements imposed by Rules 28, 31, and 32 on briefs filed in cases that do not involve cross-appeals.

Subdivision (a). Subdivision (a) makes clear that, in a case involving a cross-appeal, briefing is governed by new Rule 28.1, and not by Rules 28(a), 28(b), 28(c), 31(a)(1), 32(a)(2), 32(a)(7)(A), and 32(a)(7)(B), except to the extent that Rule 28.1 specifically incorporates those rules by reference.

Subdivision (b). Subdivision (b) defines who is the "appellant" and who is the "appellee" in a case involving a cross-appeal. Subdivision (b) is taken directly from former Rule 28(h), except that subdivision (b) refers to a party being designated as an appellant "for the purposes of this rule and Rules 30 and 34," whereas former Rule 28(h) also referred to Rule 31. Because the matter addressed by Rule 31(a)(1) — the time to serve and file briefs — is now addressed directly in new Rule 28(f), the cross-reference to Rule 31 is no longer necessary.

Subdivision (c). Subdivision (c) provides for the filing of four briefs in a case involving a cross-appeal. This reflects the practice of every circuit except the Seventh. *See* 7th Cir. R. 28(d)(1)(a).

The first brief is the "appellant's principal brief." That brief — like the appellant's principal brief in a case that does not involve a cross-appeal — must comply with Rule 28(a).

The second brief is the "appellee's principal and response brief." Because this brief serves as the appellee's principal brief on the merits of the cross-appeal, as well as the appellee's response brief on the merits of the appeal, it must also comply with Rule 28(a), with the limited exceptions noted in the text of the rule.

The third brief is the "appellant's response and reply brief." Like a response brief in a case that does not involve a cross-appeal — that is, a response brief that does not also serve as a principal brief on the merits of a cross-appeal — the appellant's response and reply brief must comply with Rule 28(a)(2)-(9) and (11), with the exceptions noted in the text of the rule. *See* Rule 28(b). The one difference between the appellant's response and

reply brief, on the one hand, and a response brief filed in a case that does not involve a cross-appeal, on the other, is that the latter must include a corporate disclosure statement. *See* Rule 28(a)(1) and (b). An appellant filing a response and reply brief in a case involving a cross-appeal has already filed a corporate disclosure statement with its principal brief on the merits of the appeal.

The fourth brief is the "appellee's reply brief." Like a reply brief in a case that does not involve a cross-appeal, it must comply with Rule 28(c), which essentially restates the requirements of Rule 28(a)(2)–(3) and (11). (Rather than restating the requirements of Rule 28(a)(2)-(3) and (11), as Rule 28(c) does, Rule 28.1(c)(4) includes a direct cross-reference.) The appellee's reply brief must also be limited to the issues presented by the cross-appeal.

Subdivision (d). Subdivision (d) specifies the colors of the covers on briefs filed in a case involving a cross-appeal. It is patterned after Rule 32(a)(2), which does not specifically refer to cross-appeals.

Subdivision (e). Subdivision (e) sets forth limits on the length of the briefs filed in a case involving a cross-appeal. It is patterned after Rule 32(a)(7), which does not specifically refer to cross-appeals. Subdivision (e) permits the appellee's principal and response brief to be longer than a typical principal brief on the merits because this brief serves not only as the principal brief on the merits of the cross-appeal, but also as the response brief on the merits of the appeal. Likewise, subdivision (e) permits the appellant's response and reply brief to be longer than a typical reply brief because this brief serves

not only as the reply brief in the appeal, but also as the response brief in the cross-appeal.

Subdivision (f). Subdivision (f) provides deadlines for serving and filing briefs in a cross-appeal. It is patterned after Rule 31(a)(1), which does not specifically refer to cross-appeals.

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

(a) **Form of a Brief.**

* * * * *

(7) **Length.**

* * * * *

(C) **Certificate of Compliance.**

(i) A brief submitted under Rules 28.1(e)(2) or 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the

certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:

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

(ii) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet the requirements of Rules 28.1(e)(3) and 32(a)(7)(C)(i).

* * * * *

Committee Note

Subdivision (a)(7)(C). Rule 32(a)(7)(C) has been amended to add cross-references to new Rule 28.1, which governs briefs filed in cases involving cross-appeals. Rule 28.1(e)(2) prescribes type-volume limitations that apply to such briefs, and Rule 28.1(e)(3) requires parties to certify compliance with those type-volume limitations under Rule 32(a)(7)(C).

Rule 34. Oral Argument

* * * * *

(d) Cross-Appeals and Separate Appeals. If there is a cross-appeal, Rule ~~28(h)~~ 28.1(b) determines which party is the appellant and which is the appellee for purposes of oral argument. Unless the court directs otherwise, a cross-appeal or separate appeal must be argued when the initial appeal is argued. Separate parties should avoid duplicative argument.

* * * * *

FEDERAL RULES OF APPELLATE PROCEDURE

Committee Note

Subdivision (d). A cross-reference in subdivision (d) has been changed to reflect the fact that, as part of an effort to collect within one rule all provisions regarding briefing in cases involving cross-appeals, former Rule 28(h) has been abrogated and its contents moved to new Rule 28.1(b).

E. New Rule 32.1

The Advisory Committee proposes to add a new Rule 32.1 that would require courts to permit the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "non-precedential," or the like. New Rule 32.1 would also require parties who cite "unpublished" or "non-precedential" opinions that are not available in a publicly accessible electronic database (such as Westlaw) to provide copies of those opinions to the court and to the other parties. The Advisory Committee makes this proposal for two reasons:

First, the local rules of the circuits differ dramatically in their treatment of the citation of "unpublished" or "non-precedential" opinions for their persuasive value. Some circuits freely permit such citation, some circuits disfavor such citation but permit it in limited circumstances, and some circuits do not permit such citation under any circumstances. These conflicting rules create a hardship for practitioners, especially those who practice in more than one circuit.

Second, the Advisory Committee believes that restrictions on the citation of "unpublished" or "non-precedential" opinions — the violation of which can lead to sanctions or to formal charges of unethical conduct — are wrong as a policy matter. The Advisory Committee defends its position at length in the Committee Note, so I will say no more about it here.

Needless to say, this is a controversial matter. Many attorneys and bar organizations are strongly opposed to no-citation rules; indeed, Dean Schiltz tells me that no issue has generated more correspondence to the Advisory Committee over the past six years. Although many judges have also expressed their opposition to no-citation rules — in fact, several circuits do not have such rules — other judges are passionate in defending such rules. If the Standing Committee approves proposed Rule 32.1 for publication, we will undoubtedly receive a substantial number of comments.

I want to stress here — as I have stressed in prior communications to the Standing Committee — that proposed Rule 32.1 is extremely limited. It takes no position on whether designating opinions as "unpublished" or "non-precedential" is constitutional. It does not require any court to issue an "unpublished" or "non-precedential" opinion, nor does it forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as "unpublished" or "non-precedential." Most importantly, it says nothing whatsoever about the effect that a court must give to one of its own "unpublished" or "non-precedential" opinions or to the "unpublished" or "non-precedential" opinions of another court. The one and only issue addressed by proposed Rule 32.1 is the ability of parties to *cite* opinions designated as "unpublished" or "non-precedential."

The Advisory Committee approved proposed Rule 32.1 at our May 2003 meeting by vote of 7 to 1, with one abstention.

Rule 32.1. Citation of Judicial Dispositions

(a) Citation Permitted. No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that

have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like, unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions.

(b) **Copies Required.** A party who cites a judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database must file and serve a copy of that opinion, order, judgment, or other written disposition with the brief or other paper in which it is cited.

Committee Note

Rule 32.1 is a new rule addressing the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like. This Note will refer to these dispositions collectively as "unpublished" opinions. This is a term of art that, while not always literally true (as many "unpublished" opinions are in fact published), is commonly

understood to refer to the entire group of judicial dispositions addressed by Rule 32.1.

The citation of "unpublished" opinions is an important issue. The thirteen courts of appeals have cumulatively issued tens of thousands of "unpublished" opinions, and about 80% of the opinions issued by the courts of appeals in recent years have been designated as "unpublished." Administrative Office of the United States Courts, Judicial Business of the United States Courts 2001, tbl. S-3 (2001). Although the courts of appeals differ somewhat in their treatment of "unpublished" opinions, most agree that an "unpublished" opinion of a circuit does not bind panels of that circuit or district courts within that circuit (or any other court).

State courts have also issued countless "unpublished" opinions in recent years. And, again, although state courts differ in their treatment of "unpublished" opinions, they generally agree that "unpublished" opinions do not establish precedent that is binding upon the courts of the state (or any other court).

Rule 32.1 is extremely limited. It takes no position on whether refusing to treat an "unpublished" opinion as binding precedent is constitutional. *See Symbol Tech., Inc. v. Lemelson Med., Educ. & Research Found.*, 277 F.3d 1361, 1366-68 (Fed. Cir. 2002); *Hart v. Massanari*, 266 F.3d 1155, 1159-80 (9th Cir. 2001); *Williams v. Dallas Area Rapid Transit,* 256 F.3d 260 (5th Cir. 2001) (Smith, J., dissenting from denial of reh'g en banc); *Anastasoff v. United States*, 223 F.3d 898, 899-905, *vacated as moot on reh'g en banc* 235 F.3d 1054 (8th Cir. 2000). It does not require any court to issue an "unpublished" opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to

designate an opinion as "unpublished" or specify the procedure that a court must follow in making that decision. It says nothing about what effect a court must give to one of its "unpublished" opinions or to the "unpublished" opinions of another court. The one and only issue addressed by Rule 32.1 is the *citation* of judicial dispositions that have been *designated* as "unpublished" or "non-precedential" by a federal or state court — whether or not those dispositions have been published in some way or are precedential in some sense.

Subdivision (a). Every court of appeals has allowed "unpublished" opinions to be cited in some circumstances, such as to support a claim of claim preclusion, issue preclusion, law of the case, double jeopardy, sanctionable conduct, abuse of the writ, notice, or entitlement to attorney's fees. Not all of the circuits have specifically mentioned all of these claims in their local rules, but it does not appear that any circuit has ever sanctioned an attorney for citing an "unpublished" opinion under these circumstances.

By contrast, the circuits have differed dramatically with respect to the restrictions that they have placed upon the citation of "unpublished" opinions for their persuasive value. An opinion cited for its "persuasive value" is cited not because it is binding on the court or because it is relevant under a doctrine such as claim preclusion. Rather, it is cited because the party hopes that it will influence the court as, say, a law review article might — that is, simply by virtue of the thoroughness of its research or the persuasiveness of its reasoning.

Some circuits have freely permitted the citation of "unpublished" opinions for their persuasive value, some circuits have disfavored such citation but permitted it in limited circumstances, and

some circuits have not permitted such citation under any circumstances. These conflicting rules have created a hardship for practitioners, especially those who practice in more than one circuit. Rule 32.1(a) is intended to replace these conflicting practices with one uniform rule.

Under Rule 32.1(a), a court of appeals may not prohibit a party from citing an "unpublished" opinion for its persuasive value or for any other reason. In addition, under Rule 32.1(a), a court of appeals may not place any restriction upon the citation of "unpublished" opinions, unless that restriction is generally imposed upon the citation of all judicial opinions — "published" and "unpublished."

It is difficult to justify prohibiting or restricting the citation of "unpublished" opinions. Parties have long been able to cite in the courts of appeals an infinite variety of sources solely for their persuasive value. These sources include the opinions of federal district courts, state courts, and foreign jurisdictions, law review articles, treatises, newspaper columns, Shakespearian sonnets, and advertising jingles. No court of appeals places any restriction on the citation of these sources (other than restrictions that apply generally to all citations, such as requirements relating to type styles). Parties are free to cite them for their persuasive value, and judges are free to decide whether or not to be persuaded.

There is no compelling reason to treat "unpublished" opinions differently. It is difficult to justify a system under which the "unpublished" opinions of the D.C. Circuit can be cited to the Seventh Circuit, but the "unpublished" opinions of the Seventh Circuit cannot be cited to the Seventh Circuit. D.C. Cir. R. 28(c)(1)(B); 7th Cir. R. 53(b)(2)(iv) & (e). And, more broadly, it is

difficult to justify a system that permits parties to bring to a court's attention virtually every written or spoken word in existence *except* those contained in the court's own "unpublished" opinions.

Some have argued that permitting citation of "unpublished" opinions would lead judges to spend more time on them, defeating their purpose. This argument would have great force if Rule 32.1(a) required a court of appeals to treat all of its opinions as precedent that binds all panels of the court and all district courts within the circuit. The process of drafting a precedential opinion is much more time consuming than the process of drafting an opinion that serves only to provide the parties with a basic explanation of the reasons for the decision. As noted, however, Rule 32.1(a) does not require a court of appeals to treat its "unpublished" opinions as binding precedent. Nor does the rule require a court of appeals to increase the length or formality of any "unpublished" opinions that it issues.

It should also be noted, in response to the concern that permitting citation of "unpublished" opinions will increase the time that judges devote to writing them, that "unpublished" opinions are already widely available to the public, and soon every court of appeals will be required by law to post all of its decisions — including "unpublished" decisions — on its website. *See* E-Government Act of 2002, Pub. L. 107-347, § 205(a)(5), 116 Stat. 2899, 2913. Moreover, "unpublished" opinions are often discussed in the media and not infrequently reviewed by the United States Supreme Court. *See, e.g., Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826 (2002) (reversing "unpublished" decision of Federal Circuit); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (reversing "unpublished" decision of Second Circuit). If this widespread scrutiny does not deprive courts of the benefits of

"unpublished" opinions, it is difficult to believe that permitting a court's "unpublished" opinions to be cited to the court itself will have that effect. The majority of the courts of appeals already permit their own "unpublished" opinions to be cited for their persuasive value, and "the sky has not fallen in those circuits." Stephen R. Barnett, *From* Anastasoff *to* Hart *to West's* Federal Appendix: *The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 20 (2002).

In the past, some have also argued that, without no-citation rules, large institutional litigants (such as the Department of Justice) who can afford to collect and organize "unpublished" opinions would have an unfair advantage. Whatever force this argument may once have had, that force has been greatly diminished by the widespread availability of "unpublished" opinions on Westlaw and Lexis, on free Internet sites, and now in the Federal Appendix. In almost all of the circuits, "unpublished" opinions are as readily available as "published" opinions. Barring citation to "unpublished" opinions is no longer necessary to level the playing field.

Unlike many of the local rules of the courts of appeals, Rule 32.1(a) does not provide that citing "unpublished" opinions is "disfavored" or limited to particular circumstances (such as when no "published" opinion adequately addresses an issue). Again, it is difficult to understand why "unpublished" opinions should be subject to restrictions that do not apply to other sources. Moreover, given that citing an "unpublished" opinion is usually tantamount to admitting that no "published" opinion supports a contention, parties already have an incentive not to cite "unpublished" opinions. Not surprisingly, those courts that have liberally permitted the citation of "unpublished" opinions have not been overwhelmed with such

citations. Finally, restricting the citation of "unpublished" opinions may spawn satellite litigation over whether a party's citation of a particular "unpublished" opinion was appropriate. This satellite litigation would serve little purpose, other than further to burden the already overburdened courts of appeals.

Rule 32.1(a) will further the administration of justice by expanding the sources of insight and information that can be brought to the attention of judges and making the entire process more transparent to attorneys, parties, and the general public. At the same time, Rule 32.1(a) will relieve attorneys of several hardships. Attorneys will no longer have to pick through the conflicting no-citation rules of the circuits in which they practice, nor worry about being sanctioned or accused of unethical conduct for improperly citing an "unpublished" opinion. *See Hart*, 266 F.3d at 1159 (attorney ordered to show cause why he should not be disciplined for violating no-citation rule); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-386R (1995) ("It is ethically improper for a lawyer to cite to a court an 'unpublished' opinion of that court or of another court where the forum court has a specific rule prohibiting any reference in briefs to ['unpublished' opinions]."). In addition, attorneys will no longer be barred from bringing to the court's attention information that might help their client's cause; whether or not this violates the First Amendment (as some have argued), it is a regrettable position in which to put attorneys. Finally, game-playing should be reduced, as attorneys who in the past might have been tempted to find a way to hint to a court that it has addressed an issue in an "unpublished" opinion can now directly bring that "unpublished" opinion to the court's attention, and the court can do whatever it wishes with that opinion.

Subdivision (b). Under Rule 32.1(b), a party who cites an "unpublished" opinion must provide a copy of that opinion to the court and to the other parties, unless the "unpublished" opinion is available in a publicly accessible electronic database — such as in Westlaw or on a court's website. A party who is required under Rule 32.1(b) to provide a copy of an "unpublished" opinion must file and serve the copy with the brief or other paper in which the opinion is cited.

It should be noted that, under Rule 32.1(a), a court of appeals may not require parties to file or serve copies of *all* of the "unpublished" opinions cited in their briefs or other papers (unless the court generally requires parties to file or serve copies of *all* of the judicial opinions that they cite). "Unpublished" opinions are widely available on free websites (such as those maintained by federal and state courts), on commercial websites (such as those maintained by Westlaw and Lexis), and even in published compilations (such as the Federal Appendix). Given the widespread availability of "unpublished" opinions, parties should be required to file and serve copies of such opinions only in the circumstances described in Rule 32.1(b).

F. Rule 35(a)

Two national standards — 28 U.S.C. § 46(c) and Rule 35(a) — provide that a hearing or rehearing en banc may be ordered by "a majority of the circuit judges who are in regular active service." Although these standards apply to all of the courts of appeals, the circuits follow three very different approaches when one or more active judges are disqualified. Those approaches are the "absolute majority" approach (disqualified judges count in the base in considering whether a

"majority" of judges have voted for hearing or rehearing en banc), the "case majority" approach (disqualified judges do not count in the base), and the "qualified case majority" approach (disqualified judges do not count in the base, but a majority of all judges — disqualified or not — must be eligible to participate in the case).

The Advisory Committee unanimously believes that Rule 35(a) should be amended so that all circuits treat disqualified judges in the same manner under 28 U.S.C. § 46(c) and Rule 35(a). The Advisory Committee also unanimously believes that either the absolute majority approach or the case majority approach can be defended as a reasonable interpretation of the statute and the rule. The Advisory Committee was divided 5-3 (with one abstention) on whether Rule 35(a) should be amended to impose the absolute majority approach or the case majority approach. The majority of the Advisory Committee prefer the case majority approach (for the reasons given in the Committee Note), but even those who favor the absolute majority approach believe that amending Rule 35(a) to adopt the case majority approach is preferable to not amending Rule 35(a) at all — that is, to permitting the circuits to continue to follow three very different approaches.

The Advisory Committee unanimously approved this amendment at our May 2003 meeting.

Rule 35. En Banc Determination

(a) **When Hearing or Rehearing En Banc May Be Ordered.** A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc

hearing or rehearing is not favored and ordinarily will not be ordered unless:

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

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

* * * * *

Committee Note

Subdivision (a). Two national standards — 28 U.S.C. § 46(c) and Rule 35(a) — provide that a hearing or rehearing en banc may be ordered by "a majority of the circuit judges who are in regular active service." Although these standards apply to all of the courts of appeals, the circuits are deeply divided over the interpretation of this language when one or more active judges are disqualified.

The Supreme Court has never addressed this issue. In *Shenker v. Baltimore & Ohio R.R. Co.*, 374 U.S. 1 (1963), the Court rejected a petitioner's claim that his rights under § 46(c) had been violated when the Third Circuit refused to rehear his case en banc. The Third Circuit had eight active judges at the time; four voted in favor of rehearing the case, two against, and two abstained. No judge was disqualified. The Supreme Court ruled against the petitioner, holding, in essence, that § 46(c) did not provide a cause of action, but

instead simply gave litigants "the right to know the administrative machinery that will be followed and the right to suggest that the *en banc* procedure be set in motion in his case." *Id.* at 5. *Shenker* did stress that a court of appeals has broad discretion in establishing internal procedures to handle requests for rehearings — or, as *Shenker* put it, "'to devise its own administrative machinery to provide the *means* whereby a majority may order such a hearing.'" *Id.* (quoting *Western Pac. R.R. Corp. v. Western Pacific R.R. Co.*, 345 U.S. 247, 250 (1953) (emphasis added)). But *Shenker* did not address what is meant by "a majority" in §46(c) (or Rule 35(a), which did not yet exist) — and *Shenker* certainly did not suggest that the phrase should have different meanings in different circuits.

In interpreting that phrase, a majority of the courts of appeals follow the "absolute majority" approach. Marie Leary, Defining the "Majority" Vote Requirement in Federal Rule of Appellate Procedure 35(a) for Rehearings En Banc in the United States Courts of Appeals 8 tbl.1 (Federal Judicial Center 2002). Under this approach, disqualified judges are counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a circuit with 12 active judges, 7 must vote to hear a case en banc. If 5 of the 12 active judges are disqualified, all 7 non-disqualified judges must vote to hear the case en banc. The votes of 6 of the 7 non-disqualified judges are not enough, as 6 is not a majority of 12.

A substantial minority of the courts of appeals follow the "case majority" approach. *Id.* Under this approach, disqualified judges are not counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a case in which 5 of a circuit's 12 active judges are disqualified, only 4 judges (a majority of the 7 non-disqualified judges) must vote to hear a case en banc.

(The Third Circuit alone qualifies the case majority approach by providing that a case cannot be heard en banc unless a majority of all active judges — disqualified and non-disqualified — are eligible to participate in the case.)

Rule 35(a) has been amended to adopt the case majority approach as a uniform national interpretation of the phrase "a majority of the circuit judges . . . who are in regular active service" in § 46(c). The federal rules of practice and procedure exist to "maintain consistency," which Congress has equated with "promot[ing] the interest of justice." 28 U.S.C. § 2073(b). The courts of appeals should not follow two inconsistent approaches in deciding whether sufficient votes exist to hear a case en banc, especially when there is a governing statute and governing rule that apply to all circuits and that use identical terms, and especially when there is nothing about the local conditions of each circuit that justifies conflicting approaches.

Both the absolute majority approach and the case majority approach are reasonable interpretations of § 46(c), but the absolute majority approach has at least two major disadvantages. First, under the absolute majority approach, a disqualified judge is, as a practical matter, counted as voting against hearing a case en banc. To the extent possible, the disqualification of a judge should not result in the equivalent of a vote for or against hearing a case en banc. Second, the absolute majority approach can leave the en banc court helpless to overturn a panel decision with which almost all of the circuit's active judges disagree. For example, in a case in which 5 of a circuit's 12 active judges are disqualified, the case cannot be heard en banc even if 6 of the 7 non-disqualified judges strongly disagree with the panel opinion. This permits one active judge — perhaps sitting

on a panel with a visiting judge — effectively to control circuit precedent, even over the objection of all of his or her colleagues. *See Gulf Power Co. v. FCC*, 226 F.3d 1220, 1222-23 (11th Cir. 2000) (Carnes, J., concerning the denial of reh'g en banc), *rev'd sub nom. National Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002). For these reasons, Rule 35(a) has been amended to adopt the case majority approach.

III. Information Items

We have no information items to report.

DRAFT

Minutes of Spring 2003 Meeting of
Advisory Committee on Appellate Rules
May 15, 2003
Washington, D.C.

I. Introductions

Judge Samuel A. Alito, Jr., called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, May 15, 2003, at 8:30 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 Carl E. Stewart, Judge Stanwood R. Duval, Jr., Justice Richard C. Howe, Prof. Carol Ann Mooney, Mr. W. Thomas McGough, Jr., Mr. Sanford Svetcov, and Mr. John G. Roberts, Jr. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, was present representing the Solicitor General. Also present were Ms. Marcia M. Waldron, the liaison from the appellate clerks; Mr. John K. Rabiej from the Administrative Office; and Ms. Marie C. Leary from the Federal Judicial Center.

Judge Alito announced that the terms of Judge Motz and Prof. Mooney would expire before the next meeting of the Committee. Judge Alito thanked Judge Motz and Prof. Mooney for their devoted service to the Committee — in Judge Motz's case, as a member, and in Prof. Mooney's case, first as the Reporter and then as a member.

Judge Alito also announced that the nomination of Mr. Roberts to the U.S. Court of Appeals for the D.C. Circuit had been approved by the Senate on May 8. On behalf of the entire Committee, Judge Alito congratulated Mr. Roberts on his confirmation.

II. Approval of Minutes of November 2002 Meeting

The minutes of the November 2002 meeting were approved.

III. Report on January 2003 Meeting of Standing Committee

The Reporter stated that, at the January 2003 meeting of the Standing Committee, Judge Alito gave an update on the continuing deliberations of the Advisory Committee with respect to the proposed amendment to Rule 35(a) regarding en banc voting and the proposed new Rule 32.1 regarding the citation of "unpublished" opinions. The Reporter said that members of the Standing Committee had expressed a great deal of interest in these two proposals.

IV. Action Items

A. Item No. 00-08 (FRAP 4(a)(6) — clarify whether verbal communication provides "notice")

The Reporter introduced the following proposed amendment and Committee Note:

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

* * * * *

(6) **Reopening the Time to File an Appeal.** The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives or observes written notice of the entry from any source, whichever is earlier;

~~(B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed~~

~~but did not receive the notice from the district court or any party within 21 days after entry;~~ and

(C) the court finds that no party would be prejudiced.

* * * * *

Committee Note

Rule 4(a)(6) has permitted a district court to reopen the time to appeal a judgment or order upon finding that four conditions were satisfied. First, the district court had to find that the appellant did not receive notice of the entry of the judgment or order from the district court or any party within 21 days after the judgment or order was entered. Second, the district court had to find that the appellant moved to reopen the time to appeal within 7 days after the appellant received notice of the entry of the judgment or order. Third, the district court had to find that the appellant moved to reopen the time to appeal within 180 days after the judgment or order was entered. Finally, the district court had to find that no party would be prejudiced by the reopening of the time to appeal.

Rule 4(a)(6) has been amended to specify more clearly what kind of "notice" of the entry of a judgment or order precludes a party from later moving to reopen the time to appeal. In addition, Rule 4(a)(6) has been amended to address confusion about what kind of "notice" triggers the 7-day period to bring a motion to reopen. Finally, Rule 4(a)(6) has been reorganized to set forth more logically the conditions that must be met before a district court may reopen the time to appeal.

Subdivision (a)(6)(A). Former subdivision (a)(6)(B) has been redesignated as subdivision (a)(6)(A), and one important substantive change has been made.

Prior to 1998, former subdivision (a)(6)(B) permitted a district court to reopen the time to appeal if it found "that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry." The rule was clear that the "notice" to which it referred was the notice required under Civil Rule 77(d), which must be served by the clerk pursuant to Civil Rule 5(b) and may also be served by a party pursuant to that same rule. In other words, prior to 1998, former subdivision (a)(6)(B) was clear that, if a party did not receive formal notice of the entry of a judgment or order under Civil Rule 77(d), that party could later move to reopen the time to appeal (assuming that the other requirements of subdivision (a)(6) were met).

In 1998, former subdivision (a)(6)(B) was amended to change the description of the type of notice that would preclude a party from moving to reopen the time to appeal. As a result of the amendment, former subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive "*such* notice" — that is, the notice required by Civil Rule 77(d) — but instead referred to the failure of the moving party to receive "*the* notice." And former subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive notice from "the *clerk* or any party," both of whom are explicitly mentioned in Civil Rule 77(d). Rather, former subdivision (a)(6)(B) referred to the failure of the moving party to receive notice from "the *district court* or any party."

The 1998 amendment meant, then, that the type of notice that precluded a party from moving to reopen the time to appeal was no longer limited to Civil Rule 77(d) notice. Under the 1998 amendment, *some* kind of notice, in addition to Civil Rule 77(d) notice, precluded a party. But the text of the amended rule did not make clear what kind of notice qualified. This was an invitation for litigation, confusion, and possible circuit splits.

To avoid such problems, former subdivision (a)(6)(B) — new subdivision (a)(6)(A) — has been amended to restore its pre-1998 simplicity. Under new subdivision (a)(6)(A), if the court finds that the moving party was not notified under Civil Rule 77(d) of the entry of the judgment or order that the party seeks to appeal within 21 days after that judgment or order was entered, then the court is authorized to reopen the time to appeal (if all of the other requirements of subdivision (a)(6) are met). Because Civil Rule 77(d) requires that notice of the entry of a judgment or order be formally served under Civil Rule 5(b), any notice that is not so served will not operate to preclude the reopening of the time to appeal under new subdivision (a)(6)(A).

REVISED VERSION OF NOTE TO AMENDMENT TO RULE 4(a)(6)(B)

Subdivision (a)(6)(B). Former subdivision (a)(6)(A) has been redesignated as subdivision (a)(6)(B), and one important substantive change has been made.

New subdivision (a)(6)(B) makes clear that only *written* notice of the entry of a judgment or order will trigger the 7-day period for a party to move to reopen the time to appeal that judgment or order. However, all that is required is that a party receive or observe written notice of the entry of the judgment or order, not that a party receive or observe a copy of the judgment or order itself. Moreover, nothing in new subdivision (a)(6)(B) requires that the written notice be received from any particular source, and nothing requires that the written notice be served pursuant to Civil Rules 77(d) or 5(b). "Any written notice of entry received by the

potential appellant or his counsel (or conceivably by some other person), regardless of how or by whom sent, is sufficient to open [new] subpart [(B)'s] seven-day window." *Wilkens v. Johnson*, 238 F.3d 328, 332 (5th Cir.) (footnotes omitted), *cert. denied*, 533 U.S. 956 (2001). Thus, a person who checks the civil docket of a district court action and learns that a judgment or order has been entered has observed written notice of that entry. And a person who learns of the entry of a judgment or order by fax, by e-mail, or by viewing a website has also received or observed written notice. However, an oral communication is not written notice for purposes of new subdivision (a)(6)(B), no matter how specific, reliable, or unequivocal.

Courts had difficulty agreeing upon what type of "notice" was sufficient to trigger the 7-day period to move to reopen the time to appeal under former subdivision (a)(6)(A). The majority of circuits held that only written notice was sufficient, although nothing in the text of the rule suggested such a limitation. *See, e.g.*, *Bass v. United States Dep't of Agric.*, 211 F.3d 959, 963 (5th Cir. 2000). By contrast, the Ninth Circuit held that while former subdivision (a)(6)(A) did not require written notice, "the quality of the communication [had to] rise to the functional equivalent of written notice." *Nguyen v. Southwest Leasing & Rental, Inc.*, 282 F.3d 1061, 1066 (9th Cir. 2002). It appeared that oral communications could be deemed "the functional equivalent of written notice" if they were sufficiently "specific, reliable, and unequivocal." *Id.* Other circuits suggested in dicta that former subdivision (a)(6)(A) required only "actual notice," which, presumably, could have included oral notice that was not "the functional equivalent of written notice." *See, e.g.*, *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 464 (8th Cir. 2000). And still other circuits read into former subdivision (a)(6)(A) restrictions that appeared only in former subdivision (a)(6)(B) (such as the requirement that notice be received "from the district court or any party," *see Benavides v. Bureau of Prisons*, 79 F.3d 1211, 1214 (D.C. Cir. 1996)) or that appeared in neither former subdivision (a)(6)(A) nor former subdivision (a)(6)(B) (such as the requirement that notice be served in the manner prescribed by Civil Rule 5, *see Ryan v. First Unum Life Ins. Co.*, 174 F.3d 302, 305 (2d Cir. 1999)).

New subdivision (a)(6)(B) resolves this circuit split by making clear that only *written* notice of the entry of a judgment or order will trigger the 7-day period for a party to move to reopen the time to appeal. "[R]equir[ing] written notice will simplify future proceedings. As the familiar request to 'put it in writing' suggests, writings are more readily susceptible to proof than oral communications. In particular, the receipt of written notice (or its absence) should be more easily demonstrable than attempting to discern whether (and, if so, when) a party received actual notice." *Scott-Harris v. City of Fall River*, 134 F.3d

427, 434 (1st Cir. 1997), *rev'd on other grounds sub nom. Bogan v. Scott-Harris*, 523 U.S. 44 (1998).

ORIGINAL VERSION OF NOTE TO AMENDMENT TO RULE 4(a)(6)(B)

Subdivision (a)(6)(B). Former subdivision (a)(6)(A) has been redesignated as subdivision (a)(6)(B), and one important substantive change has been made.

Former subdivision (a)(6)(A) required a party to move to reopen the time to appeal "within 7 days after the moving party receives notice of the entry [of the judgment or order sought to be appealed]." Courts had difficulty agreeing upon what type of "notice" was sufficient to trigger the 7-day period. The majority of circuits that addressed the question held that only *written* notice was sufficient, although nothing in the text of the rule suggested such a limitation. *See, e.g., Bass v. United States Dep't of Agric.*, 211 F.3d 959, 963 (5th Cir. 2000). By contrast, the Ninth Circuit held that while former subdivision (a)(6)(A) did not require written notice, "the quality of the communication [had to] rise to the functional equivalent of written notice." *Nguyen v. Southwest Leasing & Rental, Inc.*, 282 F.3d 1061, 1066 (9th Cir. 2002). It appeared that oral communications could be deemed "the functional equivalent of written notice" if they were sufficiently "specific, reliable, and unequivocal." *Id.* Other circuits suggested in dicta that former subdivision (a)(6)(A) required only "actual notice," which, presumably, could have included oral notice that was not "the functional equivalent of written notice." *See, e.g., Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 464 (8th Cir. 2000). And still other circuits read into former subdivision (a)(6)(A) restrictions that appeared only in former subdivision (a)(6)(B) (such as the requirement that notice be received "from the district court or any party," *see Benavides v. Bureau of Prisons*, 79 F.3d 1211, 1214 (D.C. Cir. 1996)) or that appeared in neither former subdivision (a)(6)(A) nor former subdivision (a)(6)(B) (such as the requirement that notice be served in the manner prescribed by Civil Rule 5, *see Ryan v. First Unum Life Ins. Co.*, 174 F.3d 302, 305 (2d Cir. 1999)).

Former subdivision (a)(6)(A) — new subdivision (a)(6)(B) — has been amended to resolve this circuit split. Under new subdivision (a)(6)(B), only *written* notice of the entry of a judgment or order triggers the 7-day period. "[R]equir[ing] written notice will simplify future proceedings. As the familiar request to 'put it in writing' suggests, writings are more readily susceptible to proof than oral communications. In particular, the receipt of written notice (or its absence) should be more easily demonstrable than attempting to discern whether (and, if so, when) a party received actual notice." *Scott-Harris v. City of Fall*

River, 134 F.3d 427, 434 (1st Cir. 1997), *rev'd on other grounds sub nom. Bogan v. Scott-Harris*, 523 U.S. 44 (1998).

All that is required to trigger the 7-day period under new subdivision (a)(6)(B) is that a party receive or observe written notice of the entry of a judgment or order, not a copy of the judgment or order itself. Moreover, nothing in new subdivision (a)(6)(B) requires that the written notice be received from any particular source, and nothing requires that the written notice be served pursuant to Civil Rules 77(d) or 5(b). "Any written notice of entry received by the potential appellant or his counsel (or conceivably by some other person), regardless of how or by whom sent, is sufficient to open [new] subpart [(B)'s] seven-day window." *Wilkens v. Johnson*, 238 F.3d 328, 332 (5th Cir.) (footnotes omitted), *cert. denied*, 533 U.S. 956 (2001). Thus, a person who checks the civil docket of a district court action and learns that a judgment or order has been entered has observed written notice of that entry. And a person who learns of the entry of a judgment or order by fax, by e-mail, or by viewing a website has also received or observed written notice. However, an oral communication is not written notice for purposes of new subdivision (a)(6)(B), no matter how specific, reliable, or unequivocal.

The Reporter said that this was the third time that the Committee had considered a draft amendment to Rule 4(a)(6). Prior drafts were discussed at the April 2002 and November 2002 meetings.

Describing the most recent draft amendment, the Reporter said that the amendment to subdivision (A) and the accompanying Committee Note were identical to the amendment and Note approved by the Committee at its November 2002 meeting.

Regarding the amendment to subdivision (B), the Reporter said that the amendment had been changed precisely as the Committee had directed at its November 2002 meeting. Specifically, the words "or observes" were inserted after "receives" and before "written," and the words "from any source" were added after "entry" and before "whichever." These changes are intended to communicate more clearly that the 7-day period is triggered even when a party has not been served with notice of the entry of the judgment, but instead has learned of that entry "passively" by, for example, checking a docket sheet or a website.

Regarding the Note, the Reporter reminded the Committee that, at the November 2002 meeting, a member of the Committee had suggested reordering the Note to the amendment to subdivision (B) so that it first described the changes made by the amendment and then described the reasons for the changes. The Reporter said that he had revised the Note as requested. However, the Reporter thought that, although both the original Note and the revised Note were

satisfactory, the original Note was clearer on first read. The Reporter provided both versions of the Note so that the Committee could decide which it preferred.

After a brief discussion, the Committee decided by consensus to make two changes to the revised version of the Note. First, the Committee deleted the quotation from *Scott-Harris v. City of Fall River*. By referring to "written" notice, to "'put[ting] it in writing,'" and to "writings," that quotation might mislead readers about the scope of amended subdivision (B). Again, the 7-day window is triggered not just by notice received from "writings," but by, for example, notice observed on a website. Second, the Committee inserted the words "receipt or observation of" prior to "*written* notice" in the sentence preceding the (deleted) quotation from *Scott-Harris*. This change will avoid misunderstandings by making the language of the Note more consistent with the language of the rule.

A member moved that the amendments to Rule 4(a)(6) and the revised version of the Committee Note be approved, with the two changes agreed to by the Committee. The motion was seconded. The motion carried (unanimously).

B. Item No. 00-11 (FRAP 35(a) — disqualified judges/en banc rehearing)

The Reporter introduced the following proposed amendment and Committee Note:

Rule 35. En Banc Determination

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

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

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

* * * * *

Committee Note

Subdivision (a). Two national standards — 28 U.S.C. § 46(c) and Rule 35(a) — provide that a hearing or rehearing en banc may be ordered by "a majority of the circuit judges who are in regular active service." Although these standards apply to all of the courts of appeals, the circuits are deeply divided over the interpretation of this language when one or more active judges are disqualified.

The Supreme Court has never addressed this issue. In *Shenker v. Baltimore & Ohio R.R. Co.*, 374 U.S. 1 (1963), the Court rejected a petitioner's claim that his rights under § 46(c) had been violated when the Third Circuit refused to rehear his case en banc. The Third Circuit had eight active judges at the time; four voted in favor of rehearing the case, two against, and two abstained. No judge was disqualified. The Supreme Court ruled against the petitioner, holding, in essence, that § 46(c) did not provide a cause of action, but instead simply gave litigants "the right to know the administrative machinery that will be followed and the right to suggest that the *en banc* procedure be set in motion in his case." *Id.* at 5. *Shenker* did stress that a court of appeals has broad discretion in establishing internal procedures to handle requests for rehearings — or, as *Shenker* put it, "'to devise its own administrative machinery to provide the *means* whereby a majority may order such a hearing.'" *Id.* (quoting *Western Pac. R.R. Corp. v. Western Pacific R.R. Co.*, 345 U.S. 247, 250 (1953) (emphasis added)). But *Shenker* did not address what is meant by "a majority" in §46(c) (or Rule 35(a), which did not yet exist) — and *Shenker* certainly did not suggest that the phrase should have different meanings in different circuits.

In interpreting that phrase, a majority of the courts of appeals follow the "absolute majority" approach. Marie Leary, Defining the "Majority" Vote Requirement in Federal Rule of Appellate Procedure 35(a) for Rehearings En Banc in the United States Courts of Appeals 8 tbl.1 (Federal Judicial Center 2002). Under this approach, disqualified judges are counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a circuit with 12 active judges, 7 must vote to hear a case en banc. If 5 of the 12 active judges are disqualified, all 7 non-disqualified judges must vote to hear the case en banc. The votes of 6 of the 7 non-disqualified judges are not enough, as 6 is not a majority of 12.

A substantial minority of the courts of appeals follow the "case majority" approach. *Id.* Under this approach, disqualified judges are not counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a case in which 5 of a circuit's 12 active judges are disqualified, only 4 judges (a majority of the 7 non-disqualified judges) must vote to hear a case en

banc. (The Third Circuit alone qualifies the case majority approach by providing that a case cannot be heard en banc unless a majority of all active judges — disqualified and non-disqualified — are eligible to participate in the case.)

Rule 35(a) has been amended to adopt the case majority approach as a uniform national interpretation of the phrase "a majority of the circuit judges . . . who are in regular active service" in § 46(c). The federal rules of practice and procedure exist to "maintain consistency," which Congress has equated with "promot[ing] the interest of justice." 28 U.S.C. § 2073(b). The courts of appeals should not follow two inconsistent approaches in deciding whether sufficient votes exist to hear a case en banc, especially when there is a governing statute and governing rule that apply to all circuits and that use identical terms, and especially when there is nothing about the local conditions of each circuit that justifies conflicting approaches.

Both the absolute majority approach and the case majority approach can be defended as reasonable interpretations of § 46(c), but the absolute majority approach has at least two major disadvantages. First, under the absolute majority approach, a disqualified judge is, as a practical matter, counted as voting against hearing a case en banc. To the extent possible, the disqualification of a judge should not result in the equivalent of a vote for or against hearing a case en banc. Second, the absolute majority approach can leave the en banc court helpless to overturn a panel decision with which almost all of the circuit's active judges disagree. For example, in a case in which 5 of a circuit's 12 active judges are disqualified, the case cannot be heard en banc even if 6 of the 7 non-disqualified judges strongly disagree with the panel opinion. This permits one active judge — perhaps sitting on a panel with a visiting judge — effectively to control circuit precedent, even over the objection of all of his or her colleagues. *See Gulf Power Co. v. FCC*, 226 F.3d 1220, 1222-23 (11th Cir. 2000) (Carnes, J., dissenting from denial of rehearing en banc), *rev'd sub nom. National Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002). For these reasons, Rule 35(a) has been amended to adopt the case majority approach.

Judge Alito reminded the Committee that, at its April 2002 meeting, the Committee decided to move forward on the suggestion of Judge Edward E. Carnes that Rule 35(a) be amended to resolve the three-way circuit split over the treatment of disqualified judges in determining whether "a majority of the circuit judges who are in regular active service" have ordered an en banc hearing under 28 U.S.C. § 46(c) and Rule 35(a). Specifically, the Committee tentatively decided to amend Rule 35(a) to impose the "qualified case majority" approach upon all of the circuits.

At its November 2002 meeting, the Committee changed course and decided, by a 5-3 vote (with one abstention), to amend Rule 35(a) to impose the "case majority" approach. The draft amendment and Note now presented by the Reporter would implement that decision.

Committee members expressed satisfaction with the amendment and Note, except that one member said that she still believes that the "absolute majority" approach is much more defensible as an interpretation of § 46(c) than the "case majority" approach. Other Committee members responded that, in their view, both were reasonable interpretations.

One member suggested that the Note be amended so that, in the first sentence of the last paragraph, the words "can be defended as reasonable interpretations" be replaced by the words "are reasonable interpretations." By consensus, the Committee agreed to the change.

The Committee discussed at some length the conflicting practices of the circuits regarding the amount of information that is disclosed about votes to deny petitions for hearing or rehearing en banc. (Understandably, no circuit discloses any information about votes to *grant* rehearing petitions.) Practices appear to range from, at the one extreme, disclosing nothing except that the petition was denied to, at the other extreme, identifying which judges voted in favor of rehearing, which voted against, which abstained, and which were disqualified. One member said that Judge A. Wallace Tashima, a member of the Standing Committee, had suggested that the Appellate Rules be amended to require courts to disclose the votes of individual judges when rehearing petitions are denied. By consensus, the Committee agreed to put Judge Tashima's suggestion on the study agenda.

Following further discussion, a member moved that the amendment to Rule 35(a) and accompanying Committee Note be approved, with the one change to the Note agreed to by the Committee. The motion was seconded. The motion carried (unanimously).

C. Item No. 01-01 (citation of non-precedential decisions)

The Reporter introduced the following proposed amendment and Committee Note:

Rule 32.1. Citation of Judicial Dispositions

(a) **Citation Permitted.** No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like, unless that

prohibition or restriction is generally imposed upon the citation of all sources.

(b) **Copies Required.** A party who cites a judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database must file and serve a copy of that opinion, order, judgment, or other written disposition with the brief or other paper in which it is cited.

Committee Note

Rule 32.1 is a new rule addressing the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like. This Note will refer to these dispositions collectively as "unpublished" opinions. This is a term of art that, while not always literally true (as many "unpublished" opinions are in fact published), is commonly understood to refer to the entire group of judicial dispositions addressed by Rule 32.1.

The citation of "unpublished" opinions is an important issue. The thirteen courts of appeals have cumulatively issued tens of thousands of "unpublished" opinions, and about 80% of the opinions issued by the courts of appeals in recent years have been designated as "unpublished." Administrative Office of the United States Courts, Judicial Business of the United States Courts 2001, tbl. S-3 (2001). Although the courts of appeals differ somewhat in their treatment of "unpublished" opinions, most agree that an "unpublished" opinion of a circuit does not bind panels of that circuit or district courts within that circuit (or any other court).

State courts have also issued countless "unpublished" opinions in recent years. And, again, although state courts differ in their treatment of "unpublished" opinions, they generally agree that "unpublished" opinions do not establish precedent that is binding upon the courts of the state (or any other court).

Rule 32.1 is extremely limited. It takes no position on whether refusing to treat an "unpublished" opinion as binding precedent is constitutional. *See Symbol Technologies, Inc. v. Lemelson Med., Educ. & Research Found.*, 277 F.3d 1361, 1366-68 (Fed. Cir. 2002); *Williams v. Dallas Area Rapid Transit,* 256 F.3d 260

(5th Cir. 2001) (Smith, J., dissenting from denial of reh'g en banc); *Hart v. Massanari*, 266 F.3d 1155, 1159-80 (9th Cir. 2001); *Anastasoff v. United States*, 223 F.3d 898, 899-905, *vacated as moot on reh'g en banc* 235 F.3d 1054 (8th Cir. 2000). It does not require any court to issue an "unpublished" opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as "unpublished" or specify the procedure that a court must follow in making that decision. It says nothing about what effect a court must give to one of its "unpublished" opinions or to the "unpublished" opinions of another court. The one and only issue addressed by Rule 32.1 is the *citation* of judicial dispositions that have been *designated* as "unpublished" or "non-precedential" by a federal or state court — whether or not those dispositions have been published in some way or are precedential in some sense.

Subdivision (a). Every court of appeals has allowed "unpublished" opinions to be cited in some circumstances, such as to support a claim of claim preclusion, issue preclusion, law of the case, double jeopardy, sanctionable conduct, abuse of the writ, notice, or entitlement to attorney's fees. Not all of the circuits have specifically mentioned all of these claims in their local rules, but it does not appear that any circuit has ever sanctioned an attorney for citing an "unpublished" opinion under these circumstances.

By contrast, the circuits have differed dramatically with respect to the restrictions that they have placed upon the citation of "unpublished" opinions for their persuasive value. An opinion cited for its "persuasive value" is cited not because it is binding on the court or because it is relevant under a doctrine such as claim preclusion. Rather, it is cited because the party hopes that it will influence the court as, say, a law review article might — that is, simply by virtue of the thoroughness of its research or the persuasiveness of its reasoning.

Some circuits have freely permitted the citation of "unpublished" opinions for their persuasive value, some circuits have disfavored such citation but permitted it in limited circumstances, and some circuits have not permitted such citation under any circumstances. These conflicting rules have created a hardship for practitioners, especially those who practice in more than one circuit. Rule 32.1(a) is intended to replace these conflicting practices with one uniform rule.

Under Rule 32.1(a), a court of appeals may not prohibit a party from citing an "unpublished" opinion for its persuasive value or for any other reason. In addition, under Rule 32.1(a), a court of appeals may not place any restriction upon the citation of "unpublished" opinions, unless that restriction is generally imposed upon the citation of published opinions and all other sources.

It is difficult to justify prohibiting or restricting the citation of "unpublished" opinions. Parties have long been able to cite in the courts of appeals an infinite variety of sources solely for their persuasive value. These sources include the opinions of federal district courts, state courts, and foreign jurisdictions, law review articles, treatises, newspaper columns, Shakespearian sonnets, and advertising jingles. No court of appeals places any restriction on the citation of these sources (other than restrictions that apply generally to all citations, such as requirements relating to type styles). Parties are free to cite them for their persuasive value, and judges are free to decide whether or not to be persuaded.

There is no compelling reason to treat "unpublished" opinions differently. It is difficult to justify a system under which the "unpublished" opinions of the D.C. Circuit can be cited to the Seventh Circuit, but the "unpublished" opinions of the Seventh Circuit cannot be cited to the Seventh Circuit. D.C. Cir. R. 28(c)(1)(B); 7th Cir. R. 53(b)(2)(iv) & (e). And, more broadly, it is difficult to justify a system that permits parties to bring to a court's attention virtually every written or spoken word in existence *except* those contained in the court's own "unpublished" opinions.

Some have argued that permitting citation of "unpublished" opinions would lead judges to spend more time on them, defeating their purpose. This argument would have great force if Rule 32.1(a) required a court of appeals to treat all of its opinions as precedent that binds all panels of the court and all district courts within the circuit. The process of drafting a precedential opinion is much more time consuming than the process of drafting an opinion that serves only to provide the parties with a basic explanation of the reasons for the decision. As noted, however, Rule 32.1(a) does not require a court of appeals to treat its "unpublished" opinions as binding precedent. Nor does the rule require a court of appeals to increase the length or formality of any "unpublished" opinions that it issues.

It should also be noted, in response to the concern that permitting citation of "unpublished" opinions will increase the time that judges devote to writing them, that "unpublished" opinions are already widely available to the public, and in two years every court of appeals will be required by law to post all of its decisions — including "unpublished" decisions — on its website. *See* E-Government Act of 2002, Pub. L. 107-347, § 205(a)(5), 116 Stat. 2899, 2913-15. Moreover, "unpublished" opinions are often discussed in the media and not infrequently reviewed by the United States Supreme Court. *See, e.g., Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 122 S. Ct. 1889 (2002) (reversing "unpublished" decision of Federal Circuit); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (reversing "unpublished" decision of Second Circuit).

If this widespread scrutiny does not deprive courts of the benefits of "unpublished" opinions, it is difficult to believe that permitting a court's "unpublished" opinions to be cited to the court itself will have that effect. The majority of the courts of appeals already permit their own "unpublished" opinions to be cited for their persuasive value, and "the sky has not fallen in those circuits." Stephen R. Barnett, *From* Anastasoff *to* Hart *to West's* Federal Appendix: *The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 20 (2002).

In the past, some have also argued that, without no-citation rules, large institutional litigants (such as the Department of Justice) who can afford to collect and organize "unpublished" opinions would have an unfair advantage. Whatever force this argument may once have had, that force has been greatly diminished by the widespread availability of "unpublished" opinions on Westlaw and Lexis, on free Internet sites, and now in the Federal Appendix. In almost all of the circuits, "unpublished" opinions are as readily available as published opinions. Barring citation to "unpublished" opinions is no longer necessary to level the playing field.

Unlike many of the local rules of the courts of appeals, Rule 32.1(a) does not provide that citing "unpublished" opinions is "disfavored" or limited to particular circumstances (such as when no published opinion adequately addresses an issue). Again, it is difficult to understand why "unpublished" opinions should be subject to restrictions that do not apply to other sources. Moreover, given that citing an "unpublished" opinion is usually tantamount to admitting that no published opinion supports a contention, parties already have an incentive not to cite "unpublished" opinions. Not surprisingly, those courts that have liberally permitted the citation of "unpublished" opinions have not been overwhelmed with such citations. Finally, restricting the citation of "unpublished" opinions may spawn satellite litigation over whether a party's citation of a particular "unpublished" opinion was appropriate. This satellite litigation would serve little purpose, other than further to burden the already overburdened courts of appeals.

Rule 32.1(a) will further the administration of justice by expanding the sources of insight and information that can be brought to the attention of judges and making the entire process more transparent to attorneys, parties, and the general public. At the same time, Rule 32.1(a) will relieve attorneys of several hardships. Attorneys will no longer have to pick through the conflicting no-citation rules of the circuits in which they practice, nor worry about being sanctioned or accused of unethical conduct for improperly citing an "unpublished" opinion. *See Hart*, 266 F.3d at 1159 (attorney ordered to show cause why he should not be disciplined for violating no-citation rule); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-386R (1995) ("It is ethically improper for a lawyer to cite to a court an "unpublished" opinion of that court or of another

court where the forum court has a specific rule prohibiting any reference in briefs to [unpublished opinions]."). In addition, attorneys will no longer be barred from bringing to the court's attention information that might help their client's cause; whether or not this violates the First Amendment (as some have argued), it is a regrettable position in which to put attorneys. Finally, game-playing should be reduced, as attorneys who in the past might have been tempted to find a way to hint to a court that it has addressed an issue in an "unpublished" opinion can now directly bring that "unpublished" opinion to the court's attention, and the court can do whatever it wishes with that opinion.

Subdivision (b). Under Rule 32.1(b), a party who cites an "unpublished" opinion must provide a copy of that opinion to the court and to the other parties, unless the "unpublished" opinion is available in a publicly accessible electronic database — such as in Westlaw or on a court's website. A party who is required under Rule 32.1(b) to provide a copy of an "unpublished" opinion must serve and file the copy with the brief or other paper in which the opinion is cited.

It should be noted that, under Rule 32.1(a), a court of appeals may not require parties to file or serve copies of *all* of the "unpublished" opinions cited in their briefs or other papers (unless the court generally requires parties to file or serve copies of *all* sources that they cite). "Unpublished" opinions are widely available on free websites (such as those maintained by federal and state courts), on commercial websites (such as those maintained by Westlaw and Lexis), and even in published compilations (such as the Federal Appendix). Given the widespread availability of "unpublished" opinions, parties should be required to file and serve copies of such opinions only in the circumstances described in Rule 32.1(b).

The Reporter said that he had taken "Alternative B" of the three alternative drafts of new Rule 32.1 presented to the Committee at the November 2002 meeting and made the following changes (among others) to address concerns raised by Committee members:

1. Rule 32.1 has been divided into two subdivisions. Subdivision (a) permits the citation of unpublished opinions, and subdivision (b) requires parties who cite unpublished opinions to provide copies of those opinions if they are not available online.

2. Rule 32.1 is written passively ("No prohibition or restriction may be imposed") rather than actively ("A court must not impose"). Some Committee members thought that this was less confrontational and thus less likely to raise the hackles of judges. This change is not likely to be popular with the Style Subcommittee, though.

3. Rather than state affirmatively that "any opinion may be cited," Rule 32.1 instead forbids courts from placing prohibitions or restrictions on the citation of unpublished opinions. The Committee has been concerned that courts hostile to the citation of unpublished opinions might undermine an affirmative rule by placing various conditions or restrictions upon the citation of unpublished opinions, while claiming that they still permit such opinions to be cited.

4. Rule 32.1 refers broadly to the citation of "judicial opinions, orders, judgments, or other written dispositions." The Committee has been concerned that, if a narrower phrase such as "judicial opinions" is used, courts hostile to the citation of unpublished opinions might argue that they do not issue "opinions," but "orders" or "mem. disps."

5. Rule 32.1 refers broadly to the citation of opinions "that have been designated as 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent,' or the like." Again, this is an attempt to capture the entire universe of what are commonly referred to as "unpublished" opinions so as to prevent hostile courts from evading the rule.

6. The Note abandons "non-precedential" as the shorthand way of referring to the judicial dispositions that are the subject of Rule 32.1 and substitutes in its place "unpublished." This reflects common parlance, and it further distances Rule 32.1 from battles over whether and to what extent these dispositions are precedential.

7. Language has been added to the Note to more clearly communicate that Rule 32.1 is meant to encompass the unpublished opinions of state courts, as well as those of federal courts.

The Committee's discussion of draft Rule 32.1 focused on three issues:

1. A member asked whether the expression "not available in a publicly accessible electronic database" in subdivision (b) would be understood to refer to an opinion that was available on Westlaw or Lexis but no where else. Are Westlaw and Lexis "publicly accessible," given that one has to pay a fee to use them? The Reporter said that he thought so — just as, say, a movie playing at a local theater would be considered "publicly accessible," even though one must buy a ticket to see it. Other members concurred and pointed out that the Note was clear on the point. Members also mentioned that, under the E-Government Act of 2002, all of the courts of appeals will soon be required to make all of their opinions — published and unpublished — available on their websites.

2. A member pointed out the difference between the language at the end of subdivision (a) — "unless that prohibition or restriction is generally imposed upon the citation of all sources" — and the language at the end of the fourth paragraph of the Note to subdivision (a) — "unless that restriction is generally imposed upon the citation of published opinions and all other sources." The member expressed concern that the inclusion of the reference to "published opinions" in the Note might confuse readers, who might conclude that the Note was meant to communicate something different from the rule. By consensus, the Committee agreed to delete

the words "published opinions and" from the last sentence of the fourth paragraph of the Note to subdivision (a).

3. A member expressed concern about using the expression "generally imposed upon the citation of all sources" in *either* the rule *or* the Note. The member said that courts should be free to impose restrictions on the citation of all *judicial opinions* — published or unpublished — even if those restrictions were not also imposed upon the citation of *all* sources. For example, a local rule requiring parties to identify the author of any judicial opinion cited in a brief should not be objectionable, as long as it is applied to both published and unpublished opinions. But such a rule would be barred by subdivision (a) as currently drafted, because such a rule would place upon the citation of unpublished opinions a restriction that is not "generally imposed upon the citation of *all* sources" — including, for example, statutes or regulations.

All members agreed that subdivision (a) should be modified to provide, in essence, that no restriction can be imposed upon the citation of unpublished judicial opinions unless that restriction is also imposed upon the citation of published judicial opinions. After members struggled to find a concise and elegant way to amend the rule to express that sentiment, a member moved that subdivision (a) be amended by replacing the phrase "unless that prohibition or restriction is generally imposed upon the citation of all sources" with the phrase "unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions." The motion was seconded. Several members spoke in support of the motion, arguing that, while the motion would lengthen the rule and make it somewhat ungainly, it would also express the Committee's intention precisely and clearly. The motion carried (unanimously).

Following further discussion, a member moved that new Rule 32.1 and the accompanying Committee Note be approved, with the one change to subdivision (a) agreed to by the Committee. The motion was seconded. The motion carried (7-1, with one abstention). By consensus, the Committee authorized Judge Alito and the Reporter to make any changes in the Note that they deemed appropriate in light of the amendment to subdivision (a).

V. Discussion Items

A. Item No. 00-07 (FRAP 4 — time for Hyde Amendment appeals)
B. Item No. 02-08 (FRAP 10, 11 & 30 — transmitting records and filing appendices)
C. Item No. 02-16 (FRAP 28 — contents of briefs)
D. Item No. 02-17 (FRAP 32 — contents of covers of briefs)

The Committee is awaiting proposals or revised proposals from the Justice Department with respect to Item Nos. 00-07, 02-08, 02-16, and 02-17. Mr. Letter brought the Committee up to date with respect to the Department's deliberations about these proposals, describing at length

the complications that the Department is attempting to address. Mr. Letter said that the Department hopes to present proposals or revised proposals with respect to these items at the November 2003 meeting of the Committee.

The Committee took a 15-minute break.

E. Items Awaiting Initial Discussion

1. Item No. 03-01 (FRAP 4(a)(4)(A)(vi) — clarify whether includes Rule 60(a) motions)

Judge Jon O. Newman of the Second Circuit wrote a letter to Judge Alito calling the attention of the Committee to *Dudley v. Penn-America Ins. Co.*, 313 F.3d 662 (2d Cir. 2002), in which two judges disagreed over the meaning of Rule 4(a)(4)(A)(vi). That rule tolls the time to appeal if a party files a motion "for relief under [Civil] Rule 60 if the motion is filed no later than 10 days after the judgment is entered." In *Dudley*, Judge Rosemary S. Pooler, writing for the majority, read Rule 4(a)(4)(A)(vi) to encompass both motions under Rule 60(a) and motions under Rule 60(b). Judge Sonia Sotomayor, in a concurrence, argued that Rule 4(a)(4)(A)(vi) should be read to encompass only motions filed under Rule 60(b).

After discussion, the Committee determined by consensus that no amendment to Rule 4(a)(4)(A)(vi) was necessary and that Item No. 03-01 should be removed from the study agenda. Members of the Committee agreed with Judge Pooler that the rule is clear on its face and encompasses both Rule 60(a) motions and Rule 60(b) motions. Moreover, the Committee did not want to amend Rule 4(a)(4)(A)(vi) in a way that would make it necessary for judges to identify whether a post-trial motion was filed under Rule 60(a) or instead under Rule 60(b). Post-trial motions are often labeled wrongly — or not labeled at all — and thus it is often not clear whether a motion is brought under Rule 59, Rule 60(a), or Rule 60(b). After amending Rule 4(a)(4) in 1993 to make it unnecessary to distinguish between Rule 59 and Rule 60 motions, the Committee does not want to amend Rule 4(a)(4) to make it necessary to distinguish between Rule 60(a) and Rule 60(b) motions.

2. Item No. 03-02 (FRAP 7 — clarify whether limited to only FRAP 39 costs)

The Reporter called the attention of the Committee to *Pedraza v. United Guaranty Corp.*, 313 F.3d 1323 (11th Cir. 2002), in which the Eleventh Circuit described a circuit split over the meaning of Rule 7. Under Rule 7, a district court may require an appellant to post a bond "to ensure payment of costs on appeal." The circuits disagree about whether the reference to "costs on appeal" in Rule 7 is limited to those costs identified in Rule 39(e). The D.C. and Third Circuits have held that the phrase is so limited, but the Second and Eleventh Circuits disagree. According to the Second and Eleventh Circuits, the phrase "costs on appeal" in Rule 7 encompasses attorneys' fees that are defined as "costs" under a fee-shifting statute.

The Committee discussed this issue at some length and reached two conclusions:

First, Rule 7 should be amended to resolve the circuit split. This issue is important, and appellants in the Second and Eleventh Circuits — who might be required to post a bond to secure costs and attorneys' fees amounting to hundreds of thousands of dollars — are treated much differently than similarly situated appellants in the D.C. and Third Circuits — who cannot be required to post a bond to secure anything more than a few hundred dollars in costs.

Second, the amendment to Rule 7 should make clear that appellants can be required to post a bond only to secure what are typically thought of as "costs" (such as the costs identified in Rule 39(e)) and not attorneys' fees — whether or not those attorneys' fees are defined as "costs" in the relevant fee-shifting statute. Adopting the position of the Second and Eleventh Circuits would expand Rule 7 beyond its intended scope and vastly increase the cost of Rule 7 bonds. It would also attach significant consequences to whether a particular fee-shifting statute defines attorneys' fees as "costs," a matter that likely reflects little conscious thought on the part of Congress. In addition, district courts would confront practical problems in trying to determine the size of bond necessary to secure attorneys' fees that will be incurred in an appeal that is in its infancy. Finally, requiring appellants to post a bond to secure attorneys' fees is almost always unnecessary. In most cases in which an appellant might be held liable under a fee-shifting statute for the attorneys' fees incurred by an appellee, the appellant will be a public entity or other organization with ample resources to pay the fees.

The Committee discussed how Rule 7 might be amended to reflect this decision. It quickly became apparent that the drafting will be complicated by the fact that no where in the Appellate Rules or in the U.S. Code is there a comprehensive list of costs that are recoverable on appeal. For example, 28 U.S.C. § 1920 identifies costs that are not mentioned in Rule 39, and Rule 39 identifies costs that are not mentioned in § 1920. The Reporter agreed to research this matter further and present a draft amendment and Committee Note at a future meeting.

3. Item No. 03-03 (FRAP 11 & 12 — forbid returning exhibits to parties)

Judge John M. Roll, a member of the Criminal Rules Committee, has called the attention of the Committee to the fact that it is the practice of many district courts to return trial exhibits to the parties while their case is pending on appeal. Judge Roll has two concerns: (1) He is concerned about the ability of appellate courts quickly to retrieve exhibits from parties. (2) More importantly, he is concerned about the integrity of the exhibits — that is, about the possibility that exhibits will be destroyed, misplaced, or altered by the parties while the case is on appeal.

Members of the Committee agreed that this was an important issue, but expressed at least two concerns about any rule that would require clerks to maintain possession of all trial exhibits. First, many clerks simply do not have space to store exhibits. Second, many exhibits — such as

guns or drugs — are dangerous, and clerks understandably do not want to take responsibility for securing them.

At the request of the Committee, Mr. Letter agreed that the Justice Department would study this issue and make a recommendation at a future meeting.

4. Item No. 03-04 (FRAP 44 — differences with proposed Civil Rule 5.1)

Under Rule 44(a), a party who challenges the constitutionality of a federal statute in a case in which the federal government is not a party is required to notify the clerk of the challenge, and the clerk is then required to notify the Attorney General. Rule 44(b) — added in 2002 — applies a similar notice requirement to challenges to the constitutionality of state statutes in cases in which state governments are not parties. Rule 44 is derived from 28 U.S.C. § 2403.

Civil Rule 24(c) contains provisions similar to those found in Appellate Rule 44. However, the provisions of Civil Rule 24(c) have largely escaped the notice of district judges and trial attorneys, most likely because they are buried in a rule regarding intervention. As a result, the federal government often has not received timely notice — or, indeed, *any* notice — of constitutional challenges to federal statutes.

The Civil Rules Committee proposes to remedy this problem by adopting a new Civil Rule 5.1. That rule — which has not yet been approved for publication by the Standing Committee — would differ in several respects from current Appellate Rule 44. Most significantly, Civil Rule 5.1 would require the clerk to notify the government of a constitutional challenge when the party raising the challenge fails to do so (or when the court itself questions the constitutionality of a statute). Under Appellate Rule 44, the clerk is obligated to notify the government only after a party has notified the clerk of the existence of a constitutional challenge. Given that proposed Civil Rule 5.1 and existing Appellate Rule 44 are derived from the same statute and address the same subject matter, the Standing Committee is likely to insist that the rules be reconciled or that the differences be justified by the differences between trial proceedings and appellate proceedings.

Mr. Letter said that current Civil Rule 24(c) is not effective and needs to be changed so that the government receives timely notice of constitutional challenges to federal statutes. Although members of the Committee did not dispute that point, they did raise some practical questions about proposed Civil Rule 5.1. For example, how are clerks supposed to "screen" cases for constitutional challenges? Clerks cannot possibly read every paper filed in every case — much less follow every oral argument made before a court. How are clerks supposed to know when the constitutionality of a statute has been challenged? Moreover, does the government really want to be notified of each and every constitutional challenge — including the many hundreds of frivolous challenges made by prisoners, tax protesters, and pro se litigants? Is it not possible that serious challenges would get lost in the blizzard of paperwork created by the many frivolous challenges?

Mr. Letter acknowledged that these were valid questions and asked that he be given an opportunity to consult with his colleagues at the Department of Justice and report back to the Committee with a recommendation regarding Rule 44. By consensus, the Committee agreed to maintain Item No. 03-04 on its study agenda.

5. Item No. 03-05 (require written opinions in every case)

Prof. Joseph R. Weeks of the Oklahoma City University School of Law has proposed a new Appellate Rule 49 that would require courts to "issue a written opinion explaining the basis for each disposition." In other words, every decision by a court of appeals would have to be explained in a written opinion. Under Prof. Weeks's proposal, every opinion would have to "expound on the law as applied to the facts of the case and set out the basis for the disposition."

Several members of the Committee expressed appreciation for Prof. Weeks's proposal and agreement with many of the points that he made in his letter. No one on the Committee disagrees that, for many reasons, it is important for courts to explain their decisions. All members of the Committee agree that, in an ideal world, every decision of every court would be accompanied by a meaningful opinion. However, the Committee also agreed by consensus not to pursue Prof. Weeks's proposal. Among the Committee's concerns are the following:

1. Any rule that would require that every decision be explained in a written opinion would have little chance of being approved by the Standing Committee and no chance of being approved by the Judicial Conference.

2. The Committee is already engaged in a difficult effort to amend the Appellate Rules to require courts to permit the citation of unpublished opinions. Members of the Committee have assured wary judges that proposed Rule 32.1 is not the first step on a slippery slope that will end with all courts being required to issue "precedential" opinions in all cases. Prof. Weeks's proposal would be seen as the next step on that slippery slope, and if the Committee were to pursue the proposal, the likely reaction from judges might make it more difficult to get approval of Rule 32.1.

3. The workloads of federal appellate judges are enormous. The judges of today are required to decide many more cases than the judges of 30 or 40 years ago. Until significantly more judgeships are created and filled, hard decisions will have to be made about the allocation of judicial resources. Prof. Weeks's proposal would essentially force judges to spread their time thinly over all cases rather than choose to devote substantial time to some cases and less time to others. Some members of the Committee view this as poor stewardship of judicial resources. More importantly, all Committee members, regardless of their personal views, agree that this policy decision should not be made in the same way for all judges by this Committee.

4. It would be extremely difficult to draft a rule that would be effective in forcing judges who do not want to do so to issue a satisfactory opinion in every case. Moreover, it would be almost impossible to enforce a "mandatory opinion" rule against judges who tried to evade it.

By consensus, the Committee removed Item No. 03-05 from the study agenda.

6. Item No. 03-06 (FRAP 3 — defining parties)

On behalf of the Solicitor General, Mr. Letter presented a proposal to add a new Rule 3(f). Under that proposed rule, all parties to the case before the district court would be deemed parties to the case on appeal, and all parties to the case on appeal — save those who actually file a notice of appeal — would be deemed appellees. Parties who had no interest in the outcome of the appeal could withdraw from the case by filing a notice with the clerk. An "appellee" who supported the position of an appellant would have to file its brief within 7 days after the brief of that appellant was due. And an appellee who supported the position of an appellant would not be permitted to file a reply brief. Mr. Letter stressed that proposed Rule 3(f) was drafted to avoid the difficult issue of whether and to what extent a non-party can take advantage of the decision of an appellate court.

One member said that, in prohibiting appellees who support appellants from filing reply briefs, proposed Rule 3(f) departs from the Supreme Court rules on which it is patterned. Respondents who support petitioners are allowed to file reply briefs in the Supreme Court. The member said that he thought that a similar practice should be followed in the courts of appeals.

Another member objected to giving appellees who support appellants 7 more days to file their briefs than appellants themselves. Although she understands the desire to avoid duplication, she pointed out that the effect of the rule is to give de facto appellants who do *not* file notices of appeals more time to file briefs than de jure appellants who *do* file such notices.

Another member questioned the need for proposed Rule 3(f). He pointed out that, under Rule 4(a)(3), if one party files an appeal, all other parties get at least 14 days to file a notice of appeal. Thus, a party who does not want to appeal, but who also wants to participate in the appeal if another party appeals, can simply file its own notice of appeal after the other party "pulls the trigger." The member said that he saw little need for the rule, and he feared that the rule might have unintended and unanticipated consequences.

Finally, Prof. Mooney said that the Committee considered a similar proposal about 10 years ago. She recalls that the Committee gave the proposal considerable attention. She said that she did not have a good memory of the details of the proposal or the reasons for its rejection, but the records of the Committee should illuminate the matter. Mr. Rabiej agreed to research the Committee records.

By consensus, the Committee agreed to maintain Item No. 03-06 on the study agenda. Mr. Letter said that the Justice Department would consider the comments made by Committee members and review any records discovered by Mr. Rabiej.

VI. Additional Old Business and New Business

Judge Stewart and Mr. Svetcov described an issue that had been brought to their attention by Judge Will Garwood of the Fifth Circuit (former chair of the Committee) and Fifth Circuit clerk Charles R. "Fritz" Fulbruge III (former liaison to the Committee from the appellate clerks).

Under Rule 26(a)(2), "legal holidays" are excluded when computing any period of time that is less than 11 days. Moreover, under Rule 26(a)(3), if the last day of a period of time falls on a "legal holiday," that period of time does not end until the following day.

Rule 26(a)(4) defines "legal holiday" to include a list of federal holidays and "any other day declared a holiday by . . . the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office." Thus, in a case involving an appeal to the Fifth Circuit (headquartered in New Orleans) from an order of a district court in Texas, a day that is declared a holiday in *either* Louisiana *or* Texas would be deemed a "legal holiday" for purposes of Rule 26(a).

Mr. Fulbruge has raised the question whether a holiday declared by a particular *county* or *parish* would count as a "legal holiday" under Rule 26(a)(4). The Committee unanimously agreed that it would not, although the fact that a holiday was declared by the county or parish in which the circuit clerk's office was located might make the office "inaccessible" for purposes of Rule 26(a)(3).

Judge Garwood and Mr. Fulbruge also identified the following anomaly: A lawyer who lives in Texas and who represents a party in an appeal from an order of a district court in Texas and who has 10 days to respond to a paper would get an "extra" day under Rule 26(a)(2) if a holiday declared by the State of *Louisiana* falls in the middle of that 10-day period. There is no reason why an attorney who lives and works in Texas — or any other state except Louisiana — should get extra time to file a paper because one of the days within his deadline happens to be a holiday in Louisiana.

Committee members agreed with Judge Garwood's and Mr. Fulbruge's interpretation of the rule. However, Committee members also expressed the view that Rule 26(a) should not be amended to "fix" this anomaly. First, the anomaly does not arise from an ambiguity in the rule; indeed, the anomaly is created by the plain meaning of the rule. Second, the anomaly does not harm anyone. A very clever lawyer might figure out that he has one additional day to file a paper, and a similarly situated lawyer who is not as clever might file his paper one day earlier than was necessary. But no lawyer is going to blow a deadline because of the anomaly. Third,

the anomaly cuts both ways in the sense that a lawyer living and working in New York who represents a party in an appeal from an order of a district court in Texas will *not* get to exclude a New York holiday, even though his office may be closed on that day. Finally, amending the rule to "fix" the anomaly would be a complicated undertaking and might very well give rise to additional anomalies — anomalies that might be more harmful than the anomaly identified by Judge Garwood and Mr. Fulbruge.

Judge Alito agreed that he would contact Judge Garwood and Mr. Fulbruge and inform them that, while the Committee would be happy to entertain a specific proposal to amend Rule 26(a), it was not presently inclined to try to fix the anomaly that they had identified.

VII. Schedule Dates and Location of Fall 2003 Meeting

The Committee will meet during the first week of November 2003 in Santa Fe, New Mexico. The precise dates will be set after the Committee is polled by the Administrative Office. At this point, it appears that only a one-day meeting will be necessary, but that could change.

VIII. Adjournment

By consensus, the Committee adjourned at 12:00 noon.

Respectfully submitted,

_____

Patrick J. Schiltz
Reporter

Advisory Committee on Appellate Rules
Table of Agenda Items — Revised May 2003

FRAP Item	Proposal	Source	Current Status
97-14	Amend FRAP 46(b)(1)(B) to replace the general "conduct unbecoming" standard with a more specific standard.	Standing Committee	Awaiting initial discussion Discussed and retained on agenda 04/98 Discussed and retained on agenda 10/99 Discussed and retained on agenda 04/00 Discussed and retained on agenda 04/01
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
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 Discussed and retained on agenda 04/01 Draft approved 04/02 for submission to Standing Committee
00-07	Amend FRAP 4 to specify time for appeal of order granting or denying motion for attorney's fees under Hyde Amendment.	Hon. Stanwood R. Duval, Jr. (E.D. La.)	Awaiting initial discussion Discussed and retained on agenda 04/01; awaiting proposal from Department of Justice Discussed and retained on agenda 04/02 Discussed and retained on agenda 11/02; awaiting revised proposal from Department of Justice
00-08	Amend FRAP 4(a)(6) to clarify whether a moving party "receives notice" of the entry of a judgment when that party learns of the judgment only through a verbal communication.	Hon. Stanwood R. Duval, Jr. (E.D. La.)	Awaiting initial discussion Discussed and retained on agenda 04/01 Discussed and retained on agenda 04/02 Discussed and retained on agenda 11/02 Draft approved 05/03 for submission to Standing Committee
00-11	Amend FRAP 35(a) to provide that disqualified judges should not be considered in assessing whether "[a] majority of the circuit judges who are in regular active service" have voted to hear or rehear a case en banc.	Hon. Edward E. Carnes (CA11)	Awaiting initial discussion Discussed and retained on agenda 04/01; awaiting report from Federal Judicial Center Discussed and retained on agenda 04/02 Discussed and retained on agenda 11/02 Draft approved 05/03 for submission to Standing Committee

FRAP Item	Proposal	Source	Current Status
00-12	Amend FRAP 28, 31 & 32 to specify the length, timing, and cover colors of briefs in cases involving cross-appeals.	Solicitor General	Awaiting initial discussion Discussed and retained on agenda 04/01; awaiting revised proposal from Department of Justice Discussed and retained on agenda 04/02 Draft approved 11/02 for submission to Standing Committee
01-01	Add rule to regulate the citation of unpublished and non-precedential decisions.	Solicitor General	Awaiting initial discussion Discussed and retained on agenda 04/01 Discussed and retained on agenda 04/02 Discussed and retained on agenda 11/02 Draft approved 05/03 for submission to Standing Committee
01-03	Amend FRAP 26(a)(2) to clarify interaction with "3-day rule" of FRAP 26(c).	Roy H. Wepner, Esq.	Awaiting initial discussion Discussed and retained on agenda 04/01 Referred to Civil Rules Committee 04/02
01-05	Amend Forms 1, 2, 3, and 5 to change references to "19__."	Advisory Committee	Awaiting initial discussion Draft approved 04/02 for submission to Standing Committee in 06/02 Approved by Standing Committee 06/02 Approved by Judicial Conference 09/02 Approved by Supreme Court 03/03
02-01	Amend FRAP 27(d) to apply typeface and type-style limits of FRAP 32(a)(5)&(6) to motions.	Charles R. Fulbruge III (CA5 Clerk)	Awaiting initial discussion Discussed and retained on agenda 04/02 Draft approved 11/02 for submission to Standing Committee
02-08	Amend FRAP 10, 11 & 30 to eliminate local rule variations regarding transmitting records and filing appendices.	ABA Council of Appellate Lawyers	Awaiting initial discussion Discussed and retained on agenda 11/02; awaiting proposal from Department of Justice
02-16	Amend FRAP 28 to eliminate local rule variations regarding contents of briefs.	ABA Council of Appellate Lawyers	Awaiting initial discussion Discussed and retained on agenda 11/02; awaiting proposal from Department of Justice
02-17	Amend FRAP 32 to eliminate local rule variations regarding contents of covers of briefs.	ABA Council of Appellate Lawyers	Awaiting initial discussion Discussed and retained on agenda 11/02; awaiting proposal from Department of Justice

FRAP Item	Proposal	Source	Current Status
03-02	Amend FRAP 7 to clarify whether reference to "costs" includes only FRAP 39 costs.	Advisory Committee	Awaiting initial discussion Discussed and retained on agenda 05/03
03-03	Amend FRAP 11 or 12 to forbid returning exhibits to parties unless electronic copies are made.	Hon. John M. Roll (D. Ariz.)	Awaiting initial discussion Discussed and retained on agenda 05/03; awaiting proposal from Department of Justice
03-04	Amend FRAP 44 to conform to proposed Civil Rule 5.1.	Civil Rules Committee	Awaiting initial discussion Discussed and retained on agenda 05/03; awaiting proposal from Department of Justice
03-06	Adopt new FRAP 3(f) to define parties.	Solicitor General	Awaiting initial discussion Discussed and retained on agenda 05/03
03-07	Amend FRAP 35 to require disclosure of votes of individual judges when rehearing petitions are denied.	Hon. A. Wallace Tashima (CA9)	Awaiting initial discussion

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

SAMUEL A. ALITO, JR.
APPELLATE RULES

A. THOMAS SMALL
BANKRUPTCY RULES

DAVID F. LEVI
CIVIL RULES

EDWARD E. CARNES
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

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

FROM: **Ed Carnes, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: **Report of the Advisory Committee on Criminal Rules**

DATE: **May 15, 2003**

I. Introduction

The Advisory Committee on the Rules of Criminal Procedure met on April 26-27, 2003 in Santa Barbara, California and took action on proposed amendments to the Rules of Criminal Procedure. The Minutes of that meeting are included at Appendix E.

This Report addresses eight action items: approval of published Rules 35, 41, and the restyled Rules Governing § 2254 and § 2255 Proceedings, for transmission to the Judicial Conference and approval for publication and comment on proposed amendments to Rules 12.2, 29, 32, 32.1, 33, 34, 45, and new Rule 59. In addition, the report includes two information items.

II. Action Items—Summary and Recommendations.

The Advisory Committee on the Criminal Rules met on April 27 and 28, 2003, and acted on a number of proposed amendments. This report addresses matters discussed by the Committee at that meeting. First, the Committee considered public comments on proposed amendments to the following Rules:

- Rule 35. Correcting or Reducing a Sentence; Addition of Definition for Sentencing.

- Rule 41. Search and Seizure; Tracking-Device Warrants
- Rules Governing § 2254 and § 2255 Proceedings and Accompanying Forms

As noted in the following discussion, the Advisory Committee proposes that those amendments be approved by the Committee and forwarded to the Judicial Conference.

Second, the Committee has considered and recommended amendments to the following Rules:

- Rule 12.2. Notice of Insanity Defense; Mental Examination; Sanction for Failing to Disclose.
- Rules 29, 33, 34 & 45. Regarding Ruling by Judge on Motions to Extend Time for Filing Motions Under Those Rules.
- Rule 32. Sentencing; Regarding Victim Allocution.
- Rule 32.1. Revoking or Modifying Probation or Supervised Release; Regarding Allocution by Defendant.
- New Rule 59. Review of Rulings by Magistrate Judges

The Committee recommends that those rules be published for public comment.

III. Action Items--Recommendations to Forward Amendments to the Judicial Conference

A. Summary and Recommendations

At its June 2001 meeting, the Standing Committee approved the publication of proposed amendments to Rule 35 for public comment and in June 2002, the committee approved proposed amendments to Rule 41 and the Rules Governing § 2254 and § 2255 Proceedings. The comment period for the proposed amendment to Rule 35 was closed on February 15, 2002 and the comment period for the proposed amendments to the other rules closed on February 15, 2003. In response, the Advisory Committee received written comments from a number of persons and organizations commenting on all or some of the Committee's proposed amendments to the rules. The Committee has made several changes to rules and recommends that all of the proposed amendments be forwarded to the Judicial Conference for approval and transmittal to the Supreme Court. The following discussion briefly summarizes the proposed amendments.

B. ACTION ITEM —Rule 35. Correcting or Reducing a Sentence.

Several years ago, after the restyled rules were published for comment, the Committee considered an issue raised by members of the Appellate Rules Committee regarding possible conflict over what was meant by the term "imposition of sentence" in

original Rule 35(c) (now restyled Rule 35(a)), which serves as the triggering event for the 7-day period for making corrections to the sentence. Initially, the Committee decided to use the term "oral announcement of sentence," but then later determined that the Rule should be more consistent with Appellate Rule 4 and any other rules that might specify when the right to appeal is triggered. Thus, it proposed an amendment that would include in the rule a new definitional section that stated that for purposes of Rule 35, sentencing meant "entry of the judgment." That amendment was published for comment and the comment period expired in February 2002.

At the April 2002 meeting, the Committee considered the seven written comments on the proposed amendment. The comments were mixed. While The Department of Justice, the Federal Bar Association, the Committee on the U.S. Courts of the State Bar of Michigan, and the NACDL opposed the amendment, the State Bar of California Committee on Federal Courts, the Federal Magistrate Judges Assn., and Judge David Lawson endorsed the amendment.

The public comments opposing the amendment cited concerns about interjecting more uncertainty into the area, expanding the time during which the court could change the sentence, and adopting the minority view of the circuit courts that have addressed the issue. On the other hand, those endorsing the amendment believed that it would clarify an ambiguity in the rule and make it more consistent with Appellate Rule 4.

Following additional discussion the Committee voted to use the term "oral announcement" throughout Rule 35 and to forward the amendment to the Standing Committee for action. However, shortly after the Criminal Rules Committee's meeting, it became apparent that approach would result in unwieldy language. Thus, the rule was not forwarded to the Standing Committee in June 2002. Instead, at its September 2002 meeting, the Committee reverted to the original concept of including a special definition of sentencing and instructed the Reporter to prepare the draft. That draft was considered and approved at the Committee's April 2003 meeting.

The Committee does not believe that the proposed amendment needs to be republished. A copy of the rule, Committee Note, summary of the written comments and a GAP report are at Appendix A.

Recommendation —The Committee recommends that the amendments to Rule 35 be approved and forwarded to the Judicial Conference.

C. ACTION ITEM--Rule 41. Search and Seizure; Tracking Device Warrants.

In June 2002, the Standing Committee approved for publication amendments to Rule 41 that would address tracking-device warrants, and conforming amendments to 18

U.S.C. § 3103, concerning delays in notification required under Rule 41. The Committee considered the seven written comments and made several minor clarifying changes to the published rule. A copy of the rule, Committee Note, summary of written comments, and GAP report are at Appendix B.

Recommendation —The Committee recommends that the amendments to Rule 41 be approved and forwarded to the Judicial Conference.

D. ACTION ITEM—Rules Governing § 2254 and § 2255 Rules and Accompanying Forms

Following successful restyling of the Criminal Rules, the Committee obtained approval from the Standing Committee to proceed with a review of the Rules Governing § 2254 and § 2255 Proceedings (the "Habeas Rules"). Under the chairmanship of Judge David Trager, and with the assistance of the style subcommittee, the Committee recommended a number of style and substantive changes to the rules themselves and also to the accompanying official forms. The rules and forms were published for comment in 2002 and the comment period ended on February 15, 2003. The Committee received a large number of comments from individuals and organizations.

At its April 2003 meeting, the Committee considered those comments and made a number of changes to the rules as published. A copy of the rules, Committee Notes, forms, summary of written comments and GAP reports are at Appendix C.

Recommendation —The Committee recommends that the amendments to the Rules Governing § 2254 Proceedings and the Rules Governing § 2255 Proceedings, and the forms accompanying those rules be approved and forwarded to the Judicial Conference.

IV. Action Items—Recommendation to Publish Amendments to Rules

A. ACTION ITEM — Rule 12.2. Notice of Insanity Defense; Mental Examination and Sanctions for Failure to Disclose.

For the last year the Committee has considered a proposal to amend Rule 12.2 to fill a perceived gap. Although the rule contains a sanctions provision for failing to comply with the requirements of the rule, there is no provision stating possible sanctions if the defendant does not comply with Rule 12.2(c)(3), which requires the defendant to disclose to the government the results and reports of the defendant's expert examination.

The Committee has unanimously proposed an amendment to Rule 12.2(d) to address that issue and requests that the rule be published for public comment.

The Rule and the accompanying Committee Note are at Appendix D.

B. ACTION ITEM —Rules 29, 33, 34, and 45; Proposed Amendments re Rulings by Court and Setting Times for Filing Motions.

In Rules 29, 33, and 34 the court is required to rule on any motion for an extension of time, within the seven-day period specified for filing the underlying motion. Failure to do so deprives the court of the jurisdiction to consider an underlying motion, filed after the seven-day period. *See United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to fix a time for filing a motion for new trial within seven days of the verdict"). Thus, if a defendant files a request for an extension of time to file a motion for a judgment of acquittal within the seven-day period, the judge must rule on that motion or request within the same seven-day period. If for some reason the court does not act on the request within the seven days, the court lacks jurisdiction to act on the underlying substantive motion.

Parallel amendments have been proposed for Rules 29, 33, and 34 and a conforming change has been proposed for Rule 45. The defendant would still be required to file motions under those rules within the specified seven-day period unless the time is extended. And the defendant would still be required to file within that seven-day period any request for extension. The change is that the court would not be required to act on that motion within the same seven-day period on the request for the extension.

The Rule and Committee Note, which was approved by an 8 to 2 vote of the Committee is attached at Appendix D.

C. ACTION ITEM —Rule 32, Sentencing; Proposed Amendment re Allocution Rights of Victims of Non-violent and Non-sexual Abuse Felonies.

Currently, Rule 32(i)(4) provides for allocution at sentencing by victims of violent crimes and sexual abuse. Although there is no provision in the current rule for victim allocution for other felonies, the Committee understands that many courts nonetheless consider statements from victims of felonies that do not involve violence or sexual abuse.

At its September 2002, meeting the Committee decided to amend Rule 32 to provide for allocution for victims of non-violent and non-sexual abuse felonies. At its April 2003 meeting, the Committee continued its discussion of the proposed amendment

and voted by a margin of 7 to 2, with one abstention, to recommend that the proposed amendment be published for comment.

The Committee considered but rejected a provision that would provide that a court's decision regarding allocution in this type of case would not be reviewable. In rejecting that provision, the Committee considered the fact that there is already some authority for the view that victims do not have standing to appeal a court's decision denying them the ability to address the court.

The proposed amendment does not make any specific provision for hearing from representatives of victims of non-violent or non-sexual abuse felonies, because the Committee believes that the policy reasons for permitting statements by third persons are not as compelling, in cases involving "economic" crimes. In any event, the rule does not prohibit the court from considering statements from third persons, speaking on behalf of victims.

A copy of the proposed rule and Committee Note are at Appendix D.

D. ACTION ITEM —Rule 32.1. Revoking Or Modifying Probation Or Supervised Release. Proposed Amendments To Rule Concerning Defendant's Right Of Allocution.

In *United States v. Frazier*, 283 F.3d 1242 (11th Cir. 2002), the court observed that there is no explicit provision in Rule 32.1 giving the defendant a right to allocution; it suggested that the Advisory Committee might wish to address that matter. At the Committee's April 2002 meeting, it voted to amend Rule 32.1 to address allocution rights at revocation hearings; at its September 2002 meeting, the Committee decided to consider a further amendment to the rule that would include a similar allocution provision in proceedings to modify a sentence.

The Committee unanimously approved the proposed amendment to Rule 32.1 and recommends that the Standing Committee approve the amendments for publication. A copy of the rule and Committee Note are at Appendix D.

E. ACTION ITEM—Rule 59; Proposed New Rule Concerning Rulings by Magistrate

In response to a decision by the Ninth Circuit in *United States v. Abonce-Barerra*, 257 F.3d 959, 969 (9th Cir. 2001), the Committee has considered an amendment to the Rules of Criminal Procedure that would parallel Federal Rule of Civil Procedure 72, which addresses procedures for appealing decisions by magistrate judges.

At its April 2002 meeting, the Committee voted to consider the issue further and at its September 2002 meeting the Committee adopted a draft rule that would have included not only procedures for appealing a magistrate judge's decision but would also have addressed the ability of a magistrate judge to take a guilty plea. That provision was dropped, however, due to two developments. First, the Magistrate Judges' Committee was opposed to any reference in the rule to taking guilty pleas. And second, the Ninth Circuit had granted *en banc* review in *United States v. Reyna-Tapia*, 294 F.3d 1192 (9th Cir.), *vacated by* 315 F.3d 1107 (9th Cir. 2002), the case that had provided the impetus for including reference to guilty pleas in the proposed rule. [Following the meeting, the Committee learned the court had decided that a magistrate judge could hear Rule 11 plea colloquies, for findings and recommendations and that the district court was not required to conduct a de novo review unless one of the parties objected.]

The current draft, approved by a vote of 8 to 1 would be new Rule 59 and it would address only the issue of appealing a magistrate judge's orders, both for dispositive and nondispositive matters.

A copy of Rule 59 and the accompanying Committee Note are at Appendix D.

V. Information Items

A. Congressional Amendments to Rule 6

As the restyled Criminal Rules were going into effect in December 2002, Congress further amended Rule 6 to permit the government to share grand jury information with foreign governments in terrorism cases. But the amendment was based on the former version of the rule, and therefore the legislation could not be executed. Mr. Rabiej, Professor Schlueter, Professor Kimble, Judge Carnes, and the Department of Justice prepared conforming language to remedy the problem, but to date Congress had not acted. Thus, there is a potential conflict between the rule that went into effect on December 1, 2002, and the subsequent legislative amendment. The Department of Justice considers the legislation a nullity and will not rely on it. The Criminal Rules Committee does not anticipate taking any additional action at this point.

B. Congressional Consideration of Amendments to Rule 46.

For the past several years Congress had considered an amendment to Rule 46. Bail bondsmen have urged Congress to amend that rule to prevent judges from revoking surety bonds for violation of any condition other than for failure to appear in court. They are concerned that the current version of Rule 46 might serve as the basis for similar treatment in state practice. The chair of the Criminal Rules Committee, Judge Carnes, has testified on the matter and presented additional statistical data supporting the current version of the rule. To date, no additional action has apparently been taken by Congress.

Attachments:

Appendix A. Rule 35. Correction or Reduction of Sentence.
Appendix B. Rule 41. Search Warrants.
Appendix C. Rules Governing § 2254 and § 2255 Proceedings
Appendix D. Proposed Amendments to Rules 12.2, 29, 33, 34, 45, 32, 32.1, 45, and 59 (new rule).
Appendix E. Minutes of April 2003 Meeting.

APPENDIX A

RULE 35. CORRECTING OR REDUCING A SENTENCE

- **Copy of Rule**
- **Committee Note**
- **Summary of Written Public Comments**
- **GAP Report**

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.*** Upon the government's motion made more than one year after sentencing, the court may reduce a sentence if the defendant's substantial assistance involved:

(A) information not known to the defendant until one year or more after sentencing;

(B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until more than one year after sentencing; or

(C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant.

(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) **"Sentencing" Defined.** As used in this rule, "sentencing" means the oral announcement of the sentence.

COMMITTEE NOTE

Rule 35(c) is a new provision, which defines sentencing for purposes of Rule 35 as the oral announcement of the sentence.

Originally, the language in Rule 35 had used the term "imposition of the sentence." The term "imposition of sentence" was not defined in the rule and the courts addressing the meaning of the term were split. The majority view was that the term meant the oral announcement of the sentence and the minority view was that it meant the entry of the judgment. *See United States v. Aguirre*, 214 F.3d 1122, 1124-25 (9th Cir. 2000) (discussion of original Rule 35(c) and citing cases). During the restyling of all of the Criminal Rules in 2000 and 2001, the Committee determined that the uniform term "sentencing" throughout the entire rule was the more appropriate term. After further reflection, and with the recognition that some ambiguity may still be present in using the term "sentencing," the Committee believes that the better approach is to make clear in the rule itself that the term "sentencing" in Rule 35 means the oral announcement of the sentence. That is the meaning recognized in the majority of the cases addressing the issue.

SUMMARY OF COMMENTS ON RULE 32.

The Committee received only seven written comments on the proposed amendment to Rule 35

The comments were mixed. While The Department of Justice, the Federal Bar Association, the Committee on the U.S. Courts of the State Bar of Michigan, and the NACDL opposed the amendment, the State Bar of California Committee on Federal Courts, the Federal Magistrate Judges Assn., and Judge David Lawson endorsed the amendment.

The public comments opposing the amendment cited concerns about interjecting more uncertainty into the area, expanding the time during which the court could change the sentence, and adopting the minority view of the circuit courts that have addressed the issue. On the other hand, those endorsing the amendment believed that it would clarify an ambiguity in the rule and make it more consistent with Appellate Rule 4.

GAP REPORT--RULE 35.

The Committee changed the definition of the triggering event for the timing requirements in Rule 35 to conform to the majority view in the circuit courts and adopted added a special definitional section, Rule 35(c) to define sentencing as the "oral announcement of the sentence."

APPENDIX B

RULE 41. SEARCH AND SEIZURE

- **Copy of Rule**
- **Committee Note**
- **Summary of Written Public Comments**
- **GAP Report**

Rule 41. Search and Seizure

(a) Scope and Definitions.

* * * * *

(2) Definitions. The following definitions apply under this rule:

* * * * *

(D) "Domestic terrorism" and "international terrorism" have the meanings set out in 18 U.S.C. § 2331.

(E) "Tracking device" has the meaning set out in 18 U.S.C. § 3117(b).

(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 with authority in the district—or if none is reasonably available, a judge of a state court of record in the district—has authority to issue a warrant to search for and seize a person or property located within the district;

(2) a magistrate judge with authority in the district has authority to 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 or be moved outside the district before the warrant is executed; ~~and~~

(3) a magistrate judge—in an investigation of domestic terrorism or international terrorism ~~(as defined in 18 U.S.C. § 2331) having~~ with authority in any district in which activities related to the terrorism may have occurred, ~~may~~ has authority to issue a warrant for a person or property within or outside that district~~.~~; and

(4) a magistrate judge with authority in the district has authority to issue a warrant to install within the district a tracking device; the warrant may authorize use of the device to track the movement of a person or property located within the district, outside the district, or both.

* * * * *

(d) Obtaining a Warrant.

(1) ***~~Probable Cause~~ In General.*** After receiving an affidavit or other information, a magistrate judge—or if authorized by Rule 41(b), ~~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 or to install and use a tracking device ~~under Rule 41(c)~~.

* * * * *

(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.

(2) ***Contents of the Warrant.***

(A) *Warrant to Search for and Seize a Person or Property.* Except for a tracking-device warrant, ~~T~~the warrant must identify the person or property to be searched, 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)~~(i) execute the warrant within a specified time no longer than 10 days;

~~(B)~~(ii) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution

at another time; and

~~(C)~~(iii) return the warrant to the magistrate judge designated in the warrant.

(B) *Warrant for a Tracking Device.* A tracking-device warrant must identify the person or property to be tracked, designate the magistrate judge to whom it must be returned, and specify a reasonable length of time that the device may be used. The time must not exceed 45 days from the date the warrant was issued. The court may, for good cause, grant one or more extensions for a reasonable period not to exceed 45 days each. The warrant must command the officer to:

(i) complete any installation authorized by the warrant within a specified time no longer than 10 calendar days;

(ii) perform any installation authorized by the warrant during the daytime, unless the judge for good cause

expressly authorizes installation at another time; and

(iii) return the warrant to the magistrate judge designated in the warrant.

(3) ***Warrant by Telephonic or Other Means.***

* * * * *

(f) Executing and Returning the Warrant.

(1) Warrant to Search for and Seize a Person or Property.

~~(1)~~(A) *Noting the Time.* The officer executing the warrant must enter on ~~its face~~ the exact date and time it is was executed.

~~(2)~~(B) *Inventory.* An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in

the presence of at least one other credible person.

~~(3)~~(C) *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)~~(D) *Return.* The officer executing the warrant must promptly return it—together with the 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.

(2) *Warrant for a Tracking Device.*

(A) *Noting the Time.* The officer executing a tracking-device warrant must enter on it the date and time the device was

installed and the period during which it was used.

(B) *Return.* Within 10 calendar days after the use of the tracking device has ended, the officer executing the warrant must return it to the magistrate judge designated in the warrant.

(C) *Service.* Within 10 calendar days after the use of the tracking device has ended, the officer executing a tracking must serve a copy of the warrant on the person who was tracked or whose property was tracked. Service may be accomplished by delivering a copy to the person who, or whose property, was tracked; or by leaving a copy at the person's residence or usual place of abode with an individual of suitable age and discretion who resides at that location and by mailing a copy to the person's last known address. Upon request of the government, the magistrate

judge may delay notice as provided in 41(f)(3).

(3) ***Delayed Notice.*** Upon request of the government, a magistrate judge—or if authorized by Rule 41(b), a judge of a state court of record—may delay any notice required by this rule if the delay is authorized by statute.

* * * * *

COMMITTEE NOTE

The amendments to Rule 41 address two issues: first, procedures for issuing tracking device warrants and second, a provision for delaying any notice required by the rule.

Amended Rule 41(a)(2) includes two new definitional provisions. The first, in Rule 41(a)(2)(D), addresses the definitions of "domestic terrorism" and "international terrorism," terms used in Rule 41(b)(2). The second, in Rule 41(a)(2)(E), addresses the definition of "tracking device."

Amended Rule 41(b)(4) is a new provision, designed to address the use of tracking devices. Such searches are recognized both by statute, *see* 18 U.S.C. § 3117(b) and by caselaw, *see, e.g.*, *United States v. Karo*, 468 U.S. 705 (1984); *United States v. Knotts*, 460 U.S. 276 (1983). Warrants may be required to monitor tracking devices when they are used to monitor persons or property in areas where there is a reasonable expectation of privacy. *See, e.g., United States v. Karo*, *supra* (although no probable cause was required to install beeper, officers' monitoring of its location in defendant's

home raised Fourth Amendment concerns). Nonetheless, there is no procedural guidance in current Rule 41 for those judicial officers who are asked to issue tracking device warrants. As with traditional search warrants for persons or property, tracking device warrants may implicate law enforcement interests in multiple districts.

The amendment provides that a magistrate judge may issue a warrant, if he or she has the authority to do so in the district, to install and use a tracking device, as that term is defined in 18 U.S.C. § 3117(b). The magistrate judge's authority under this rule includes the authority to permit entry into a area where there is a reasonable expectation of privacy, installation of the tracking device, and maintenance and removal of the device. The Committee did not intend by this amendment to expand or contract the definition of what might constitute a tracking device. The amendment is based on the understanding that the device will assist officers only in tracking the movements of a person or property. The warrant may authorize officers to track the person or property within the district of issuance, or outside the district.

Because the authorized tracking may involve more than one district or state, the Committee believes that only federal judicial officers should be authorized to issue this type of warrant. Even where officers have no reason to believe initially that a person or property will move outside the district of issuance, issuing a warrant to authorize tracking both inside and outside the district avoids the necessity of obtaining multiple warrants if the property or person later crosses district or state lines.

The amendment reflects the view that if the officers intend to install or use the device in a constitutionally protected area, they must obtain judicial approval to do so. If, on the other hand, the officers intend to install and use the device without implicating any Fourth Amendment rights, there is no need to obtain the warrant. *See, e.g. United States v. Knotts, supra*, where the officers' actions in installing and following tracking device did not amount to a search under the Fourth Amendment.

Amended Rule 41(d) includes new language on tracking devices. The tracking device statute, 18 U.S.C. § 3117, does not specify the standard an applicant must meet to install a tracking device. The Supreme Court has acknowledged that the standard for installation of a tracking device is unresolved, but has reserved ruling on the issue until it is squarely presented by the facts of a case. *See United States v. Karo*, 468 U.S. 705, 718 n. 5 (1984). The amendment to Rule 41 does not resolve this issue or hold that such warrants may issue only on a showing of probable cause. Instead, it simply provides that if probable cause is shown, the magistrate must issue the warrant. And the warrant is only needed if the device is installed (for example in the trunk of the defendant's car) or monitored (for example, while the car is in the defendant's garage) in an area in which the person being monitored has a reasonable expectation of privacy.

Amended Rule 41(e)(2)(B) is a new provision intended to address the contents of tracking device warrants. To avoid open-ended monitoring of tracking devices, the revised rule requires the magistrate judge to specify in the warrant the length of time for using the device. Although the initial time stated in the warrant may not exceed 45 days, extensions of time may be granted for good cause. The rule further specifies that any installation of a tracking device authorized by the warrant must be made within ten calendar days and, unless otherwise provided, that any installation occur during daylight hours.

Current Rule 41(f) has been completely revised to accommodate new provisions dealing with tracking device warrants. First, current Rule 41(f)(1) has been revised to address execution and delivery of warrants to search for and seize a person or property; no substantive change has been made to that provision. New Rule 41(f)(2) addresses execution and delivery of tracking device warrants. That provision generally tracks the structure of revised Rule 41(f)(1), with appropriate adjustments for the particular requirements of tracking device warrants. Under Rule 41(f)(2)(A) the officer must note on the warrant the time the device was installed and the period during which the device was used. And under new Rule 41(f)(2)(B), the officer must return the tracking device warrant to the magistrate designated in the warrant, within 10 calendar days after use of

the device has ended.

Amended Rule 41(f)(2)(C) addresses the particular problems of serving a copy of a tracking device warrant on the person who has been tracked, or whose property has been tracked. In the case of other warrants, current Rule 41 envisions that the subjects of the search typically know that they have been searched, usually within a short period of time after the search has taken place. Tracking device warrants, on the other hand, are by their nature covert intrusions and can be successfully used only when the person being investigated is unaware that a tracking device is being used. The amendment requires that the officer must serve a copy of the tracking device warrant on the person within 10 calendar days after the tracking has ended. That service may be accomplished by either personally serving the person or by leaving a copy at the person's residence or usual abode and by sending a copy by mail. The Rule also provides, however, that the officer may (for good cause) obtain the court's permission to delay further the delivery of the warrant. That might be appropriate, for example, where the owner of the tracked property is undetermined, or where the officer establishes that the investigation is ongoing and that disclosure of the warrant will compromise that investigation.

Use of a tracking device is to be distinguished from other continuous monitoring or observations that are 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*, 786 F.2d 504 (2d Cir. 1986) (use of video camera); *United States v. Torres*, 751 F.2d 875 (7th Cir. 1984) (television surveillance).

Finally, amended Rule 41(f)(3) is a new provision that permits the government to request, and the magistrate judge to grant, a delay in any notice required in Rule 41. The amendment is co-extensive with 18 U.S.C. § 3103a(b). That new provision, added as part of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, authorizes a court to

delay any notice required in conjunction with the issuance of any search warrants.

SUMMARY OF PUBLIC COMMENTS ON RULE 41.

The Committee received seven written comments on Rule 41. The commentators generally approved of the concept of including a reference to tracking-device warrants in the rule. Several commentators, however, offered suggested language that they believed would clarify several issues, including the definition of probable cause vis a vis tracking device warrants, and language that would more closely parallel provisions in Title III of the Omnibus Crime Control Act of 1968.

Mr. Jack E. Horsley, Esq. (02-CR-003)
Matoon, Illinois
October 25, 2002.

Mr. Horsley believes that the proposed amendments concerning tracking-device warrants should be adopted

Hon. Joel M. Feldman (02-CR-007)
United States District Court, N.D. Ga,
Atlanta, Georgia
December 2, 2002

Judge Feldman suggests that the Committee consider further amendments to Rule 41 regarding warrants used to obtain electronic records from providers of electronic communications services. He attaches a written inquiry from one of colleagues pointing out a number of questions that are likely to arise in such cases.

Hon. Dennis G. Green (02-CR-011)
United States Magistrate Judge
President, Federal Magistrate Judges Assn.
Del Rio, Texas
January 14, 2003.

The Magistrate Judge's Association generally supports the proposed amendments to Rule 41. But the Association believes that either the rule itself or the committee note should be changed to clarify whether a separate warrant is needed to enter constitutionally protected property to install the device. The Association states that the current rule and note are not clear on that point, and believe that as written, unnecessary litigation will result.

Mr. Kent S. Hofmeister (02-CR-014)
President, Federal Bar Association
Dallas, Texas
February 14, 2003

The Federal Bar Association approves of the amendments to Rule 41, noting that they fill a void.

Mr. Saul Bercovitch (02-CR-015)
Staff Attorney
State Bar of California's Committee on Federal Courts
December 14, 2003

The Committee on Federal Courts for the State Bar of California generally approves of the proposed amendments to Rule 41. But it raises two points that it believes should be addressed. First, the amendments do not clarify what the probable cause finding must be made upon, or whether a showing less than probable cause will suffice.

Second, the rule does not address the consequences of failure to comply with the delayed notice provisions in Rule 41(f)(2).

Mr. Eric H. Jaso (02-CR-019)
Counselor to the Assistant Attorney General
Criminal Division
United States Department of Justice
Washington, D.C.,
February 20, 2003

Mr. Jaso, on behalf of the Department of Justice, offers several suggested changes to the proposed amendments to Rule 41. First, the Department is concerned that the language in Rule 41(d) might be read to require that a warrant is required anytime a tracking-device is installed; he suggests alternative language. Second, he states that some members of the Appellate Chiefs Working Group recommend deletion of the requirement that the installation occur during daylight hours. And third, he recommends a change to Rule 41(f)(2)(C), which permits delayed notification following execution of a tracking device; he believes that it would be better to delete the "good cause shown" language, and simply cross reference Rule 41(f)(3), which is the general provision dealing with delayed notice.

Mr. William Genego & Mr. Peter Goldberger (02-CR-021)
National Association of Criminal Defense Lawyers
March 21, 2003

NADCL offers a number of suggestions on Rule 41. First, it urges the Committee to use two benchmarks in amending Rule 41: tradition and jurisprudence of issuing warrants and Title III of the Omnibus Crime Control Act of 1968. Second, it notes that there is a lack of parallelism in Rule 41(b)(3) and (b)(4) from (b)(1) and (b)(2); it notes that use of the words "may issue" in (b)(4) are ambiguous. Third, NADCL also suggests

that the rule contain some reference to the fact that a warrant may be issued by district judges as well as magistrate judges. Fourth, it offers suggested language that would require that the probable cause focus on the specific need for installing the tracking device and that the government first show that there is a genuine need for using a tracking device. Fifth, regarding Rule 41(e), NADCL again urges the Committee to follow Title III. And finally, with regard to Rule 41(f)(2), it states that the current language is open-ended and vague; it suggests new wording that it believes would require the magistrate judge to specify a particular period of time.

GAP REPORT--RULE 41

The Committee agreed with the NADCL proposal that the words "has authority" should be inserted in Rule 41(c)(3), and (4) to parallel similar language in Rule 41(c)(1) and (2). The Committee also considered, but rejected, a proposal from NADCL to completely redraft Rule 41(d) , regarding the finding of probable cause. The Committee also made minor clarifying changes in the Committee Note

APPENDIX C

RULES GOVERNING § 2254 AND § 2255 PROCEEDINGS

- Copy of Rules
- Committee Notes
- Forms Accompanying Rules
- Summary of Written Public Comments on Rules and Forms
- GAP Reports

RULES FOR PROCEEDINGS UNDER 28 U.S.C. § 2254

Present Rules	Restyled Rules
Rule 1. Scope of Rules	**Rule 1. Scope**
(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:	**(a) Cases Involving a Petition under 28 U.S.C. § 2254.** These rules govern a petition for a writ of habeas corpus filed in a United States district court under 28 U.S.C. § 2254 by:
(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	(1) a person in custody under a state-court judgment who seeks a determination that the custody violates 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.	(2) a person in custody under a state-court or federal-court judgment who seeks a determination that future custody under a state-court judgment would violate the Constitution, laws, or treaties of the United States.
(b) Other situations. In applications for habeas corpus in cases not covered by subdivision (a), these rules may be applied at the discretion of the United States district court.	**(b) Other Cases.** The district court may apply any or all of these rules to a habeas corpus petition not covered by Rule 1(a).

COMMITTEE NOTE

The language of Rule 1 has been amended as part of general restyling of the 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.

Rule 2. Petition	Rule 2. The Petition
(a) Applicants in present custody. If the applicant is presently in custody pursuant to the state judgment in question, the application shall be in the form of a petition for a writ of habeas corpus in which the state officer having custody of the applicant shall be named as respondent.	**(a) Current Custody; Naming the Respondent.** If the petitioner is currently in custody under a state-court judgment, the petition must name as respondent the state officer who has custody.
(b) Applicants subject to future custody. If the applicant is not presently in custody pursuant to the state judgment against which he seeks relief but may be subject to such custody in the future, the application shall be in the form of a petition for a writ of habeas corpus with an added prayer for appropriate relief against the judgment which he seeks to attack. In such a case the officer having present custody of the applicant and the attorney general of the state in which the judgment which he seeks to attack was entered shall each be named as respondents.	**(b) Future Custody; Naming the Respondents and Specifying the Judgment.** If the petitioner is not yet in custody — but may be subject to future custody — under the state-court judgment being contested, the petition must name as respondents both the officer who has current custody and the attorney general of the state where the judgment was entered. The petition must ask for relief from the state-court judgment being contested.
(c) Form of Petition. The petition shall be in substantially the form annexed to these rules, except that any district court may by local rule require that petitions filed with it shall be in a form prescribed by the local rule. Blank petitions 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 petitioner 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 petition shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petitioner.	**(c) Form.** The petition must: (1) specify all the grounds for relief available to the petitioner; (2) state the facts supporting each ground; (3) state the relief requested; (4) be printed, typewritten or legibly handwritten; and (5) be signed under penalty of perjury by the petitioner or a person authorized to do so under 28 U.S.C. § 2242.

(d) Petition to be directed to judgments of one court only. A petition shall be limited to the assertion of a claim for relief against the judgment or judgments of a single state court (sitting in a county or other appropriate political subdivision). If a petitioner desires to attack the validity of the judgments of two or more state courts under which he is in custody or may be subject to future custody, as the case may be, he shall do so by separate petitions.	(d) **Standard Form.** The petition must substantially follow either the form appended to these rules or a form prescribed by a local district-court rule. The clerk must make blank forms available to petitioners without charge.
(e) Return of insufficient petition. If a petition received by 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.	(e) **Separate Petitions for Judgments of Separate Courts.** A petitioner who seeks relief from judgments of more than one state court must file a separate petition covering the judgment or judgments of each court.

COMMITTEE NOTE

The language of Rule 2 has been amended as part of general restyling of the 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.

Revised Rule 2(c)(5) has been amended by removing the requirement that the petition be signed personally by the petitioner. As reflected in 28 U.S.C. § 2242, an application for habeas corpus relief may be filed by the person who is seeking relief, or by someone acting on behalf of that person. *See, e.g.*, Whitmore v. Arkansas, 495 U.S. 149 (1990) (discussion of requisites for "next friend" standing in petition for habeas corpus). Thus, under the amended rule the petition may be signed by petitioner personally or by someone acting on behalf of the petitioner, assuming that the person is authorized to do so, for example, an attorney for the petitioner. The Committee envisions that the courts will apply third-party, or "next-friend," standing analysis in deciding whether the signer was actually authorized to sign the petition on behalf of the petitioner.

The language in new Rule 2(d) has been changed to reflect that a petitioner must substantially follow the standard form, which is appended to the rules, or a form provided by the court. The current rule, Rule 2(c), seems to indicate a preference for the standard "national" form. Under the amended rule, there is no stated preference. The Committee understood that current practice in some

courts is that if the petitioner first files a petition using the national form, the courts may then ask the petitioner to supplement it with the local form.

Current Rule 2(e), which provided for returning an insufficient petition, has been deleted. The Committee believed that the approach in Federal Rule of Civil Procedure 5(e) was more appropriate for dealing with petitions that do not conform to the form requirements of the rule. That Rule provides that the clerk may not refuse to accept a filing solely for the reason that it fails to comply with these rules or local rules. Prior to the adoption of a one-year statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, the petitioner suffered no penalty, other than delay, if the petition was deemed insufficient. Now that a one-year statute of limitations applies to petitions filed under § 2254, *see* 28 U.S.C. § 2244(d)(1), the court's dismissal of a petition because it is not in proper form may pose a significant penalty for a petitioner, who may not be able to file another petition within the one-year limitation period. Now, under revised Rule 3(b), the clerk is required to file a petition, even though it may otherwise fail to comply with the provisions in revised Rule 2(c). The Committee believed that the better procedure was to accept the defective petition and require the petitioner to submit a corrected petition that conforms to Rule 2(c).

Rule 3. Filing Petition	Rule 3. Filing the Petition; Inmate Filing
(a) Place of filing; copies; filing fee. A petition shall be filed in the office of the clerk of the district court. It shall be accompanied by two conformed copies thereof. It shall also be accompanied by the filing fee prescribed by law unless the petitioner applies for and is given leave to prosecute the petition in forma pauperis. If the petitioner desires to prosecute the petition in forma pauperis, he shall file the affidavit required by 28 U.S.C. § 1915. In all such cases the petition shall also be accompanied by a certificate of the warden or other appropriate officer of the institution in which the petitioner is confined as to the amount of money or securities on deposit to the petitioner's credit in any account in the institution, which certificate may be considered by the court in acting upon his application for leave to proceed in forma pauperis.	**(a) Where to File; Copies; Filing Fee.** An original and two copies of the petition must be filed with the clerk and must be accompanied by: (1) the applicable filing fee, or (2) a motion for leave to proceed in forma pauperis, the affidavit required by 28 U.S.C. § 1915, and a certificate from the warden or other appropriate officer of the place of confinement showing the amount of money or securities that the petitioner has in any account in the institution.
(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 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.	**(b) Filing.** The clerk must file the petition and enter it on the docket. **(c) Time to File.** The time for filing a petition is governed by 28 U.S.C. § 2244(d). **(d) Inmate Filing.** A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

COMMITTEE NOTE

The language of Rule 3 has been amended as part of general restyling of the 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 last sentence of current Rule 3(b), dealing with an answer being filed by the respondent, has been moved to revised Rule 5(a).

Revised Rule 3(b) is new and is intended to parallel Federal Rule of Civil Procedure 5(e), which provides that the clerk may not refuse to accept a filing solely for the reason that it fails to comply with these rules or local rules. Prior to the adoption of a one-year statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, the petitioner suffered no penalty, other than delay, if the petition was deemed insufficient. That Act, however, added a one-year statute of limitations to petitions filed under § 2254, *see* 28 U.S.C. § 2244(d)(1). Thus, a court's dismissal of a defective petition may pose a significant penalty for a petitioner who may not be able to file a corrected petition within the one-year limitation period. The Committee believed that the better procedure was to accept the defective petition and require the petitioner to submit a corrected petition that conforms to Rule 2. Thus, revised 3(b) requires the clerk to file a petition, even though it may otherwise fail to comply with Rule 2. The rule, however, is not limited to those instances where the petition is defective only in form; the clerk would also be required, for example, to file the petition even though it lacked the requisite filing fee or an *in forma pauperis* form.

Revised Rule 3(c), which sets out a specific reference to 28 U.S.C. § 2244(d), is new and has been added to put petitioners on notice that a one-year statute of limitations applies to petitions filed under these Rules. Although the rule does not address the issue, every circuit that has addressed the issue has taken the position that equitable tolling of the statute of limitations is available in appropriate circumstances. *See, e.g., Smith v. McGinnis*, 208 F.3d 13, 17-18 (2d Cir. 2000); *Miller v. New Jersey State Department of Corrections*, 145 F.3d 616, 618-19 (3d Cir. 1998); *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000). The Supreme Court has not addressed the question directly. *See Duncan v. Walker*, 533 U.S. 167, 181 (2001) ("We ... have no occasion to address the question that Justice Stevens raises concerning the availability of equitable tolling.").

Rule 3(d) is new and provides guidance on determining whether a petition from an inmate is considered to have been filed in a timely fashion. The new provision parallels Federal Rule of Appellate Procedure 25(a)(2)(C).

Rule 4. Preliminary Consideration by Judge	Rule 4. Preliminary Review; Serving the Petition and Order
The original petition shall be presented promptly to a judge of the district court in accordance with the procedure of the court for the assignment of its business. The petition shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate. In every case a copy of the petition and any order shall be served by certified mail on the respondent and the attorney general of the state involved.	The clerk must promptly forward the petition to a judge under the court's assignment procedure, and the judge must promptly examine it. If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner. If the petition is not dismissed, the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order. In every case, the clerk must serve a copy of the petition and any order on the respondent and on the attorney general or other appropriate officer of the state involved.

COMMITTEE NOTE

The language of Rule 4 has been amended as part of general restyling of the 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 amended rule reflects that the response to a habeas petition may be a motion.

The requirement that in every case the clerk of the court must serve a copy of the petition on the respondent by certified mail has been deleted. In addition, the current requirement that the petition be sent to the Attorney General of the state has been modified to reflect practice in some jurisdictions that the appropriate state official may be someone other than the Attorney General, for example, the officer in charge of a local confinement facility. This comports with a similar provision in 28 U.S.C. § 2252, which addresses notice of habeas corpus proceedings to the state's attorney general or other appropriate officer of the state.

Rule 5. Answer; Contents	Rule 5. The Answer and the Reply
The answer shall respond to the allegations of the petition. In addition it shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state and including also his right of appeal both from the judgment of conviction and from any adverse judgment or order in the post-conviction proceeding.	**(a) When Required.** The respondent is not required to answer the petition unless a judge so orders. **(b) Addressing the Allegations; State Remedies.** The answer must address the allegations in the petition. In addition, it must state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, or a statute of limitations.
The answer shall indicate what transcripts (of pretrial, trial, sentencing, and post-conviction proceedings) are available, when they can be furnished, and also what proceedings have been recorded and not transcribed. There shall be attached to the answer such portions of the transcripts as the answering party deems relevant. The court on its own motion or upon request of the petitioner may order that further portions of the existing transcripts be furnished or that certain portions of the non-transcribed proceedings be transcribed and furnished. If a transcript is neither available nor procurable, a narrative summary of the evidence may be submitted.	**(c) Transcripts.** The answer must also indicate what transcripts (of pretrial, trial, sentencing, or post-conviction proceedings) are available, when they can be furnished, and what proceedings have been recorded but not transcribed. The respondent must attach to the answer parts of the transcript that the respondent considers relevant. The judge may order that the respondent furnish other parts of existing transcripts or that parts of untranscribed recordings be transcribed and furnished. If a transcript cannot be obtained, the respondent may submit a narrative summary of the evidence.
If the petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of the petitioner's brief on appeal and of the opinion of the appellate court, if any, shall also be filed by the respondent with the answer.	**(d) Briefs on Appeal and Opinions.** The respondent must also file with the answer a copy of: (1) any brief that the petitioner submitted in an appellate court contesting the conviction or sentence, or contesting an adverse judgment or order in a post-conviction proceeding; (2) any brief that the prosecution submitted in an appellate court

	relating to the conviction or sentence; and (3) the opinions and dispositive orders of the appellate court relating to the conviction or the sentence. **(e) Reply.** The petitioner may submit a reply to the respondent's answer or other pleading within a time fixed by the judge.

COMMITTEE NOTE

The language of Rule 5 has been amended as part of general restyling of the 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.

Revised Rule 5(a), which provides that the respondent is not required to file an answer to the petition, unless a judge so orders, is taken from current Rule 3(b). The revised rule does not address the practice in some districts, where the respondent files a pre-answer motion to dismiss the petition. But revised Rule 4 permits that practice and reflects the view that if the court does not dismiss the petition, it may require (or permit) the respondent to file a motion

Rule 5(b) has been amended to require that the answer address not only failure to exhaust state remedies, but also procedural bars and any statute of limitations. While the latter two matters are not addressed in the current rule, the Committee intends no substantive change with the additional new language. *See, e.g.*, 28 U.S.C. § 2254(b)(3). Instead, the Committee believes that the explicit mention of those issues in the rule conforms to current case law and statutory provisions. *See, e.g.*, 28 U.S.C. § 2244(d)(1).

Revised Rule 5(d) includes new material. First, Rule 5(d)(2), requires a respondent – assuming an answer is filed – to provide the court with a copy of any brief submitted by the prosecution to the appellate court. And Rule 5(d)(3) now provides that the respondent also file copies of any opinions and dispositive orders of the appellate court concerning the conviction or sentence. These provisions are intended to insure that the court is provided with additional information that may assist it in resolving the issues raised, or not raised, in the petition.

Finally, revised Rule 5(e) adopts the practice in some jurisdictions of giving the petitioner an opportunity to file a reply to the respondent's answer. Rather than using terms such as "traverse, " *see* 28 U.S.C. § 2248, to identify the petitioner's response to the answer, the rule uses the more general term "reply." The Rule prescribes that the court set the time for such responses and in lieu

of setting specific time limits in each case, the court may decide to include such time limits in its local rules.

Rule 6. Discovery	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).	(a) **Leave of Court Required.** A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery. If necessary for effective discovery, the judge must appoint an attorney for a petitioner who qualifies to have counsel appointed under 18 U.S.C. § 3006A.
(b) Requests for discovery. Requests for discovery shall be accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced.	(b) **Requesting Discovery.** A party requesting discovery must provide reasons for the request. The request must also include any proposed interrogatories and requests for admission, and must specify any requested documents.
(c) Expenses. If the respondent is granted leave to take the deposition of the petitioner or any other person the judge may as a condition of taking it direct that the respondent pay the expenses of travel and subsistence and fees of counsel for the petitioner to attend the taking of the deposition.	(c) **Deposition Expenses.** If the respondent is granted leave to take a deposition, the judge may require the respondent to pay the travel expenses, subsistence expenses, and fees of the petitioner's attorney to attend the deposition.

COMMITTEE NOTE

The language of Rule 6 has been amended as part of general restyling of the 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.

Although current Rule 6(b) contains no requirement that the parties provide reasons for the requested discovery, the revised rule does so and also includes a requirement that the request be accompanied by any proposed interrogatories, requests for admission, and must specify any requested documents. The Committee believes that the revised rule makes explicit what has been implicit in current practice.

Rule 7. Expansion of Record	Rule 7. Expanding the Record
(a) Direction for expansion. If the petition is not dismissed summarily the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the petition.	**(a) In General.** If the petition is not dismissed, the judge may direct the parties to expand the record by submitting additional materials relating to the petition. The judge may require that these materials be authenticated.
(b) Materials to be added. The expanded record may include, without limitation, letters predating the filing of the petition in the district court, documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.	**(b) Types of Materials.** The materials that may be required include letters predating the filing of the petition, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits may also be submitted and considered as part of the record.
(c) Submission to opposing party. In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to be included shall be submitted to the party against whom they are to be offered, and he shall be afforded an opportunity to admit or deny their correctness. **(d) Authentication.** The court may require the authentication of any material under subdivision (b) or (c).	**(c) Review by the Opposing Party**. The judge must give the party against whom the additional materials are offered an opportunity to admit or deny their correctness.

COMMITTEE NOTE

The language of Rule 7 has been amended as part of general restyling of the 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 noted below..

Revised Rule 7(a) is not intended to restrict the authority of the court to expand the record through means other than requiring the parties themselves to provide the information. Further, the rule has been changed to remove the reference to the "merits" of the petition in the recognition that a court may wish to expand the record in order to assist it in deciding an issue other than the merits of the petition.

The language in current Rule 7(d), which deals with authentication of materials in the expanded record, has been moved to revised Rule 7(a).

Rule 8. Evidentiary Hearing	Rule 8. Evidentiary Hearing
(a) Determination by court. If the petition is not dismissed at a previous stage in the proceeding, the judge, after the answer and the transcript and record of state court proceedings are filed, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require.	**(a) Determining Whether to Hold a Hearing.** If the petition is not dismissed, the judge must review the answer, any transcripts and records of state-court proceedings, and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted.
(b) Function of the magistrate. (1) When designated to do so in accordance with 28 U.S.C. § 636(b), a magistrate 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 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.	**(b) Reference to a Magistrate Judge.** A judge may, under 28 U.S.C. § 636(b), refer the petition to a magistrate judge to conduct hearings and to file proposed findings of fact and recommendations for disposition. When they are filed, the clerk must promptly serve copies of the proposed findings and recommendations on all parties. Within 10 days after being served, a party may file objections as provided by local court rule. The judge must determine *de novo* any proposed finding or recommendation to which objection is made. The judge may accept, reject, or modify any proposed finding or recommendation.

(c) Appointment of counsel; time for hearing. If an evidentiary hearing is required the judge shall appoint counsel for a petitioner who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g) 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 case if the interest of justice so requires.	(c) **Appointing Counsel; Time of Hearing.** If an evidentiary hearing is warranted, the judge must appoint an attorney to represent a petitioner who qualifies to have counsel appointed under 18 U.S.C. § 3006A. The judge must conduct the hearing as soon as practicable after giving the attorneys adequate time to investigate and prepare. These rules do not limit the appointment of counsel under § 3006A at any stage of the proceeding.

COMMITTEE NOTE

The language of Rule 8 has been amended as part of general restyling of the 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.

Rule 8(a) is not intended to supercede the restrictions on evidentiary hearings contained in 28 U.S.C. § 2254(e)(2).

The requirement in current Rule 8(b)(2) that a copy of the magistrate judge's findings must be promptly mailed to all parties has been changed in revised Rule 8(b) to require that copies of those findings be served on all parties. As used in this rule, requiring that the parties be "served" is consistent with Federal Rule of Civil Procedure 5(b), which may include mailing the copies.

Rule 9. Delayed or Successive Petitions	Rule 9. Second or Successive Petitions
(a) Delayed petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.	
(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 presenting a second or successive petition, the petitioner must obtain an order from the appropriate court of appeals authorizing the district court to consider the petition as required by 28 U.S.C. § 2244(b)(3) and (4).

COMMITTEE NOTE

The language of Rule 9 has been amended as part of general restyling of the 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 noted below.

First, current Rule 9(a) has been deleted as being unnecessary in light of the applicable one-year statute of limitations for § 2254 petitions, added as part of the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2244(d).

Second, current Rule 9(b), now Rule 9, has been changed to also reflect provisions in the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2244(b)(3) and (4), which now require a petitioner to obtain approval from the appropriate court of appeals before filing a second or successive petition.

Finally, the title of Rule 9 has been changed to reflect the fact that the only topic now addressed in the rule is that of second or successive petitions.

Rule 10. Powers of Magistrates	Rule 10. Powers of a Magistrate Judge
The duties imposed upon the judge of the district court by these rules may be performed by a United States magistrate pursuant to 28 U.S.C. § 636.	A magistrate judge may perform the duties of a district judge under these rules, as authorized under 28 U.S.C. § 636

COMMITTEE NOTE

The language of Rule 10 has been amended as part of general restyling of the 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.

Rule 11. Federal Rules of Civil Procedure; Extent of Applicability	Rule 11. Applicability of the Federal Rules of Civil Procedure
The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules.	The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied to a proceeding under these rules.

COMMITTEE NOTE

The language of Rule 11 has been amended as part of general restyling of the 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.

RULES FOR PROCEEDINGS UNDER 28 U.S.C. § 2255

Present Rules	Restyled Rules
Rule 1. Scope of Rules	**Rule 1. Scope**
These rules govern the procedure in the district court on a motion under 28 U.S.C. § 2255: (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	These rules govern a motion filed in a United States district court under 28 U.S.C. § 2255 by: **(a)** a person in custody under a judgment of that court who seeks a determination that: (1) the judgment violates the Constitution or laws of the United States; (2) the court lacked jurisdiction to enter the judgment; (3) the sentence exceeded the maximum allowed by law; or (4) the judgment or sentence is otherwise subject to collateral review; 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.	**(b)** a person in custody under a judgment of a state court or another federal court, and subject to future custody under a judgment of the district court, who seeks a determination that: (1) future custody under a judgment of the district court would violate the Constitution or laws of the United States; (2) the district court lacked jurisdiction to enter the judgment; (3) the district court's sentence exceeded the maximum allowed by law; or (4) the district court's judgment or sentence is otherwise subject to collateral review.

COMMITTEE NOTE

The language of Rule 1 has been amended as part of general restyling of the 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.

Rule 2. Motion	Rule 2. The Motion
(a) Nature of application for relief. If the person is presently in custody pursuant to the federal judgment in question, or if not presently in custody may be subject to such custody in the future pursuant to such judgment, the application for relief shall be in the form of a motion to vacate, set aside, or correct the sentence.	**(a) Applying for Relief.** The application must be in the form of a motion to vacate, set aside, or correct the sentence.
(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.	**(b) Form.** The motion must: (1) specify all the grounds for relief available to the moving party; (2) state the facts supporting each ground; (3) state the relief requested; (4) be printed, typewritten or legibly handwritten; and (5) be signed under penalty of perjury by the movant or a person authorized to do so **(c) Standard Form.** The motion must substantially follow either the form appended to these rules or a form prescribed by a local district-court rule. The clerk must make blank forms available to moving parties without charge.
(c) Motion to be directed to one judgment only. A motion shall be limited to the assertion of a claim for relief against one judgment only of the district court. If a movant desires to attack the validity of other judgments of that or any other district court under which he is in custody or may be subject to future custody, as the case may be,	**(d) Separate Motions for Separate Judgments.** A moving party who seeks relief from more than one judgment must file a separate motion covering each judgment.

he shall do so by separate motions.	
(d) Return of insufficient motion. If a motion received by 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 language of Rule 2 has been amended as part of general restyling of the 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.

Revised Rule 2(b)(5) has been amended by removing the requirement that the motion be signed personally by the moving party. Thus, under the amended rule the motion may be signed by movant personally or by someone acting on behalf of the movant, assuming that the person is authorized to do so, for example an attorney for the movant. The Committee envisions that the courts would apply third-party, or "next-friend," standing analysis in deciding whether the signer was actually authorized to sign the motion on behalf of the movant. *See generally Whitmore v. Arkansas*, 495 U.S. 149 (1990) (discussion of requisites for "next friend" standing in habeas petitions). *See also* 28 U.S.C. § 2242 (application for state habeas corpus relief may be filed by the person who is seeking relief, or by someone acting on behalf of that person).

The language in new Rule 2(c) has been changed to reflect that a moving party must substantially follow the standard form, which is appended to the rules, or a form provided by the court. The current rule, Rule 2(c), seems to indicate a preference for the standard "national" form. Under the amended rule, there is no stated preference. The Committee understood that the current practice in some courts is that if the moving party first files a motion using the national form, that courts may ask the moving party to supplement it with the local form.

Current Rule 2(d), which provided for returning an insufficient motion has been deleted. The Committee believed that the approach in Federal Rule of Civil Procedure 5(e) was more appropriate for dealing with motions that do not conform to the form requirements of the rule. That Rule provides that the clerk may not refuse to accept a filing solely for the reason that it fails to comply with these rules or local rules. Prior to the adoption of a one-year statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, the moving party suffered no penalty, other than delay, if the motion was deemed insufficient. Now that a one-year statute of limitations applies to motions filed under § 2255, *see* 28 U.S.C. § 2244(d)(1), the court's dismissal

of a motion because it is not in proper form may pose a significant penalty for a moving party, who may not be able to file another motion within the one-year limitation period. Now, under revised Rule 3(b), the clerk is required to file a motion, even though it may otherwise fail to comply with the provisions in revised Rule 2(b). The Committee believed that the better procedure was to accept the defective motion and require the moving party to submit a corrected motion that conforms to Rule 2(b).

Rule 3. Filing Motion	Rule 3. Filing the Motion; Inmate Filing
(a) Place of filing; copies. A motion under these rules shall be filed in the office of the clerk of the district court. It shall be accompanied by two conformed copies thereof.	**(a) Where to File; Copies.** An original and two copies of the motion must be filed with the clerk.
(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 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.	**(b) Filing and Service.** The clerk must file the motion and enter it on the criminal docket of the case in which the challenged judgment was entered. The clerk must then deliver or serve a copy of the motion on the United States attorney in that district, together with a notice of its filing. **(c) Time to File.** The time for filing a motion is governed by 28 U.S.C. § 2255 ¶ 6. **(d) Inmate Filing.** A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

COMMITTEE NOTE

The language of Rule 3 has been amended as part of general restyling of the 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 indicated below.

Revised Rule 3(b) is new and is intended to parallel Federal Rule of Civil Procedure 5(e), which provides that the clerk may not refuse to accept a filing solely for the reason that it fails to comply with these rules or local rules. Prior to the adoption of a one-year statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, the moving party suffered no penalty, other than delay, if the petition was deemed insufficient. That Act, however, added a one-year statute of limitations to motions filed under § 2255, *see* 28 U.S.C. § 2244(d)(1). Thus, a court's dismissal of a defective motion may pose a significant penalty for a moving party who may not be able to file a corrected motion within the one-year limitation period. The Committee believed that the better procedure was to accept the defective motion and require the moving party to submit a corrected motion that conforms to Rule 2. Thus, revised 3(b) requires the clerk is required to file a motion, even though it may otherwise fail to comply with Rule 2.

Revised Rule 3(c), which sets out a specific reference to 28 U.S.C. § 2255, paragraph 6, is new and has been added to put moving parties on notice that a one-year statute of limitations applies to motions filed under these Rules. Although the rule does not address the issue, every circuit that has addressed the issue has taken the position that equitable tolling of the statute of limitations is available in appropriate circumstances. *See, e.g., Dunlap v. United States*, 250 F.3d 1001, 1004-07 (6th Cir. 2001); *Moore v. United States*, 173 F.3d 1131, 1133-35 (8th Cir. 1999); *Sandvik v. United States*, 177 F.3d 1269, 1270-72 (11th Cir. 1999). The Supreme Court has not addressed the question directly. *See Duncan v. Walker*, 533 U.S. 167, 181 (2001) ("We ... have no occasion to address the question that Justice Stevens raises concerning the availability of equitable tolling.").

Rule 3(d) is new and provides guidance on determining whether a motion from an inmate is considered to have been filed in a timely fashion. The new provision parallels Federal Rule of Appellate Procedure 25(a)(2)(C).

Rule 4. Preliminary Consideration by Judge	Rule 4. Preliminary Review
(a) Reference to judge; dismissal or order to answer. The original motion shall be presented promptly to the judge of the district court who presided at the movant's trial and sentenced him, or, if the judge who imposed sentence was not the trial judge, then it shall go to the judge who was in charge of that part of the proceedings being attacked by the movant. If the appropriate judge is unavailable to consider the motion, it shall be presented to another judge of the district in accordance with the procedure of the court for the assignment of its business.	(a) **Referral to Judge.** The clerk must promptly forward the motion to the judge who conducted the trial and imposed sentence or, if the judge who imposed sentence was not the trial judge, to the judge who conducted the proceedings being challenged. If the appropriate judge is not available, the clerk must forward the motion to a judge under the court's assignment procedure.
(b) Initial consideration by judge. The motion, together with all the files, records, transcripts, and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the movant to be notified. Otherwise, the judge shall order the United States Attorney to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.	(b) **Initial Consideration by Judge.** The judge who receives the motion must promptly examine it. If it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party. If the motion is not dismissed, the judge must order the United States attorney to file an answer or other response within a fixed time, or to take other action the judge may order.

COMMITTEE NOTE

The language of Rule 4 has been amended as part of general restyling of the 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.

The amended rule reflects that the response to a Section 2255 motion may be a motion to dismiss or some other response.

Rule 5. Answer; Contents	Rule 5. The Answer and the Reply
(a) Contents of answer. The answer shall respond to the allegations of the motion. In addition it shall state whether the movant has used any other available federal remedies including any prior post-conviction motions under these rules or those existing previous to the adoption of the present rules. The answer shall also state whether an evidentiary hearing was accorded the movant in a federal court.	**(a) When Required.** The respondent is not required to answer the motion unless a judge so orders. **(b) Addressing the Allegations; Other Remedies.** The answer must address the allegations in the motion. In addition, it must state whether the moving party has used any other federal remedies, including any prior post-conviction motions under these rules or any previous rules, and whether the moving party received an evidentiary hearing.
(b) Supplementing the answer. The court shall examine its files and records to determine whether it has available copies of transcripts and briefs whose existence the answer has indicated. If any of these items should be absent, the government shall be ordered to supplement its answer by filing the needed records. The court shall allow the government an appropriate period of time in which to do so, without unduly delaying the consideration of the motion.	**(c) Records of Prior Proceedings.** If the answer refers to briefs or transcripts of the prior proceedings that are not available in the court's records, the judge must order the government to furnish them within a reasonable time that will not unduly delay the proceedings. **(d) Reply.** The moving party may submit a reply to the respondent's answer or other pleading within a time fixed by the judge.

COMMITTEE NOTE

The language of Rule 5 has been amended as part of general restyling of the 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.

Revised Rule 5(a), which provides that the respondent is not required to file an answer to the motion, unless a judge so orders, is taken from current Rule 3(b). The revised rule does not address the practice in some districts, where the respondent files a pre-answer motion to dismiss the motion. But revised Rule 4(b) contemplates that practice and has been changed to reflect the view that if the court does not dismiss the motion, it may require (or permit) the respondent to file a motion.

Finally, revised Rule 5(e) adopts the practice in some jurisdictions giving the movant an opportunity to file a reply to the respondent's answer. Rather than using terms such as "traverse, "

see 28 U.S.C. § 2248, to identify the movant's response to the answer, the rule uses the more general term "reply." The Rule prescribes that the court set the time for such responses and in lieu of setting specific time limits in each case, the court may decide to include such time limits in its local rules.

Rule 6. Discovery	Rule 6. Discovery
(a) Leave of court required. A party may invoke the processes of discovery available under the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure or elsewhere in the usages and principles of law 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 movant who qualifies for appointment of counsel under 18 U.S.C. § 3006A(g).	**(a) Leave of Court Required.** A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Criminal Procedure or Civil Procedure, or in accordance with the practices and principles of law. If necessary for effective discovery, the judge must appoint an attorney for a moving party who qualifies to have counsel appointed under 18 U.S.C. § 3006A.
(b) Requests for discovery. Requests for discovery shall be accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced.	**(b) Requesting Discovery.** A party requesting discovery must provide reasons for the request. The request must also include any proposed interrogatories and requests for admission, and must specify any requested documents.
(c) Expenses. If the government is granted leave to take the deposition of the movant or any other person, the judge may as a condition of taking it direct that the government pay the expenses of travel and subsistence and fees of counsel for the movant to attend the taking of the deposition.	**(c) Deposition Expenses.** If the government is granted leave to take a deposition, the judge may require the [government][attorney for the government] to pay the travel expenses, subsistence expenses, and fees of the moving party's attorney to attend the deposition.

COMMITTEE NOTE

The language of Rule 6 has been amended as part of general restyling of the 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 indicated below.

Although current Rule 6(b) contains no requirement that the parties provide reasons for the requested discovery, the revised rule does so and also includes a requirement that the request be accompanied by any proposed interrogatories, requests for admission, and must specify any

requested documents. The Committee believes that the revised rule makes explicit what has been implicit in current practice.

Rule 7. Expansion of Record	Rule 7. Expanding the Record
(a) Direction for expansion. If the motion is not dismissed summarily, the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the motion.	**(a) In General.** If the motion is not dismissed, the judge may direct the parties to expand the record by submitting additional materials relating to the motion. The judge may require that these materials be authenticated.
(b) Materials to be added. The expanded record may include, without limitation, letters predating the filing of the motion in the district court, documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.	**(b) Types of Materials.** The materials that may be required include letters predating the filing of the motion, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits also may be submitted and considered as part of the record.
(c) Submission to opposing party. In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to be included shall be submitted to the party against whom they are to be offered, and he shall be afforded an opportunity to admit or deny their correctness. **(d) Authentication.** The court may require the authentication of any material under subdivision (b) or (c).	**(c) Review by the Opposing Party.** The judge must give the party against whom the additional materials are offered an opportunity to admit or deny their correctness.

COMMITTEE NOTE

The language of Rule 7 has been amended as part of general restyling of the 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.

Revised Rule 7(a) is not intended to restrict the authority of the court to expand the record through means other than requiring the parties themselves to provide the information.

The language in current Rule 7(d), which deals with authentication of materials in the expanded record, has been moved to revised Rule 7(a).

Rule 8. Evidentiary Hearing	Rule 8. Evidentiary Hearing
(a) Determination by court. If the motion has not been dismissed at a previous stage in the proceeding, the judge, after the answer is filed and any transcripts or records of prior court actions in the matter are in his possession, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the motion as justice dictates.	**(a) Determining Whether to Hold a Hearing.** If the motion is not dismissed, the judge must review the answer, any transcripts and records of prior proceedings, and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted.
(b) Function of the magistrate. (1) When designated to do so in accordance with 28 U.S.C. § 636(b), a magistrate 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 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.	**(b) Reference to a Magistrate Judge.** A judge may, under 28 U.S.C. § 636(b), refer the motion to a magistrate judge to conduct hearings and to file proposed finding of fact and recommendations for disposition. When they are filed, the clerk must promptly serve copies of the proposed findings and recommendations on all parties. Within 10 days after being served, a party may file objections as provided by local court rule. The judge must determine *de novo* any proposed finding or recommendation to which objection is made. The judge may accept, reject, or modify any proposed finding or recommendation.

(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) 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.	**(c) Appointing Counsel; Time of Hearing.** If an evidentiary hearing is warranted, the judge must appoint an attorney to represent a moving party who qualifies to have counsel appointed under 18 U.S.C. § 3006A. The judge must conduct the hearing as soon as practicable after giving the attorneys adequate time to investigate and prepare. These rules do not limit the appointment of counsel under § 3006A at any stage of the proceeding.
(d) Production of statements at evidentiary hearing. **(1) In General.** Federal Rule of Criminal Procedure 26.2(a)-(d), and (f) applies at an evidentiary hearing under these rules. **(2) Sanctions for Failure to Produce Statement.** If a party elects not to comply with an order under Federal Rule of Criminal Procedure 26.2(a) to deliver a statement to the moving party, at the evidentiary hearing the court may not consider the testimony of the witness whose statement is withheld.	**(d) Producing a Statement.** Federal Rule of Criminal Procedure 26.2(a)-(d) and (f) applies at a hearing under this rule. 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.

COMMITTEE NOTE

The language of Rule 8 has been amended as part of general restyling of the 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 requirement in current Rule 8(b)(2) that a copy of the magistrate judge's findings must be promptly mailed to all parties has been changed in revised Rule 8(b) to require that copies of those findings be served on all parties. As used in this rule, requiring that the parties be "served" is consistent with Federal Rule of Civil Procedure 5(b), which may include mailing the copies.

Rule 9. Delayed or Successive Motions	Rule 9. Second or Successive Motions
(a) Delayed motions. A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing unless the movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.	
(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 presenting a second or successive motion, the moving party must obtain an order from the appropriate court of appeals authorizing the district court to consider the motion, as required by 28 U.S.C. § 2255, para. 8.

COMMITTEE NOTE

The language of Rule 9 has been amended as part of general restyling of the 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 indicated below.

First, current Rule 9(a) has been deleted as being unnecessary in light of the applicable one-year statute of limitations for § 2255 motions, added as part of the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2255, para. 6.

Second, the remainder of revised Rule 9 reflects provisions in the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2255, para. 8, which now require a moving party to obtain approval from the appropriate court.

Finally, the title of the rule has been changed to reflect the fact that the revised version addresses only the topic of second or successive motions.

Rule 10. Powers of Magistrates	Rule 10. Powers of a Magistrate Judge
The duties imposed upon the judge of the district court by these rules may be performed by a United States magistrate pursuant to 28 U.S.C. § 636.	A magistrate judge may perform the duties of a district judge under these rules, as authorized under 28 U.S.C. § 636 .

COMMITTEE NOTE

The language of Rule 10 has been amended as part of general restyling of the 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.

Rule 11. Time for Appeal	Rule 11. Time to Appeal
The time for appeal from an order entered on a motion for relief made pursuant to these rules is as provided in Rule 4(a) of the Federal Rules of Appellate Procedure. Nothing in these rules shall be construed as extending the time to appeal from the original judgment of conviction in the district court.	Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. These rules do not extend the time to appeal the original judgment of conviction.

COMMITTEE NOTE

The language of Rule 11 has been amended as part of general restyling of the 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.

Rule 12. Federal Rules of Criminal and Civil Procedure; Extent of Applicability	Rule 12. Applicability of the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure
If no procedure is specifically prescribed by these rules, the district court may proceed in any lawful manner not inconsistent with these rules, or any applicable statute, and may apply the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure, whichever it deems most appropriate, to motions filed under these rules.	The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, to the extent that they are not inconsistent with these rules, may be applied to motions filed under these rules.

COMMITTEE NOTE

The language of Rule 12 has been amended as part of general restyling of the 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.

Petition for Relief From a Conviction or Sentence By a Person in State Custody

(Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus)

Instructions

1. To use this form, you must be a person who is currently serving a sentence under a judgment against you in a state court. You are asking for relief from the conviction or the sentence. This form is your petition for relief.

2. You may also use this form to challenge a state judgment that imposed a sentence to be served in the future, but you must fill in the name of the state where the judgment was entered. If you want to challenge a federal judgment that imposed a sentence to be served in the future, you should file a motion under 28 U.S.C. § 2255 in the federal court that entered the judgment.

3. Make sure the form is typed or neatly written.

4. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.

5. Answer all the questions. You do not need to cite law. You may submit additional pages if necessary. If you do not fill out the form properly, you will be asked to submit additional or correct information. If you want to submit a brief or arguments, you must submit them in a separate memorandum.

6. You must pay a fee of $5. If the fee is paid, your petition will be filed. If you cannot pay the fee, you may ask to proceed *in forma pauperis* (as a poor person). To do that, you must fill out the last page of this form. Also, you must submit a certificate signed by an officer at the institution where you are confined showing the amount of money that the institution is holding for you. If your account exceeds $ _____, you must pay the filing fee.

7. In this petition, you may challenge the judgment entered by only one court. If you want to challenge a judgment entered by a different court (either in the same state or in different states), you must file a separate petition.

8. When you have completed the form, send the original and two copies to the Clerk of the United States District Court at this address:

   Clerk, United States District Court for _____
   Address
   City, State Zip Code

9. **CAUTION: You must include in this petition all the grounds for relief from the conviction or sentence that you challenge. And you must state the facts that support each ground. If you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.**

10. **CAPITAL CASES: If you are under a sentence of death, you are entitled to the assistance of counsel. You should request the appointment of counsel.**

PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District
Name (under which you were convicted):	Docket or Case No :
Place of Confinement:	Prisoner No.:
Petitioner (include the name under which you were convicted)	Respondent (authorized person having custody of petitioner)
v.	
The Attorney General of the State of	

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: _____

   _____

   _____

   (b) Criminal docket or case number (if you know): _____
2. (a) Date of the judgment of conviction (if you know): _____

   (b) Date of sentencing: _____
3. Length of sentence: _____
4. In this case, were you convicted on more than one count or of more than one crime? Yes ❑ No ❑
5. Identify all crimes of which you were convicted and sentenced in this case: _____

   _____

   _____

   _____

   _____
6. (a) What was your plea? (Check one)

   (1) Not guilty ❑ (3) Nolo contendere (no contest) ❑

   (2) Guilty ❑ (4) Insanity plea ❑

   (b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to?_____

   _____

(c) If you went to trial, what kind of trial did you have? (Check one)

Jury ❑ Judge only ❑

7. Did you testify at either a pretrial hearing, trial or a post-trial hearing?

Yes ❑ No ❑

8. Did you appeal from the judgment of conviction?

Yes ❑ No ❑

9. If you did appeal, answer the following:

(a) Name of court: _____

(b) Docket or case number (if you know): _____

(c) Result: _____

(d) Date of result (if you know): _____

(e) Citation to the case (if you know): _____

(f) Grounds raised: _____

(g) Did you seek further review by a higher state court? Yes ❑ No ❑

If yes, answer the following:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Result: _____

(4) Date of result (if you know): _____

(5) Citation to the case (if you know): _____

(6) Grounds raised: _____

(h) Did you file a petition for certiorari in the United States Supreme Court? Yes ❑ No ❑

If yes, answer the following:

(1) Docket or case number (if you know): _____

(2) Result: _____

_____

(3) Date of result (if you know): _____

(4) Citation to the case (if you know): _____

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court?

Yes ❑ No ❑

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

_____

_____

_____

_____

_____

_____

_____

_____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes ❑ No ❑

(7) Result: _____

(8) Date of result (if you know): _____

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

_____

_____

_____

_____

_____

_____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes ❑ No ❑

(7) Result: _____

(8) Date of result (if you know): _____

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes ❑ No ❑

(7) Result: _____

(8) Date of result (if you know): _____

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: Yes ❑ No ❑

(2) Second petition: Yes ❑ No ❑

(3) Third petition: Yes ❑ No ❑

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not: _____

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: _____

_____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): _____

_____

_____

_____

_____

_____

_____

_____

(b) If you did not exhaust your state remedies on Ground One, explain why: _____

_____

_____

_____

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ❑ No ❑

(2) If you did not raise this issue in your direct appeal, explain why: _____

_____

_____

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ❑ No ❑

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

(3) Did you receive a hearing on your motion or petition?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion or petition?

Yes ❑ No ❑

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

_____

_____

_____

_____

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: _____

_____

_____

GROUND TWO: _____

_____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): _____

_____

_____

_____

_____

_____

_____

_____

(b) If you did not exhaust your state remedies on Ground Two, explain why: _____

_____

_____

_____

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ❑ No ❑

(2) If you did not raise this issue in your direct appeal, explain why: _____

_____

_____

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ❑ No ❑

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

(3) Did you receive a hearing on your motion or petition?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion or petition?

Yes ❑ No ❑

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue.

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two:

GROUND THREE:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) If you did not exhaust your state remedies on Ground Three, explain why:

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ❑ No ❑

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ❑ No ❑

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

(3) Did you receive a hearing on your motion or petition?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion or petition?

Yes ❑ No ❑

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

_____

_____

_____

_____

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three: _____

_____

_____

GROUND FOUR: _____

_____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): _____

_____

_____

_____

_____

_____

(b) If you did not exhaust your state remedies on Ground Four, explain why: _____

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ❑ No ❑

(2) If you did not raise this issue in your direct appeal, explain why: _____

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ❑ No ❑

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion or petition?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion or petition?

Yes ❑ No ❑

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four:

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? Yes ❑ No ❑

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them:

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? Yes ❑ No ❑

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinions or orders, if available.

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? Yes ❑ No ❑

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. _____

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: _____

(b) At arraignment and plea: _____

(c) At trial: _____

(d) At sentencing: _____

(e) On appeal: _____

(f) In any post-conviction proceeding: _____

(g) On appeal from any ruling against you in a post-conviction proceeding: _____

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ❑ No ❑

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

_____

(b) Give the date the other sentence was imposed: _____

(c) Give the length of the other sentence: _____

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? Yes ❑ No ❑

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as codified in 28 U.S.C. § 2244(d) does not bar your petition.*

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as codified in 28 U.S.C. § 2244(d) provides in part that:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Therefore, petitioner asks that the Court grant the following relief: _____

_____

_____

or any other relief to which he or she may be entitled.

_____

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on _____

_____ (month, date, year).

Executed (signed) on _____ (date).

_____

Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition. _____

_____

_____

IN FORMA PAUPERIS DECLARATION

[Insert from Appendix of Forms for 28 U.S.C. § 2254]

Motion to Vacate, Set Aside, or Correct a Sentence By a Person in Federal Custody

(Motion Under 28 U.S.C. § 2255)

Instructions

1. To use this form, you must be a person who is serving a sentence under a judgment against you in a federal court. You are asking for relief from the conviction or the sentence. This form is your motion for relief.

2. You must file the form in the United States district court that entered the judgment that you are challenging. If you want to challenge a federal judgment that imposed a sentence to be served in the future, you should file the motion in the federal court that entered that judgment.

3. Make sure the form is typed or neatly written.

4. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.

5. Answer all the questions. You do not need to cite law. You may submit additional pages if necessary. If you do not fill out the form properly, you will be asked to submit additional or correct information. If you want to submit a brief or arguments, you must submit them in a separate memorandum.

6. If you cannot pay for the costs of this motion (such as costs for an attorney or transcripts), you may ask to proceed *in forma pauperis* (as a poor person). To do that, you must fill out the last page of this form. Also, you must submit a certificate signed by an officer at the institution where you are confined showing the amount of money that the institution is holding for you.

7. In this motion, you may challenge the judgment entered by only one court. If you want to challenge a judgment entered by a different judge or division (either in the same district or in a different district), you must file a separate motion.

8. When you have completed the form, send the original and two copies to the Clerk of the United States District Court at this address:

   Clerk, United States District Court for _____
   Address
   City, State Zip Code

9. **CAUTION: You must include in this motion all the grounds for relief from the conviction or sentence that you challenge. And you must state the facts that support each ground. If you fail to set forth all the grounds in this motion, you may be barred from presenting additional grounds at a later date.**

10. **CAPITAL CASES: If you are under a sentence of death, you are entitled to the assistance of counsel. You should request the appointment of counsel.**

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court	District
Name:	Docket or Case No.:
Place of Confinement:	Prisoner No.:
UNITED STATES OF AMERICA	Movant (include name under which convicted)
v.	

MOTION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: _____

   _____

   _____

   (b) Criminal docket or case number (if you know): _____

2. (a) Date of the judgment of conviction (if you know): _____

   (b) Date of sentencing: _____

3. Length of sentence: _____

4. Nature of crime (all counts): _____

   _____

   _____

   _____

   _____

   _____

5. (a) What was your plea? (Check one)

   (1) Not guilty ❑ (2) Guilty ❑ (3) Nolo contendere (no contest) ❑

   (b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to? _____

   _____

   _____

   _____

   _____

6. If you went to trial, what kind of trial did you have? (Check one) Jury ❑ Judge only ❑

7. Did you testify at either a pretrial hearing, trial or post-trial hearing? Yes ❑ No ❑

8. Did you appeal from the judgment of conviction? Yes ❑ No ❑

9. If you did appeal, answer the following:

(a) Name of court: _____

(b) Docket or case number (if you know): _____

(c) Result: _____

(d) Date of result (if you know): _____

(e) Citation to the case (if you know): _____

(f) Grounds raised: _____

_____

_____

_____

_____

_____

_____

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes ❑ No ❑

If "Yes," answer the following:

(1) Docket or case number (if you know): _____

(2) Result: _____

_____

(3) Date of result (if you know): _____

(4) Citation to the case (if you know): _____

(5) Grounds raised: _____

_____

_____

_____

_____

_____

_____

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning this judgment of conviction in any court?

Yes ❑ No ❑

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

_____

_____

_____

_____

_____

_____

_____

(6) Did you receive a hearing where evidence was given on your motion, petition, application?

Yes ❑ No ❑

(7) Result: _____

(8) Date of result (if you know): _____

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

_____

_____

_____

_____

_____

_____

_____

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ❑ No ❑

(7) Result: _____

(8) Date of result (if you know): _____

(c) Did you appeal to a federal appellate court having jurisdiction the action taken on your motion, petition, or application?

(1) First petition: Yes ❑ No ❑

(2) Second petition: Yes ❑ No ❑

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not: _____

_____

_____

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE: _____

_____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): _____

_____

_____

_____

_____

_____

_____

_____

_____

_____

(b) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ❑ No ❑

(2) If you did not raise this issue in your direct appeal, explain why: _____

_____

_____

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ❑ No ❑

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ❑ No ❑

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:_____

_____

Docket or case number (if you know):_____

Date of the court's decision:_____

Result (attach a copy of the court's opinion or order, if available):_____

_____

_____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

_____

_____

_____

_____

GROUND TWO: _____

_____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): _____

_____

_____

_____

_____

_____

_____

_____

_____

(b) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ❑ No ❑

(2) If you did not raise this issue in your direct appeal, explain why: _____

_____

_____

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ❑ No ❑

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:_____

Name and location of the court where the motion or petition was filed:_____

_____

Docket or case number (if you know):_____

Date of the court's decision:_____

Result (attach a copy of the court's opinion or order, if available):_____

_____

_____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ❑ No ❑

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:_____

_____

Docket or case number (if you know):_____

Date of the court's decision:_____

Result (attach a copy of the court's opinion or order, if available):_____

_____

_____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

_____

_____

_____

_____

GROUND THREE: _____

_____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): _____

_____

(b) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ❑ No ❑

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ❑ No ❑

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ❑ No ❑

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):_____

_____

_____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

_____

_____

_____

_____

GROUND FOUR: _____

_____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): _____

_____

_____

_____

_____

_____

_____

_____

_____

_____

(b) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ❑ No ❑

(2) If you did not raise this issue in your direct appeal, explain why: _____

_____

_____

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ❑ No ❑

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:_____

Name and location of the court where the motion or petition was filed:_____

_____

Docket or case number (if you know):_____

Date of the court's decision:_____

Result (attach a copy of the court's opinion or order, if available):_____

_____

_____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ❑ No ❑

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:_____

_____

Docket or case number (if you know):_____

Date of the court's decision:_____

Result (attach a copy of the court's opinion or order, if available):_____

_____

_____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

_____

_____

_____

_____

13. Is there any ground in this motion that you have <u>not</u> previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them: _____

_____

_____

_____

_____

_____

_____

14. Do you have any motion, petition, or appeal <u>now pending</u> (filed and not decided yet) in any court for the judgment you are challenging? Yes ❑ No ❑

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. _____

_____

_____

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: _____

(b) At arraignment and plea: _____

(c) At trial: _____

(d) At sentencing: _____

(e) On appeal: _____

(f) In any post-conviction proceeding: _____

(g) On appeal from any ruling against you in a post-conviction proceeding: _____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes ❑ No ❑

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ❑ No ❑

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed: _____

(c) Give the length of the other sentence: _____

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ❑ No ❑

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as codified in 28 U.S.C. § 2255 does not bar your motion.*

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as codified in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —

(1) the date on which the judgment of conviction became final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Therefore, movant asks that the Court grant the following relief: _____

_____

_____

or any other relief to which he or she may be entitled.

_____

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion Under 28 U.S.C. § 2255 was placed in the prison mailing system on _____

_____ (month, date, year).

Executed (signed) on _____ (date).

_____

Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion. _____

_____

_____

IN FORMA PAUPERIS DECLARATION

[Insert from Appendix of Forms for 28 U.S.C. § 2254]

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 1 — RULES GOVERNING § 2254 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 1

Six commentators submitted written comments on the proposed revisions to Rule 1. Most of the comments were positive. Among the comments received were recommendations to create another set of rules to deal with habeas corpus applications filed under § 2241 and a recommendation that the term "application" be used in lieu of "petition."

II. LIST OF COMMENTATORS: RULE 1

02-CR-007 Hon. Joel M. Feldman, N.D. GA, Atlanta, GA., December 3, 2002.

02-CR-010 Mr. Patrick J. Charest, AIS No. 182262, Atmore, Alabama, December 9, 2002

02-CR-014 Mr. Kent S. Hofmeister, Federal Bar Association, Washington, D.C., February 14, 2003.

02-CR-015 Mr. Saul Bercovitch, Esq., State Bar of California, San Francisco, CA, February 14, 2003

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: RULE 1

Hon. Joel M. Feldman (02-CR-007)
United States District Judge
United States District Court of the Northern District of Georgia
Atlanta, GA.
December 3, 2002.

Judge Feldman points out that § 2254 refers to an "application" for a writ of habeas corpus. To be grammatically correct, he notes, the rules should refer to the moving papers as an "application," not a "petition."

Mr. Patrick J. Charest (02-CR-010)
Inmate, AIS No. 182262
Atmore, Alabama.
December 9, 2002

Mr. Charest states that the courts have misinterpreted and misapplied 28 U.S.C. § 2244(d)(2) (excluding periods from period of limitation) and that that has had an impact on the ability of persons to rely on § 2254. He offers no specific comment on the proposed rules.

Mr. Kent S. Hofmeister (02-CR-014)
Federal Bar Association
Washington, D.C.,
February 14, 2003.

The Federal Bar Association "supports the proposed revisions to the *habeas corpus* rules and the associated forms."

Mr. Saul Bercovitch, Esq., (02-CR-015)
State Bar of California
Committee on Federal Courts
San Francisco, California
February 14, 2003

The State Bar of California's Committee on Federal Courts supports the proposed amendments to the Rules Governing § 2254 and § 2255 Proceedings and the accompanying forms.

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, urges the Committee to continue consideration of the issue of whether there should be any specific rules of procedure for § 2241 proceedings. He believes it would be helpful to adopt a third set of rules for the "triumvirate of oddball collateral attack cases.

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Mr. Goldberger observes that as redrafted, Rule 1 seems to suggest an all-or-nothing approach to applying the rules to § 2241 proceedings. In his view, the Rule should allow a court to apply the rules selectively.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 2 — RULES GOVERNING § 2254 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 2

The Committee received written comments from seven persons or organizations. A number of the commentators opposed the proposed amendment to Rule 2(c)(5) that would permit someone other than the petitioner to sign the petition. In addition, one commentator suggested that the term "briefly summarize" was redundant and potentially misleading; the petitioner should be permitted to state the facts upon which he or she is basing their petition, and not simply summarize those facts or arguments.

II. LIST OF COMMENTATORS: RULE 2

02-CR-002 Hon. William F. Sanderson, U.S. Magistrate Judge, Dallas, Texas, October 22, 2002.

02-CR-011 Hon. Dennis G. Green, U.S. Magistrate Judges' Assn., Del Rio, Texas, January 14, 2003.

02-CR-013 Mr. Michael Rizza, Esq., Pittsburgh, PA, January 15, 2003.

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-018 Mr. Sheldon N. Light, Esq., Detroit, Michigan, February 12, 2003.

02-CR-020 Mr. Kent S. Scheidegger, Criminal Justice Legal Foundation, Sacramento, CA, February 13, 2003.

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003.

III. COMMENTS: RULE 2

Hon. William F. Sanderson (02-CR-002)
United States Magistrate Judge

Dallas, Texas,
October 22, 2002.

Judge Sanderson objects to the amendment to Rule 2 that would permit someone other than the petitioner/movant personally sign the petition/motion. He believes that the current provision is not onerous and acts as a "prophylactic to a person who might assert patently false allegations; he doubts that an attorney is competent to execute a declaration subject to the penalty of perjury. He adds that if the Committee continues with the proposed change, the Committee Notes should make clear that under the rule only licensed attorneys may act on an applicant's behalf. Otherwise, he argues, someone will argue that persons other than attorneys may sign the petition or motion.

Hon. Dennis G. Green (02-CR-011)
United States Magistrate Judge
President, Federal Magistrate Judges Assn.
Del Rio, Texas
January 14, 2003.

The Magistrate Judges Association opposes the amendment to Rule 2(c)(5) that would permit someone other than the petitioner to sign the petition. The Association notes that the Committee Note cites § 2242 for the proposition that someone other than the petitioner may sign. But the Association points out that in the context of § 2242, the person acting on behalf of the petition has "significant meaning." Citing *Whitmore v. Arkansas*, 495 U.S. 149 (1990), the Association states that the person signing on behalf of the petitioner must be a "next friend" and that the third party is not automatically granted that status. Instead, the granting of that status depends on a showing why the third party's actions would be in the best interests of the petitioner. In short, the Association believes that this amendment to Rule 2 will result in a significant substantive change. It recommends that if the amendment is retained that the Committee Note should provide some context for the meaning of the term "someone."

Mr. Michael Rizza, Esq. (02-CR-013)
Pittsburgh, PA,
January 15, 2003.

Mr. Michael Rizza, Pro Se Staff Attorney for the Western District of Pennsylvania, suggests that proposed Rule 2(c) include some sort of requirement that a person signing on behalf of the petitioner or movant to explain whey the petitioner or movant has not, or cannot, sign the petition or motion. In the alternative, the rule could require some sort of attestation that the petitioner or movant does not object to the filing. He notes examples of cases where third persons who opposed the death penalty have signed petitions or motions even where the person facing the death penalty did not wish to have the papers filed.

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, offers several suggestions on Rule 2. First, regarding Rule 2(b), he suggests that the last sentence in the rule be revised to substitute the word "from" in the place of the word "against." Thus, that sentence would read, "The petition must ask for relief from the state-court judgment being contested."

Second, he suggests that the term "briefly summarize" in Rule 2(c)(2) is redundant and also potentially bad advice. He states that the petition is often the only vehicle where the factual predicate for a claim can be set out. He cites the Supreme Court's decision in *Strickland v. Washington*, as an example of when a petitioner is required to demonstrate cause and prejudice—something that may not be briefly summarized. The petition, he argues, is the best and surest place to detail the necessary facts. A brief summary on the other hand, may lead to denied relief because it fails to adequately state a claim. He suggests the sentence should read: "The petition must (2) set forth the facts supporting each ground."

Finally, he welcomes the change in Rule 2(c)(5) that removes the requirement that the petitioner personally sign the petition. Regardless of whether it reflects good or bad policy, it is consistent with § 2242.

Mr. Sheldon N. Light, Esq. (02-CR-018)
State Bar of Michigan
Standing Committee on United States Courts
Detroit, Michigan
February 12, 2003.

Mr. Sheldon, commenting on behalf of the State Bar of Michigan's Standing Committee on United States Courts, believes that the amendment to Rule 2(c)(5) that would permit someone other than the petitioner to sign the petition, is incomplete. It would create the false impression that anyone may petition for habeas relief on behalf of another. He proposes that Rule 2(c)(5) be changed to read: "...be signed under penalty of perjury *by the petitioner or a next friend or other appropriate person appointed by the court to prosecute the action.*"

Regarding Rule 2(e), he notes that there is no current conflict between the current rule and Civil Rule 5(e) and that there is nothing the proposed rule itself reflecting the Committee's apparent belief that it is better to require the clerk to file otherwise defective

petitions. He suggests that a new Rule 3(b) be inserted, which would be more explicit about what the Committee Notes assume:

> "The court may order petitioner to correct any petition that fails to comply substantially with the requirements of these rules and may dismiss a petition without prejudice for a petitioner's unreasonable failure to comply with the requirements of such an order."

Mr. Kent S. Scheidegger (02-CR-020)
Criminal Justice Legal Foundation
Sacramento, CA
February 13, 2003.

Mr. Scheidegger, on behalf of the Criminal Justice Legal Foundation, objects to the proposed amendment that would permit someone other than the petitioner to sign the petition. He points out that the system is plagued with a "flood of worthless petitions" and that if any change is made to the rule, it should be that there is some system of verifying the interest of any third person who might sign the petition. He recommends that the rule be changed to permit "next friend" petitions as recognized in *Whitmore v. Arkansas.*

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Mr. Goldberger, on behalf of NADCL, offers several comments on Rule 2. First, regarding Rule 2(a) and (b), he suggests that the rule clarify that the petition may be filed even though petitioner may not know the exact name of the respondent.

Regarding Rule 2(c)(5), he suggests that the Committee Note should make it explicit that the five items that must be contained in the petition is an "exclusive" list and that a petition cannot be dismissed if the petitioner fails to allege any other matters, e.g., exhaustion of remedies or other affirmative defenses.

Finally, regarding Rule 2(d), he suggests that the rule be amended to add the word "either" after the words, "If filed pro se, the petition must substantially follow..." He observes that any mandatory local forms, which deviate from the national model form, should not be permitted, or at least controlled. On the other hand, he suggests that the courts should be permitted to exempt capital cases from the form. He offers substitute language:

"If the petition is filed by counsel, all information required by the form shall be included, and the petition may either follow the form or comply with the rules of the district court where filed for a complaint in a civil action."

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 3 — RULES GOVERNING § 2254 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 3

Four persons submitted written comments on the proposed amendments to Rule 3. One of the commentators, currently a state prisoner, offered extensive comments on the problems with prison internal mail systems and may pose problems for application of the proposed rule. One commentator opposed the proposed amendment that requires the court to accept even defective petitions, while another supports that amendment.

II. LIST OF COMMENTATORS: RULE 3

02-CR-009 Ms. Theresa Torricellas, W#21722, Corona, CA, November 28, 2002.

02-CR-011 Hon. Dennis G. Green, U.S. Magistrate Judges' Assn., Del Rio, Texas, January 14, 2003.

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: RULE 3

Ms. Theresa Torricellas (02-CR-009)
Inmate, W#21722
Corona, CA
November 28, 2002.

Ms. Torricellas provides an extensive discussion pointing some of the inherent problems with referencing prison internal mailing systems in Rule 3. She notes that the prison systems do not meet the "ideal necessary to be compatible with the proposed [rule]."

Hon. Dennis G. Green (02-CR-011)
United States Magistrate Judge
President, Federal Magistrate Judges Assn.
Del Rio, Texas
January 14, 2003.

The Magistrate Judges Association supports the proposed amendment to Rule 3(b), which would require the clerk to file a petition, even if it was otherwise procedurally defective.

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, observes that the proposed amendment to Rule 3(b) (which requires the clerk to file every petition) will create more work for the courts and goes beyond the ostensibly parallel provision in Rule of Civil Procedure 5(e). The latter rule states that the clerk shall not refuse to file a paper solely because it is not in proper form. Under Rule 3, the clerk would be required to file a petition even if the required fee or IFP affidavit was not attached. He suggests that Rule 3 should at least conform to the language in Civil Rule 5.

He "applauds" proposed Rule 3(c) and (d).

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Noting that Rule 3(c) references § 2244(d), Mr. Goldberger believes that the rules should not presume to judge the validity, or constitutionality, of a particular statute. Further, the rule should not "mislead" with regard to the existence of "extrastatutory issues, such as equitable tolling of the statute of limitations..." The rule should state in an unqualified way that timeliness "is governed" by statute.

With regard to Rule 3(d), Mr. Goldberger assumes the proposed language regarding "timely filing may be shown..." means that the § 1746 statement is sufficient but not necessary and that the court may examine other papers or information to determine if the filing is timely. If that is now permitted, he agrees with the change.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 4 — RULES GOVERNING § 2254 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 4

The Committee received written comments from five commentators. One commentator, the Magistrate Judges Assn., approves the amendment that addresses the issue of notifying state officials of the habeas petition. Another commentator, a career law clerk, points out that the proposed amendment fails to address a significant area of practice —filing of pre-answer motions to dismiss.

II. LIST OF COMMENTATORS: RULE 4

02-CR-011 Hon. Dennis G. Green, U.S. Magistrate Judges' Assn., Del Rio, Texas, January 14, 2003.

02-CR-012 Hon. Benson Everett Legg, D. MD, Baltimore, MD., January 22, 2003.

02-CR-016 Mr. John H, Blume, Esq., Columbia, South Carolina, February 14, 2003.

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: RULE 4

Hon. Dennis G. Green (02-CR-011)
United States Magistrate Judge
President, Federal Magistrate Judges Assn.
Del Rio, Texas
January 14, 2003.

The Magistrate Judges Association supports the amendment to Rule 4. In particular they approve the requirement in Rule 4 that addresses the notice of the habeas proceedings to state officials.

Hon. Benson Everett Legg (02-CR-012)
United States District Judge
United States District Court for the District of Maryland
Baltimore, Maryland
January 22, 2003.

Judge Legg suggests that Rule 4 be amended to provide that the court may require the petitioner to supplement his or her petition before deciding whether to dismiss the petition. He notes that in his district it is the practice to issue a show cause order to the petitioner if it appears that the petition is time barred; based on that response, the court may dismiss the petition without requiring an answer from the government. They use the same system if it appears from the face of the petition that there may be an unexhausted claim. He suggests some additional language that would reflect that practice.

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, states that proposed Rules 4 and 5 fail to address a significant issue in habeas practice. He notes that since AEDPA, there has been a significant increase in the number of filings of pre-Answer motions to dismiss, even though it is not entirely clear that a motion to dismiss is even proper in habeas practice. And there are no national rules addressing the issue of such motions; whatever guidance exists is in the form of local rules or practice. He urges the Committee to address the issue and suggests that Civil Rule 12(b) might provide a useful model for the habeas rules. However, he notes that "time" is a major issue and urges the Committee to resolve the conflict between the indefinite time limits in Rule 4(b) and the more specific time limits in § 2243.

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Mr. Goldberger refers the Committee to 28 U.S.C. § 1631 (transfer to cure jurisdictional defect). He states that a federal court should not be in the position of being an advocate for the government, much less raising and ruling upon waivable defenses. The Note, he says, should emphasize the narrowness of the term, plainly appears."

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 5 — RULES GOVERNING § 2254 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 5

Five commentators submitted written comments and suggestions on Rule 5. One of them, a state prisoner, noted that the Committee had changed the rule in such a manner to create a potential substantive change, without identifying it as such in the Committee Note. One commentator suggested that the government be required to provide certified copies of all of the prior state court proceedings, and another objected that the revised rules require the petitioner to allege possible affirmative defenses. Still another commentator is concerned that the term, "traverse" which is commonly used to label the petitioner's response to the government's answer, is not used in the rule itself. Finally, one of the commentators, a career law clerk, notes that the rules fail to address the common practice of the government filing a pre-answer motion to dismiss.

II. LIST OF COMMENTATORS: RULE 5

02-CR-009 Ms. Theresa Torricellas, W#21722, Corona, CA, November 28, 2002.

02-CR-011 Hon. Dennis G. Green, U.S. Magistrate Judges' Assn., Del Rio, Texas, January 14, 2003.

02-CR-012 Hon. Benson Everett Legg, D. MD, Baltimore, MD., January 22, 2003.

02-CR-013 Mr. Michael Rizza, Esq., Pittsburgh, PA, January 15, 2003.

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: RULE 5

Ms. Theresa Torricellas (02-CR-009)
Inmate, W#21722

Corona, CA
November 28, 2002.

Ms. Torricellas points out that the Committee Note to Rule 5 is incorrect in that it does not identify a substantive change to Rule 5(b), that the new rule now explicitly requires the government to state whether any claim in the petition is barred by one of the listed grounds. She provides an extensive discussion of the point.

Hon. Dennis G. Green (02-CR-011)
United States Magistrate Judge
President, Federal Magistrate Judges Assn.
Del Rio, Texas
January 14, 2003.

The Magistrate Judges Association supports the adoption of Rule 5(c) of the § 2254 Rules and Rule 5(e) of the § 2255 Rules, noting that the proposed rule is consistent with the practice in many jurisdictions.

Hon. Benson Everett Legg (02-CR-012)
United States District Judge
United States District Court for the District of Maryland
Baltimore, Maryland
January 22, 2003.

Judge Legg suggests that Rule 5(e) be amended to clarify that a reply from the petitioner is not permitted in all cases, and offers suggested language to accomplish that change.

Mr. Michael Rizza, Esq. (02-CR-013)
Pittsburgh, PA,
January 15, 2003.

Mr. Michael Rizza, Pro Se Staff Attorney for the Western District of Pennsylvania, suggests that Rule 5 be amended to require the government to append to its answer a "certified copy of the docket entries of each and every state court in which anything was filed relative to the conviction under attack as well as a docket sheet from the United States Supreme Court if a petition for certiorari was filed from of the state court judgments." He observes that this would assist the court in deciding statute of limitations issues and would provide a "snapshot/summary" of what took place in the courts and what other documents might be necessary to rule on the petition.

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California

El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, states that proposed Rules 4 and 5 fail to address a significant issue in habeas practice. He notes that since AEDPA, there has been a significant increase in the number of filings of pre-Answer motions to dismiss, even though it is not entirely clear that a motion to dismiss is even proper in habeas practice. And there are no national rules addressing the issue of such motions; whatever guidance exists is in the form of local rules or practice. He urges the Committee to address the issue and suggests that Civil Rule 12(b) might provide a useful model for the habeas rules. However, he notes that "time" is a major issue and urges the Committee to resolve the conflict between the indefinite time limits in Rule 4(b) and the more specific time limits in § 2243.

Regarding Rule 5(e), he believes that the proposed addition of the "reply" should be reevaluated. The question of permitting the petitioner or movant to file a response to the government's answer is a murky area and it is unclear just what that filing should be called. He suggests that the term "traverse" should be used, citing various authorities that use that term. He adds that the Committee Note curiously fails to use the term, thus leaving litigants to wonder whether a reply and a traverse are the same thing. Finally, he offers some suggestions on what the traverse may, or may not, address.

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Mr. Goldberger believes that it sounds unnecessarily burdensome to require the government to respond to every allegation in the petition/motion. He adds that that seems to also contradict Rule 4, which instructs the judge to require an answer or other pleading. A typical motion would be a motion to dismiss, and that should be permitted under the rule. He points out that the second sentence of the rule is "inappropriately phrased." The rule should not seem to require a recitation of whether any affirmative defense is applicable. Instead, the rule should state that the answer or other pleading specifically pleads any affirmative defenses. He argues that this portion of the rule should be modeled after Civil Rule 12(b) and the Note should state that the rule is not an attempt to catalog what comprises an affirmative defense — the respondent has the burden of pleading and proving an affirmative defense.

Finally, in light of § 2254(b)(3)'s express waiver requirement, the lack of exhaustion of remedies defense should be treated separately. He would prefer that the Committee use the Rules Enabling Act to supercede § 2254(b)(3).

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 6 — RULES GOVERNING § 2254 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 6

The Committee received comments from only two commentators. The comments generally focused on a suggestion to change the rule to recognize the court's authority to approve and monitor discovery.

II. LIST OF COMMENTATORS: RULE 6

02-CR-003 Jack E. Horsley, Esq., Matoon, Illinois, October 25, 2002.

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

III. COMMENTS: RULE 6

Jack E. Horsley, Esq. (02-CR-003)
Matoon, Illinois
October 25, 2002.

Mr. Horsley suggests a modification in Rule 6(b) to read "...by a statement giving grounds and details supporting the request..."

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, believes that Rule 6(b) would benefit from a minor change. He suggests that the rule be changed to read, "When requesting discovery, a party must include *with the request the proposed* interrogatories..." This change, he observes, will permit the judge to evaluate whether the requested discovery is appropriate. As currently drafted, the rule would require unnecessary work by the courts; with his proposal, the judge could in a single step evaluate both the needs and the means for the obtaining discovery.

He also suggests that Rule 6(c) be changed to address the issue of whether the petitioner bears the costs of his or her discovery.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 7 — RULES GOVERNING § 2254 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 7

Four commentators submitted written suggestions on Rule 7. Two of the commentators suggested that the rule be revised to recognize that in an appropriate case, the court should be able to expand the record, without depending on the parties to do so. One commentator suggested that the rule be changed to better advise pro se petitioners that the Rules of Civil Procedure apply to habeas proceedings.

II. LIST OF COMMENTATORS: RULE 7

02-CR-005 Hon. Franklin S. Van Antwerpen, E.D. PA., November 27, 2002.

02-CR-013 Mr. Michael Rizza, Esq., Pittsburgh, PA, January 15, 2003.

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: RULE 7

Hon. Franklin S. Van Antwerpen (02-CR-005)
United States District Judge
Criminal Business Committee
United States District Court of the Eastern District of Pennsylvania
November 27, 2002.

On behalf of the Criminal Business Committee of the U.S. District Court for the Eastern District of Pennsylvania, Judge Van Antwerpen, suggests that that additional language be added to the Committee Note that expressly states that Rule 7 is not intended to "extend or alter" existing case law, which applies the Federal Rules of Civil Procedure to the rule, and its application. That Committee believes that adding that language will

help alert pro se litigants and counsel that the Rules of Civil Procedure apply, along with the existing and applicable body of case law.

Mr. Michael Rizza, Esq. (02-CR-013)
Pittsburgh, PA,
January 15, 2003.

Mr. Michael Rizza, Pro Se Staff Attorney for the Western District of Pennsylvania, suggests that Rule 7(a) be amended by deleting the word "merits." He notes that there may other occasions where the court may want to expand the record by submitting information that is relevant to some issue other than the merits of the case, for example, where there is a question about the statute of limitations. He suggests possible substitute language.

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, offers several comments on Rule 7. First, he believes that Rule 7(a) "unnecessarily cramps a judge's power to expand the record" because it contemplates that the judge will be limited to seeking additional information through the parties. The rule should be changed, he states, to read, "If the petition is not dismissed, *the judge may expand the record by obtaining additional materials, or by directing the parties to submit additional materials*, relating to the merits of the petition." Further, the rule should read, "The judge may require *these materials be authenticated.*"

Second, in Rule 7(b) the text could be simplified by inserting the word "affidavits" into the earlier list of materials in the first sentence of the rule.

Finally, he states that there is an open question whether § 2254(e)(2)'s bar on evidentiary hearings also bars other habeas discovery or whether Rules 6 and 7 are unaffected by that Act. He believes it would be helpful if the subject was addressed either in the rules or in the Committee Notes.

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Mr. Goldberger suggests that the relationship between Rules 6 and 7(b) should be clarified and suggests language to accomplish that: "If discovery has been allowed under Rule 6, either party may add the fruits of discovery to the record under this Rule." He

also suggests that the last sentence should be made a separate subsection in order to clarify that a party's ability to supplement the record with affidavits is not limited to cases covered under Rule 7(a).

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 8 — RULES GOVERNING § 2254 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 8

Three commentators offered written comments on Rule 8. One commentator observed that as a result of restyling, the court is now required to review the entire record, a task that is not currently required by any Supreme Court decision; he also notes that the 10-day provision is unrealistic. Another commentator suggests that the rule be revised to insure that courts promptly hold evidentiary hearings.

II. LIST OF COMMENTATORS: RULE 8

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-020 Mr. Kent S. Scheidegger, Criminal Justice Legal Foundation, Sacramento, CA, February 13, 2003.

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: RULE 8

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, offers suggestions on all subdivisions in Rule 8. Regarding Rule 8(a) (Determining Whether to Hold a Hearing), he states that the new provision is both underinclusive and overinclusive, and is "unwarranted." In his view, this has resulted from the restyling. He reads the new provision to require the judge to review the entire record, a task that is not required by any Supreme Court decision. To that extent it is overinclusive. And because the rule does not include in the list of documents, the petition itself and the any attached affidavits. He suggests that the rule be rewritten to

"soften the mandatory terminology," and address the issue of whether the rule encompasses the new § 2254(e)(2) prohibition on evidentiary hearings. He proposes that the rule read as follows:

> "If the petition is not dismissed, the judge *may review any part of the assembled record* to determine whether an evidentiary hearing is required *or foreclosed by a failure to develop the factual basis of the claim in State court proceedings.*"

Regarding Rule 8(b), he states that the 10-day provision in the rule is unfairly short for petitioners, especially pro se prisoner petitioners. He offers a suggested, commonplace, scenario to emphasize this point. He suggests that the time for an objection be changed to "30 days after filing." This time frame, he points out, would be consistent with the time allowed for a normal civil appeal.

Finally, regarding Rule 8(c), he states that the last sentence appears to be either superfluous and should be omitted, or instead made the subject of a new rule.

Mr. Kent S. Scheidegger (02-CR-020)
Criminal Justice Legal Foundation
Sacramento, CA
February 13, 2003.

Mr. Scheidegger, on behalf of the Criminal Justice Legal Foundation, suggests that in Rule 8(b), the word "promptly" be inserted before the words "determine de novo." He suggests that that language will admonish the district judge to expedite the process.

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Mr. Goldberger believes that Rule 8(b) should entirely deleted in light of Rule 10, and the fact that it is redundant to a large extent with 28 U.S.C. § 636 and Civil Rule 72(b). The redundancy creates a question about the Committee's intent.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 9 — RULES GOVERNING § 2254 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 9

The Committee received comments from four commentators. Two of them suggested that the rule be further amended to provide that if the court determines that the petition is a second or successive petition, that the court is required to transfer the case to the court of appeals. Another commentator recommended that the Committee use the supersession clause to eliminate the statutory procedure for second or successive petitions.

II. LIST OF COMMENTATORS: RULE 9

02-CR-011 Hon. Dennis G. Green, U.S. Magistrate Judges' Assn., Del Rio, Texas, January 14, 2003.

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-018 Mr. Sheldon N. Light, Esq., Detroit, Michigan, February 12, 2003.

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: RULE 9

Hon. Dennis G. Green (02-CR-011)
United States Magistrate Judge
President, Federal Magistrate Judges Assn.
Del Rio, Texas
January 14, 2003.

The Magistrate Judges supports the amendment to Rule 9(b). It recommends, however, that a new sentence be added after the first sentence to provide for an immediate transfer of a second or successive petition to the Court of Appeals. It suggests that the added sentence read as follows: "If it plainly appears from the petition and from a

review of the dockets of all district courts in the state that a second or successive petition has been presented, the judge shall promptly enter an order transferring the papers to the court of appeals." The Association believes that this procedure would reflect the actual practice in many districts. It adds that in some districts, however, the petition is simply dismissed.

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, believes that Rule 9 is fine as is.

Mr. Sheldon N. Light, Esq. (02-CR-018)
State Bar of Michigan
Standing Committee on United States Courts
Detroit, Michigan
February 12, 2003.

Mr. Sheldon, commenting on behalf of the State Bar of Michigan's Standing Committee on United States Courts, suggests that Rule 9 clarify the procedures to be used when a petitioner or movant submits a second or successive petition or motion. In his view, express direction in the rules themselves would be helpful. He suggests that the following language be used:

> "If it plainly appears that a second or successive petition [motion] has been presented to the District Court, that court shall promptly transfer the action to the Court of Appeals."

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Mr. Goldberg notes that any attorney who has litigated a case under the AEDPA, and judges of the Courts of Appeals, know that the statutory procedures for successive petitions or motions are cumbersome and wasteful of resources. In this view, the Act inappropriately placed that decision in the hands of the Circuit Courts. He recommends that the Committee use the Rules Enabling Act supersession clause to override the statute, and suggests language for both the Rule and the Note to accomplish that step.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 10 — RULES GOVERNING § 2254 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 10

Only two commentators submitted written comments and both of them indicated that the proposed revisions were fine.

II. LIST OF COMMENTATORS: RULE 10

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: RULE 10

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, states that Rule 10 is fine as is.

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Mr. Goldberger believes that Rule 10 is fine

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 11 — RULES GOVERNING § 2254 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 11

Three commentators submitted written comments on the proposed amendments to Rule 11. Two of them approved of the revised rule and one suggested that the rule be further revised to state that the Rules of Civil Procedure may not be used if they conflict with the habeas statutes.

II. LIST OF COMMENTATORS: RULE 11

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-020 Mr. Kent S. Scheidegger, Criminal Justice Legal Foundation, Sacramento, CA, February 13, 2003.

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: RULE 11

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, believes that Rule 11 is fine.

Mr. Kent S. Scheidegger (02-CR-020)
Criminal Justice Legal Foundation
Sacramento, CA
February 13, 2003.

Mr. Scheidegger, on behalf of the Criminal Justice Legal Foundation, points out that Rule 11 omits reference to the fact that the Rules of Civil Procedure may not be used when they conflict with the habeas corpus statutes. He suggests inserting the words, "applicable statutes or" between the words "inconsistent with" and "these rules."

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Mr. Goldberger believes that Rule 11 is fine.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO F0RMS FOR RULES GOVERNING § 2254 PROCEEDINGS

I. SUMMARY OF COMMENTS: FORMS

The Committee received comments from eight persons or organizations on the proposed forms for § 2254 proceedings. The commentators generally supported the changes to the forms, but several of them suggested that the list of possible grounds for relief be either limited or omitted altogether. Another commentator objected to requiring the petitioner to list possible affirmative defenses. Finally, one commentator noted that the proposed forms do not include reference to two increasingly common grounds in habeas petitions: challenges to prison disciplinary proceedings and challenges to revocation of parole decisions.

II. LIST OF COMMENTATORS: FORMS

02-CR-003 Jack E. Horsley, Esq., Matoon, Illinois, October 25, 2002.

02-CR-005 Hon. Franklin S. Van Antwerpen, E.D. PA., November 27, 2002.

02-CR-006 Hon. Judith K. Guthrie, E.D. Texas, Tyler, Texas, November 20, 2002.

02-CR-011 Hon. Dennis G. Green, U.S. Magistrate Judges' Assn., Del Rio, Texas, January 14, 2003.

02-CR-012 Hon. Benson Everett Legg, D. MD, Baltimore, MD., January 22, 2003.

02-CR-016 Mr. John H, Blume, Esq., Columbia, South Carolina, February 14, 2003.

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: FORMS

Jack E. Horsley, Esq. (02-CR-003)
Matoon, Illinois
October 25, 2002.

Mr. Horsley supports the material concerning "Ground Two" in the official forms.

Hon. Franklin S. Van Antwerpen (02-CR-005)
United States District Judge
Criminal Business Committee
United States District Court of the Eastern District of Pennsylvania
November 27, 2002.

On behalf of his court's Criminal Business Committee, Judge Van Antwerpen suggests additional language for the § 2254 form at Paragraph 9. The proposed language would highlight the one-year statute of limitations and the filing of second or successive petitions. He notes that as a practical matter, the language will help prevent the filing of a second or successive petition without an order from the Circuit Court.

He also suggests that Question 13(a) be deleted and that the information requested in that question be asked for in each of the four grounds listed in Question 12. Thus, Question 13(b) would become Question 13. He notes that this approach is the one taken in all petitions filed in the Eastern District of Pennsylvania and resulted after extensive review of the apparent confusion caused in the format in the proposed forms.

Finally, he suggests that in Question 12(a) for each of the grounds that the word "briefly" be deleted and that the word "specific" be highlighted. He notes that using the word "briefly" my mislead petitioners into not including the necessary facts.

Hon. Judith K. Guthrie (02-CR-006)
United States District Judge
United States District Court for the Eastern District of Texas
Tyler, Texas
November 20, 2002.

Judge Guthrie observes that a growing number of habeas cases focus on challenges by a state prisoner to prison discipline proceedings and revocation of parole decisions. She cites *Edwards v. Balisok*, 520 U.S. 641 (1997), where the Court stated that challenges to disciplinary proceedings are to be filed under § 2254. She has attached a copy of the form used in the four districts in Texas to cover such proceedings.

Hon. Dennis G. Green (02-CR-011)
United States Magistrate Judge
President, Federal Magistrate Judges Assn.
Del Rio, Texas
January 14, 2003.

The Magistrate Judges Association supports the proposed forms, but offers specific comments on Questions 11 and 12. First the Association recommends that in Question 11 it would be beneficial to include a space for insertion of the date of filing.

Second, the Association believes that the list of possible grounds for relief in Question 12 is "terribly misleading." The Association notes that unless the motion or petition specifically invokes the Constitution, laws, or treaties the petition or motion is subject to dismissal. It points out that none of the listed grounds in Question 12 reference any of those provisions. Thus, the form should include an "admonition" that the petitioner or movant must reference those provisions. The Association also suggests that four additional grounds be added.

Hon. Benson Everett Legg (02-CR-012)
United States District Judge
United States District Court for the District of Maryland
Baltimore, Maryland
January 22, 2003.

Judge Legg indicates that in his district the local forms do not include a list of possible grounds for relief. It has been the experience in that district that using a list only encourages defendants to raise inapplicable claims.

Mr. John H, Blume, Esq. (02-CR-016)
Habeas Assistance and Training Project
Columbia, South Carolina
February 14, 2003.

Mr. Blume offers several comments on the forms accompanying the § 2254 Rules. First, he supports the change to Rule 2(c)(5), concerning the signature of either the petitioner or someone else, he observes that in the Model Form there is an indication on the last line of the form that the signature of the petitioner is required. He suggests that if someone other than the petitioner may indeed sign the petition, then the word "required" should be removed from the form.

Second, notes that there is a possible inconsistency in the § 2254 form and the § 2255 form in Question 5. In the § 2254 Form, there is a reference to an "Insanity Plea." But in the § 2255 Form, there is no reference to that plea. The inconsistency he states,

will create confusion and unnecessary litigation. His solution is to remove the reference in the § 2254 form.

Third, he raises concerns about Question 19, regarding "Timeliness of Petition." In his view the addition of the section on timeliness along with the requirement for the petitioner to "explain why..." converts the affirmative defense of the statute of limitations into an affirmative pleading requirement. That conversion, he maintains, is for Congress to make. Assuming that the question is retained, it would be beneficial to include in the form a list of sample reasons why the one-year statute of limitations is not applicable; he includes a suggested list.

Finally , regarding Question 12, he states that the second sample ground, (Conviction obtained by use of coerced confession) is already subsumed into the fifth sample ground, relating to violation of the privilege against self-incrimination. He also states that the fourth ground, concerning searches and seizures, should be removed because those grounds are not ordinarily cognizable in federal habeas corpus proceedings. He continues by suggesting that if a list is to be included in Question 12, some additional grounds should be added — *Batson* issue, denial of cross-examination, denial of conflict-free counsel, statements obtained in violation of sixth amendment right to counsel, improper jury instructions, insufficient evidence, and denial of trial by impartial jury.

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, notes that while Rule 2 now permits someone other than the petitioner to sign the petition, the form still requires the petitioner's signature.

He suggests that the list of possible grounds for relief, in Question 12, be omitted. He is philosophically opposed to the courts providing what amounts to legal advice to a party. If the courts are bound to include a list, then the list should be correct; here the list is incomplete. He offers several other grounds that could be listed.

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Mr. Goldberger offers a number of comments on the model § 2254 form:

Question #2 — the phrase "Date of the judgment of conviction" is technical and ambiguous. Most prisoners will know only the date on which they were sentenced; he recommends using that event as the point of reference.

Question #3 — he suggests asking the petitioner to state all of the terms of the sentence.

Question #4 — delete ambiguity by asking "Identify all crimes for which you were convicted and sentenced in the case giving rise to the custody you are challenging in this petition."

Question #6 — substitute "If your plea was not guilty, what kind of trial did you have?"

Question #7 — this question serves no purpose and should be deleted.

Question #9 — questions 9(f), (g)(6), and (h)(5) should be deleted. First, regarding (f) and (g)(6), he notes that these and any other questions relating to affirmative defenses are inconsistent with Rule 2(c) and should be eliminated. The form should not be used to ferret out nonjurisdictional grounds to dismiss the petition. Question 9(h)(5) requests information that is entirely immaterial.

Question #11 — he recommends deleting 11(a)(4), (b)(4), (c)(4), and (e). Same reasoning as above

Question #12 — he raises several points. First, he questions the usefulness of the list of frequently raised grounds. Second, it is unfair to instruct the petitioner not to argue or cite caselaw; he adamantly opposes any requirement that the petitioner anticipate and defend against an unraised, nonjurisdictional defenses, as currently required in subsections (b) through (e) under each ground for relief.

Question #13 — he recommends deleting this question, again for reasons stated previously. The form sends the message that the purpose of the proceedings is to find some reason to deny relief, which is "deeply regrettable and totally inappropriate."

Question #14 — supports the question; fits well with his suggestion in Rule 9, *supra.*

Question #17 — he has never understood the purpose of this question. If the Committee believes that it is useful, it should be moved closer to Questions 3 to 5.

Question #19 — for reasons already stated, this question is completely inappropriate, and "legally erroneous." He states that it is not true (as recognized by case law) that the petitioner must explain the timeliness of the petition, in the petition itself.

" Claim for relief" — the form violates Rule 2(c)(3) by blocking the petitioner from stating the relief requested.

"Verification" — the two verifications should be separated; the first is always required, the second is not.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 1 — RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 1

The Committee received three written comments on Rule 1. Two of them approved the rule and one suggested that the rules contain a common reference to the prosecutor, e.g., "attorney for the government."

II. LIST OF COMMENTATORS: RULE 1

02-CR-014 Mr. Kent S. Hofmeister, Federal Bar Assn., Washington, D.C., February 14, 2003.

02-CR-019 Mr. Eric H. Jaso, Department of Justice, Washington, D.C., February 20, 2003

III. COMMENTS: RULE 1

Mr. Kent S. Hofmeister (02-CR-014)
Federal Bar Association
Washington, D.C.,
February 14, 2003.

The Federal Bar Association "supports the proposed revisions to the *habeas corpus* rules and the associated forms."

Mr. Saul Bercovitch, Esq., (02-CR-015)
State Bar of California
Committee on Federal Courts
San Francisco, California
February 14, 2003

The State Bar of California's Committee on Federal Courts supports the proposed amendments to the Rules Governing § 2254 and § 2255 Proceedings and the accompanying forms.

Mr. Eric H. Jaso (02-CR-019)
Counselor to the Assistant Attorney General

Criminal Division
United States Department of Justice
Washington, D.C.,
February 20, 2003

Mr. Wroblewski notes that the rules are not consistent when describing how they refer to the prosecutor. He suggests that, as with the revised Rules of Criminal Procedure, that the rules use the term "attorney for the government, and that the definition for that term be included in the rules.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 2 — RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 2

The Committee received seven written comments on the proposed amendments to Rule 2. Several commentators expressed concern about the possibility of unauthorized persons signing the § 2255 motion on behalf of the movant, and recommended possible changes to the rule to address that problem. One commentator suggested that the published version of the rule, which requires the motion to "briefly summarize" the facts may be misleading to the movant. Another commentator recommended that current Rule 2(e) not be deleted. Finally, one commentator stated opposition to any requirement for the movant to state possible affirmative defenses.

II. LIST OF COMMENTATORS: RULE 2

02-CR-002 Hon. William F. Sanderson, U.S. Magistrate Judge, Dallas, Texas, October 22, 2002.

02-CR-011 Hon. Dennis G. Green, U.S. Magistrate Judges' Assn., Del Rio, Texas, January 14, 2003.

02-CR-013 Mr. Michael Rizza, Esq., Pittsburgh, PA, January 15, 2003.

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-018 Mr. Sheldon N. Light, Esq., Detroit, Michigan, February 12, 2003.

02-CR-019 Mr. Eric H. Jaso, Department of Justice, Washington, D.C., February 20, 2003

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: RULE 2

Hon. William F. Sanderson (02-CR-002)

United States Magistrate Judge
Dallas, Texas,
October 22, 2002.

Judge Sanderson objects to the amendment to Rule 2 that would permit someone other than the movant personally sign the motion. He believes that the current provision is not onerous and acts as a "prophylactic to a person who might assert patently false allegations; he doubts that an attorney is competent to execute a declaration subject to the penalty of perjury. He adds that if the Committee continues with the proposed change, the Committee Notes should make clear that under the rule only licensed attorneys may act on an applicant's behalf. Otherwise, he argues, someone will argue that persons other than attorneys may sign the motion.

Hon. Dennis G. Green (02-CR-011)
United States Magistrate Judge
President, Federal Magistrate Judges Assn.
Del Rio, Texas
January 14, 2003.

The Magistrate Judges Association opposes the amendment to Rule 2(c)(5) that would permit someone other than the petitioner to sign the petition. The Association notes that the Committee Note cites § 2242 for the proposition that someone other than the petitioner may sign. But the Association points out that in the context of § 2242, the person acting on behalf of the petition has "significant meaning." Citing *Whitmore v. Arkansas*, 495 U.S. 149 (1990), the Association states that the person signing on behalf of the petitioner must be a "next friend" and that the third party is not automatically granted that status. Instead, the granting of that status depends on a showing why the third party's actions would be in the best interests of the petitioner. In short, the Association believes that this amendment to Rule 2 will result in a significant substantive change. It recommends that if the amendment is retained that the Committee Note should provide some context for the meaning of the term "someone."

Mr. Michael Rizza, Esq. (02-CR-013)
Pittsburgh, PA,
January 15, 2003.

Mr. Michael Rizza, Pro Se Staff Attorney for the Western District of Pennsylvania, suggests that proposed Rule 2(c) include some sort of requirement that a person signing on behalf of the petitioner or movant to explain whey the petitioner or movant has not, or cannot, sign the petition or motion. In the alternative, the rule could require some sort of attestation that the petitioner or movant does not object to the filing. He notes examples of cases where third persons who opposed the death penalty have signed petitions or motions even where the person facing the death penalty did not wish to have the papers filed.

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, suggests that the term "briefly summarize" in Rule 2(b)(2) is redundant and also potentially bad advice. He states that the petition is often the only vehicle where the factual predicate for a claim can be set out. He cites the Supreme Court's decision in *Strickland v. Washington*, as an example of when a petitioner is required to demonstrate cause and prejudice—something that may not be briefly summarized. The petition, he argues, is the best and surest place to detail the necessary facts. A brief summary on the other hand, may lead to denied relief because it fails to adequately state a claim. He suggests the sentence should read: "The petition must (2) set forth the facts supporting each ground."

Second, he welcomes the change in Rule 2(c)(5) that removes the requirement that the movants personally sign the motion. Regardless of whether it reflects good or bad policy, it is consistent with § 2242.

Mr. Sheldon N. Light, Esq. (02-CR-018)
State Bar of Michigan
Standing Committee on United States Courts
Detroit, Michigan
February 12, 2003.

Mr. Sheldon, commenting on behalf of the State Bar of Michigan's Standing Committee on United States Courts, believes that the amendment to Rule 2(c)(5) that would permit someone other than the movant to sign the motion is incomplete. It would create the false impression that anyone may move for relief on behalf of another. He proposes that Rule 2(c)(5) be changed to read: "...be signed under penalty of perjury *by the movant or a next friend or other appropriate person appointed by the court to prosecute the action.*"

Regarding Rule 2(e), he notes that there is no current conflict between the current rule and Civil Rule 5(e) and that there is nothing the proposed rule itself reflecting the Committee's apparent belief that it is better to require the clerk to file otherwise defective petitions or motions. He suggests that a new Rule 3(b) be inserted, which would be more explicit about what the Committee Notes assume:

> "The court may order petitioner to correct any [motion] that fails to comply substantially with the requirements of these rules and may dismiss a [motion]

> without prejudice for a [movant's] unreasonable failure to comply with the requirements of such an order."

Mr. Eric H. Jaso (02-CR-019)
Counselor to the Assistant Attorney General
Criminal Division
United States Department of Justice
Washington, D.C.,
February 20, 2003

Mr. Wroblewski suggests that Rule 2(b) be revised to require that the habeas motion contain an express statement as to whether it is the first § 2225 motion or whether it is second or successive motion that has been authorized by the Court of Appeals. Also, the rule should require that the motion state whether the grounds asserted in the motion were raised in the district court before judgment, on direct appeal, or in any other prior § 2255 motions.

He also urges the Committee to amend Rule 2(d) to include language that would limit the amount of time that a movant could take to amend or correct a defective motion. He suggests that something like the current Rule 2(d) could address that point, expressly including a specific time requirement, e.g., 30 days.

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Mr. Goldberger, on behalf of NADCL, offers several comments on Rule 2. Regarding Rule 2(b)(5), he suggests that the Committee Note should make it explicit that the five items that must be contained in the [motion] is an "exclusive" list and that a [motion] cannot be dismissed if the [movant] fails to allege any other matters, e.g., exhaustion of remedies or other affirmative defenses.

Regarding Rule 2(c), he suggests that the rule be amended to add the word "either" after the words, "If filed pro se, the [motion] must substantially follow..." He observes that any mandatory local forms, which deviate from the national model form, should not be permitted, or at least controlled. On the other hand, he suggests that the courts should be permitted to exempt capital cases from the form. He offers substitute language:

> "If the [motion] is filed by counsel, all information required by the form shall be included, and the [motion] may either follow the form or comply with the rules of the district court where filed for a complaint in a civil action."

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 3 of RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 3

Of the four comments received on Rule 3, there was mixed reaction to the proposed amendment that would require the court to accept a defective motion; one commentator (a career law clerk) viewed it as an imposition on the court, while another (the Magistrate Judges' Assn), approved of the change. Another commentator suggested that the rule explicitly state that timeliness is governed by statute.

II. LIST OF COMMENTATORS: RULE 3

02-CR-011 Hon. Dennis G. Green, U.S. Magistrate Judges' Assn., Del Rio, Texas, January 14, 2003.

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-019 Mr. Eric H. Jaso, Department of Justice, Washington, D.C., February 20, 2003

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: RULE 3

Hon. Dennis G. Green (02-CR-011)
United States Magistrate Judge
President, Federal Magistrate Judges Assn.
Del Rio, Texas
January 14, 2003.

The Magistrate Judges Association supports the proposed amendment to Rule 3(b), which would require the clerk to file a petition, even if it was otherwise procedurally defective.

Mr. Robert J. Newmeyer (02-CR-017)

United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, offers two comments on Rule 3. First, he observes that the proposed amendment to Rule 3(b) (which requires the clerk to file every motion) will create more work for the courts and goes beyond the ostensibly parallel provision in Rule of Civil Procedure 5(e). The latter rule states that the clerk shall not refuse to file a paper solely because it is not in proper form. Under Rule 3, the clerk would be required to file a motion in every case, without qualification. He suggests that Rule 3 should at least conform to the language in Civil Rule 5.

Second, he "applauds" proposed Rule 3(c) and (d).

Mr. Eric H. Jaso (02-CR-019)
Counselor to the Assistant Attorney General
Criminal Division
United States Department of Justice
Washington, D.C.,
February 20, 2003

Mr. Wroblewski suggests that the rule be amended to state that the motion must be filed with the "clerk of the United States district court in which the judgment under attack was entered."

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Noting that Rule 3(c) references § 2244(d), Mr. Goldberger believes that the rules should not presume to judge the validity, or constitutionality, of a particular statute. Further, the rule should not "mislead" with regard to the existence is sufficient of "extrastatutory issues, such as equitable tolling of the statute of limitations..." The rule should state in an unqualified way that timeliness "is governed" by statute.

With regard to Rule 3(d), Mr. Goldberger assumes the proposed language regarding "timely filing may be shown..." means that the § 1746 statement but not necessary and that the court may examine other papers or information to determine if the filing is timely. If that is now permitted, he agrees with the change.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 4 — RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 4

The Committee received four written comments on the proposed amendments to Rule 4. Two commentators focused their comments on the meaning of the phrase "plainly appears" in regard to whether to hold a hearing. Another commentator suggested that the rule permit the court to order the movant to expand the motion, before deciding whether to dismiss it. And another commentator pointed out that the rules fail to address a common practice in some districts, where the government files a pre-answer motion to dismiss first, rather than immediately filing an answer.

II. LIST OF COMMENTATORS: RULE 4

02-CR-012 Hon. Benson Everett Legg, D. MD, Baltimore, MD., January 22, 2003.

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-019 Mr. Eric H. Jaso, Department of Justice, Washington, D.C., February 20, 2003

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: RULE 4

Hon. Benson Everett Legg (02-CR-012)
United States District Judge
United States District Court for the District of Maryland
Baltimore, Maryland
January 22, 2003.

Judge Legg suggests that Rule 4 be amended to provide that the court may require the movant to supplement his or her motion before deciding whether to dismiss it. He notes that in his district it is the practice to issue a show cause order to the movant if it appears that the motion may be time barred; based on that response, the court may

dismiss the motion without requiring an answer from the government. They use the same system if it appears from the face of the motion that there may be an unexhausted claim. He suggests some additional language that would reflect that practice.

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, states that proposed Rules 4 and 5 fail to address a significant issue in habeas practice. He notes that since AEDPA, there has been a significant increase in the number of filings of pre-Answer motions to dismiss, even though it is not entirely clear that a motion to dismiss is even proper in habeas practice. And there are no national rules addressing the issue of such motions; whatever guidance exists is in the form of local rules or practice. He urges the Committee to address the issue and suggests that Civil Rule 12(b) might provide a useful model for the habeas rules. However, he notes that "time" is a major issue and urges the Committee to resolve the conflict between the indefinite time limits in Rule 4(b) and the more specific time limits in § 2243.

Mr. Eric H. Jaso (02-CR-019)
Counselor to the Assistant Attorney General
Criminal Division
United States Department of Justice
Washington, D.C.,
February 20, 2003

Mr. Wroblewski points out that as proposed, Rule 4(b) presents several problems. First, § 2255 already provides a standard for deciding whether a hearing is required; thus, the rule's language referring to "plainly appears," diverges from the statutory standard. Second, Rule 11 incorporates Rules of Civil Procedure regarding pre-answer motions or motions for summary judgment; those motions should remain important tools for the government and should be mentioned in the rule, in order to meet any objections that § 2255 permits only a motion and answer. Third, he states that the Supreme Court in *Blackledge v. Allison*, recognized that in some cases the judge's recollection of the events in issue may suffice to permit him or her to summarily dismiss the § 2255 motion.

In order to address these concerns he suggests that the following language be substituted in 4(b):

> "If the motion, any attached exhibits, the records of prior proceedings, and the judge's recollection of the events at issue, conclusively show that the moving party is not entitled to relief on some or all claims, or if some or all claims must

be dismissed pursuant to a motion under the Federal Rules of Civil Procedure, the judge must dismiss the claims of motion..."

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

[Regarding Rule 4(b)], Mr. Goldberger refers the Committee to 28 U.S.C. § 1631 (transfer to cure jurisdictional defect). He states that a federal court should not be in the position of being an advocate for the government, much less raising and ruling upon waivable defenses. The Note, he says, should emphasize the narrowness of the term, "plainly appears."

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 5 — RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 5

Five commentators submitted written comments on the proposed changes to Rule 5. The Magistrate Judges' Association approved the amendment, noting that it is consistent with current practice in many districts. One commentator noted that the rules do not address a practice that occurs in a number of districts — the government often files a pre-answer motion to dismiss the § 2255 motion. Finally, one commentator believes that it is unnecessarily burdensome for the government to respond to every allegation in the motion.

II. LIST OF COMMENTATORS: RULE 5

02-CR-011 Hon. Dennis G. Green, U.S. Magistrate Judges' Assn., Del Rio, Texas, January 14, 2003.

02-CR-012 Hon. Benson Everett Legg, D. MD, Baltimore, MD., January 22, 2003.

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-019 Mr. Eric H. Jaso, Department of Justice, Washington, D.C., February 20, 2003

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: RULE 5

Hon. Dennis G. Green (02-CR-011)
United States Magistrate Judge
President, Federal Magistrate Judges Assn.
Del Rio, Texas
January 14, 2003.

The Magistrate Judges Association supports the adoption of Rule 5(c) of the § 2254 Rules and Rule 5(e) of the § 2255 Rules, noting that the proposed rule is consistent with the practice in many jurisdictions.

Hon. Benson Everett Legg (02-CR-012)
United States District Judge
United States District Court for the District of Maryland
Baltimore, Maryland
January 22, 2003.

Judge Legg suggests that Rule 5(e) be amended to clarify that a reply from the government is not permitted in all cases, and offers suggested language to accomplish that change.

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, offers general comments on Rules 4 and 5. He states that those rules fail to address a significant issue in habeas practice. He notes that since AEDPA, there has been a significant increase in the number of filings of pre-Answer motions to dismiss, even though it is not entirely clear that a motion to dismiss is even proper in habeas practice. And there are no national rules addressing the issue of such motions; whatever guidance exists is in the form of local rules or practice. He urges the Committee to address the issue and suggests that Civil Rule 12(b) might provide a useful model for the habeas rules. However, he notes that "time" is a major issue and urges the Committee to resolve the conflict between the indefinite time limits in Rule 4(b) and the more specific time limits in § 2243.

He comments that the style of proposed Rule 5(a) is awkward and that it comes from the "curious reference" to motion practice in the current rule. If the proposed rule contemplates some sort of response by the government to a § 2255 motion, then there should be some rule governing motions practice. He cites United States v. King, 184 F.R.D. 567, 568 (E.D. Va. 1999) (noting no mention in rules regarding a reply to a motion to dismiss). The proposed rule simply hints at the possibility of a motion.

Rule 5(b), he says, "unadvisably omits" any reference to whether the statute of limitations has run. He notes that it would be helpful to the court to know the government's position on that issue.

Regarding Rule 5(e), he believes that the proposed addition of the "reply" should be reevaluated. The question of permitting the petitioner or movant to file a response to

the government's answer is a murky area and it is unclear just what that filing should be called. He suggests that the term "traverse" should be used, citing various authorities that use that term. He adds that the Committee Note curiously fails to use the term, thus leaving litigants to wonder whether a reply and a traverse are the same thing. Finally, he offers some suggestions on what the traverse may, or may not, address.

Mr. Eric H. Jaso (02-CR-019)
Counselor to the Assistant Attorney General
Criminal Division
United States Department of Justice
Washington, D.C.,
February 20, 2003

Mr. Wroblewski states that under current Rule 5(b) permits the court to grant an "appropriate period of time" to the government to file supplement its answer, etc, but that the restyled rule states that the court must grant the government a "reasonable time" to do so. He believes that the current rule seems to require the court to defer to the government's belief as to what is an appropriate period of time, while the revised rule gives the court discretion to decide what is a reasonable time. He supports retaining the "current deferential standard" in the rule.

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Mr. Goldberger believes that it sounds unnecessarily burdensome to require the government to respond to every allegation in the petition/motion. He adds that that seems to also contradict Rule 4, which instructs the judge to require an answer or other pleading. A typical motion would be a motion to dismiss, and that should be permitted under the rule. He points out that the second sentence of the rule is "inappropriately phrased." The rule should not seem to require a recitation of whether any affirmative defense is applicable. Instead, the rule should state that the answer or other pleading specifically pleads any affirmative defenses. He argues that this portion of the rule should be modeled after Civil Rule 12(b) and the Note should state that the rule is not an attempt to catalog what comprises an affirmative defense — the respondent has the burden of pleading and proving an affirmative defense.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 6 — RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 6

The Committee received only two written comments on Rule 6. Both commentators urged the Committee to amend the rule to provide greater control by the court over the discovery process.

II. LIST OF COMMENTATORS: RULE 6

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-019 Mr. Eric H. Jaso, Department of Justice, Washington, D.C., February 20, 2003

III. COMMENTS: RULE 6

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, believes that Rule 6(b) would benefit from a minor change. He suggests that the rule be changed to read, "When requesting discovery, a party must include *with the request the proposed* interrogatories..." This change, he observes, will permit the judge to evaluate whether the requested discovery is appropriate. As currently drafted, the rule would require unnecessary work by the courts; with his proposal, the judge could in a single step evaluate both the needs and the means for the obtaining discovery.

He also suggests that Rule 6(c) be changed to address the issue of whether the petitioner bears the costs of his or her discovery.

Mr. Eric H. Jaso (02-CR-019)
Counselor to the Assistant Attorney General
Criminal Division

United States Department of Justice
Washington, D.C.,
February 20, 2003

Mr. Wroblewski is concerned that restyled Rule 6(a) opens the door for movants to argue that they are entitled to discovery, even without the court's approval. He suggests that the rule be changed to read: "Discovery is only permitted if and to extent permitted by a judge under the standards set forth in this section." He also suggests elimination of the reference to the Federal Rules of Criminal Procedure and to "practices and principles of law"—because Rule 16 does not normally apply and the general reference to principles of law is "unbounded and unclear."

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 7 — RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 7

Four commentators offered written suggestions on the proposed amendments to Rule 7. Three of them offered suggestions on changing the rule to reflect that the court should be empowered to order expansion of the record, through the parties, or from other sources.

II. LIST OF COMMENTATORS: RULE 7

02-CR-005 Hon. Franklin S. Van Antwerpen, E.D. PA., November 27, 2002.

02-CR-013 Mr. Michael Rizza, Esq., Pittsburgh, PA, January 15, 2003.

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: RULE 7

Hon. Franklin S. Van Antwerpen (02-CR-005)
United States District Judge
Criminal Business Committee
United States District Court of the Eastern District of Pennsylvania
November 27, 2002.

On behalf of the Criminal Business Committee of the U.S. District Court for the Eastern District of Pennsylvania, Judge Van Antwerpen, suggests that that additional language be added to the Committee Note that expressly states that Rule 7 is not intended to "extend or alter" existing case law, which applies the Federal Rules of Civil Procedure to the rule, and its application. That Committee believes that adding that language will help alert pro se litigants and counsel that the Rules of Civil Procedure apply, along with the existing and applicable body of case law.

Mr. Michael Rizza, Esq. (02-CR-013)
Pittsburgh, PA,
January 15, 2003.

Mr. Michael Rizza, Pro Se Staff Attorney for the Western District of Pennsylvania, suggests that Rule 7(a) be amended by deleting the word "merits." He notes that there may other occasions where the court may want to expand the record by submitting information that is relevant to some issue other than the merits of the case, for example, where there is a question about the statute of limitations. He suggests possible substitute language.

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, offers several comments on Rule 7. First, he believes that Rule 7(a) "unnecessarily cramps a judge's power to expand the record" because it contemplates that the judge will be limited to seeking additional information through the parties. The rule should be changed, he states, to read, "If the petition is not dismissed, *the judge may expand the record by obtaining additional materials, or by directing the parties to submit additional materials*, relating to the merits of the petition." Further, the rule should read, "The judge may require *these materials be authenticated.*"

Second, in Rule 7(b) the text could be simplified by inserting the word "affidavits" into the earlier list of materials in the first sentence of the rule.

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Mr. Goldberger suggests that the relationship between Rules 6 and 7(b) should be clarified and suggests language to accomplish that: "If discovery has been allowed under Rule 6, either party may add the fruits of discovery to the record under this Rule" He also suggests that the last sentence should be made a separate subsection in order to clarify that a party's ability to supplement the record with affidavits is not limited to cases covered under Rule 7(a).

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 8 — RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 8

The Committee received three submissions on Rule 8. One suggested that the new language requires the judge to review the entire record, a task not required by any Supreme Court decision and that the 10-day limit was unrealistic. Another commentator suggested adding language from § 2255, concerning when to hold a hearing. And a third commentator stated that Rule 8(b) should be deleted because it is redundant with 28 USC § 636.

II. LIST OF COMMENTATORS: RULE 8

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-019 Mr. Eric H. Jaso, Department of Justice, Washington, D.C., February 20, 2003

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: RULE 8

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, offers suggestions on all subdivisions in Rule 8. Regarding Rule 8(a) (Determining Whether to Hold a Hearing), he states that the new provision is both underinclusive and overinclusive, and is "unwarranted." In his view, this has resulted from the restyling. He reads the new provision to require the judge to review the entire record, a task that is not required by any Supreme Court decision. To that extent it is overinclusive. And because the rule does not include in the list of documents, the petition itself and the any attached affidavits. He suggests that the rule be rewritten to

"soften the mandatory terminology," and address the issue of whether the rule encompasses the new § 2254(e)(2) prohibition on evidentiary hearings. He proposes new language for the rule.

Regarding Rule 8(b), he states that the 10-day provision in the rule is unfairly short for movants, especially pro se prisoner movants. He offers a suggested, commonplace, scenario to emphasize this point. He suggests that the time for an objection be changed to "30 days after filing." This time frame, he points out, would be consistent with the time allowed for a normal civil appeal.

Finally, regarding Rule 8(c), he states that the last sentence appears to be either superfluous and should be omitted, or instead made the subject of a new rule.

Mr. Eric H. Jaso (02-CR-019)
Counselor to the Assistant Attorney General
Criminal Division
United States Department of Justice
Washington, D.C.,
February 20, 2003

Mr. Wroblewski suggests adding language to Rule 8(a) that would incorporate the § 2255 standard for deciding whether a hearing should take place. He recommends that the following language be used:

> "Unless the motion, any attached exhibits, the answer, the files and records of prior proceedings, and the judge's recollection of the events at issue conclusively show that the moving party is not entitled to relief on a claim that has not been dismissed, the judge must grant a prompt hearing on that claim."

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Mr. Goldberger believes that Rule 8(b) should entirely deleted in light of Rule 10, and the fact that it is redundant to a large extent with 28 U.S.C. § 636 and Civil Rule 72(b). The redundancy creates a question about the Committee's intent.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 9 — RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 9

Six commentators offered their views on the proposed amendments to Rule 9. The comments were generally supportive. Three commentators, however, recommended that the rule be changed to require the court to transfer a second or successive § 2255 motion to the court of appeals. One suggested that the statutory procedures for second of successive motions is unduly cumbersome and suggests that the Committee used the supersession clause of the Rules Enabling Act to override the statutory provisions.

II. LIST OF COMMENTATORS: RULE 9

02-CR-001 Steven W. Allen, Esq., Jersey City, N.J., September 25, 2002.

02-CR-011 Hon. Dennis G. Green, U.S. Magistrate Judges' Assn., Del Rio, Texas, January 14, 2003.

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-018 Mr. Sheldon N. Light, Esq., Detroit, Michigan, February 12, 2003.

02-CR-019 Mr. Eric H. Jaso, Department of Justice, Washington, D.C., February 20, 2003

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: RULE 9

Steven W. Allen, Esq. (02-CR-001)
Jersey City, N.J.,
September 25, 2002.

Mr. Allen believes that the Committee has created an unintended gap in the rules. He points out that for state prisoners under Section 2244(b)(1), a court is required to

dismiss a repetitive claim. But no such provision exists in Section 2255; thus, he says, when the language "may be dismissed" in Rule 9 is deleted, there will be no operative language in either the rules or § 2255 governing repetitive claims by federal prisoners. He concludes by noting that, in effect, "new claims and repetitive claims will be treated the same in successive petitions."

Hon. Dennis G. Green (02-CR-011)
United States Magistrate Judge
President, Federal Magistrate Judges Assn.
Del Rio, Texas
January 14, 2003.

The Magistrate Judges Association supports the amendment to Rule 9(b). It recommends, however, that a new sentence be added after the first sentence to provide for an immediate transfer of a second or successive motion to the Court of Appeals. It suggests that the added sentence read as follows:

> "If it plainly appears from the motion and from a review of the dockets of all district courts in the state that a second or successive motion has been presented, the judge shall promptly enter an order transferring the papers to the court of appeals."

The Association believes that this procedure would reflect the actual practice in many districts. It adds that in some districts, however, the motion is simply dismissed.

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, believes that Rule 9 is fine as is.

Mr. Sheldon N. Light, Esq. (02-CR-018)
State Bar of Michigan
Standing Committee on United States Courts
Detroit, Michigan
February 12, 2003.

Mr. Sheldon, commenting on behalf of the State Bar of Michigan's Standing Committee on United States Courts, suggests that Rule 9 clarify the procedures to be used when a petitioner or movant submits a second or successive petition or motion. In his view, express direction in the rules themselves would be helpful. He suggests that the following language be used:

> "If it plainly appears that a second or successive petition [motion] has been presented to the District Court, that court shall promptly transfer the action to the Court of Appeals."

Mr. Eric H. Jaso (02-CR-019)
Counselor to the Assistant Attorney General
Criminal Division
United States Department of Justice
Washington, D.C.,
February 20, 2003

Mr. Wroblewski believes that either Rule 9(a) should be deleted or that the Committee Note amended to state that the deletion of Rule 9(a) is not intended to deny the government of the ability to assert defenses of laches, undue delay, or other equitable arguments when opposing a § 2255 motion. He also suggests that Rule 9 be retitled as "Second or Successive Motions;" he also suggests new language for the rule:

> "A person in custody who has already filed a motion under section 2255 challenging a judgment of a United States district court may not file in the district court a second or successive motion under section 2255 challenging that judgment unless the person has first obtained authorization by the court of appeals as provided in 28 U.S.C. Sections 2244(b) and 2255 para. 8. If such a motion is erroneously filed in the district court which imposed the challenged sentence, the district court shall transfer the petition and the record to the court of appeals. Once such authorization has been received from the court of appeals, the defendant must file the motion in the district court pursuant to these rules. After transfer, before requiring an answer, the district court shall dismiss any claims which are beyond the scope of the authorization of the court of appeals, or which are barred under 28 U.S.C. § 2244(b)(1), (2) and (4)."

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Mr. Goldberg notes that any attorney who has litigated a case under the AEDPA, and judges of the Courts of Appeals, know that the statutory procedures for successive petitions or motions are cumbersome and wasteful of resources. In this view, the Act inappropriately placed that decision in the hands of the Circuit Courts. He recommends that the Committee use the Rules Enabling Act supersession clause to override the statute, and suggests language for both the Rule and the Note to accomplish that step.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 10 — RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 10

The Committee received three written comments on Rule 10. Two commentators said that the proposed rule was fine. A third commentator suggested that the rule address the issue of certificates of appealability.

II. LIST OF COMMENTATORS: RULE 10

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-019 Mr. Eric H. Jaso, Department of Justice, Washington, D.C., February 20, 2003

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: RULE 10

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, states that Rule 10 is fine as is.

Mr. Eric H. Jaso (02-CR-019)
Counselor to the Assistant Attorney General
Criminal Division
United States Department of Justice
Washington, D.C.,
February 20, 2003

Mr. Wroblewski notes that it is the experience of the Department of Justice that frequently courts do not rule on a certificate of appealability, which in turn requires remands and resulting delay. He suggests that Rule 11 be retitled, "Appeal," and that it read as follows:

> (a) Certificate of Appealability. At the time the district court enters a final order adverse to the movant in a proceeding under section 2255, the district judge must either issue a certificate of appealability or state why a certificate should not issue as required by 28 U.S.C. Section 2253(c). If the district court issues a certificate, the judge shall state the specific issue or issues that satisfy the criteria of 28 U.S.C. Section 2253(c)(2). The district clerk must send the certificate or statement to the court of appeals when the clerk transmits the movant's notice of appeal and the file of the district court proceedings to the court of appeals."

He believes that this change "transposes to the district court's rules the requirements placed on the district court by Federal Rules of Appellate Procedure 22(b)(1)." In the alternative, he suggests that the words "on request of a party of if the movant files notice of appeal," be inserted after "2255" in the above language.

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Mr. Goldberger believes that Rule 10 is fine.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 11 — RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 11

Two commentators submitted comments on Rule 11. Both believed that the proposed changes to the rule were fine. One, however, suggested that the Committee give some consideration to including a provision for certificates of appealability.

II. LIST OF COMMENTATORS: RULE 11

2-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: RULE 11

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, believes that Rule 11 is fine.

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Mr. Goldberger believes that Rule 11 is fine. He questions, however, whether it might be helpful to add something about certificates of appealability.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 12 — RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 12

The Committee received not written comments addressing the proposed changes to Rule 12

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO FORMS FOR RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: FORMS

The Committee received five comments on the official forms for § 2255 motions. Several commentators addressed the issue of whether the forms should include a list of suggested grounds for relief. Other comments focused on the issue of whether someone other than the movant could sign the form and recommended that the form reflect that point.

II. LIST OF COMMENTATORS: FORMS

02-CR-005 Hon. Franklin S. Van Antwerpen, E.D. PA., November 27, 2002.

02-CR-011 Hon. Dennis G. Green, U.S. Magistrate Judges' Assn., Del Rio, Texas, January 14, 2003.

02-CR-012 Hon. Benson Everett Legg, D. MD, Baltimore, MD., January 22, 2003.

02-CR-016 Mr. John H, Blume, Esq., Columbia, South Carolina, February 14, 2003.

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

III. COMMENTS: FORMS

Hon. Franklin S. Van Antwerpen (02-CR-005)
United States District Judge
Criminal Business Committee
United States District Court of the Eastern District of Pennsylvania
November 27, 2002.

On behalf of his court's Criminal Business Committee, Judge Van Antwerpen suggests additional language for the form at Paragraph 9. The proposed language would highlight the one-year statute of limitations and the filing of second or successive petitions. He notes that as a practical matter, the language will help prevent the filing of a second or successive petition without an order from the Circuit Court.

He suggests that in Question 12(a) for each of the grounds that the word "briefly" be deleted and that the word "specific" be highlighted. He notes that using the word "briefly" my mislead petitioners into not including the necessary facts.

Hon. Dennis G. Green (02-CR-011)
United States Magistrate Judge
President, Federal Magistrate Judges Assn.
Del Rio, Texas
January 14, 2003.

The Magistrate Judges Association supports the proposed forms, but offers specific comments on Questions 11 and 12. First the Association recommends that in Question 11 it would be beneficial to include a space for insertion of the date of filing.

Second, the Association believes that the list of possible grounds for relief in Question 12 is "terribly misleading." The Association notes that unless the motion or petition specifically invokes the Constitution, laws, or treaties the petition or motion is subject to dismissal. It points out that none of the listed grounds in Question 12 reference any of those provisions. Thus, the form should include an "admonition" that the petitioner or movant must reference those provisions. The Association also suggests that four additional grounds be added.

Hon. Benson Everett Legg (02-CR-012)
United States District Judge
United States District Court for the District of Maryland
Baltimore, Maryland
January 22, 2003.

Judge Legg indicates that in his district the local forms do not include a list of possible grounds for relief. It has been the experience in that district that using a list only encourages defendants to raise inapplicable claims.

Mr. John H, Blume, Esq. (02-CR-016)
Habeas Assistance and Training Project
Columbia, South Carolina
February 14, 2003.

Mr. Blume offers several comments on the forms accompanying the § 2254 Rules. First, he supports the change to Rule 2(c)(5), concerning the signature of either the petitioner or someone else, he observes that in the Model Form there is an indication on the last line of the form that the signature of the petitioner is required. He suggests that if someone other than the petitioner may indeed sign the petition, then the word "required" should be removed from the form.

Second, notes that there is a possible inconsistency in the § 2254 form and the § 2255 form in Question 5. In the § 2254 Form, there is a reference to an "Insanity Plea." But in the § 2255 Form, there is no reference to that plea. The inconsistency he states, will create confusion and unnecessary litigation. His solution is to remove the reference in the § 2254 form.

Third, he raises concerns about Question 19, regarding "Timeliness of Petition." In his view the addition of the section on timeliness along with the requirement for the petitioner to "explain why..." converts the affirmative defense of the statute of limitations into an affirmative pleading requirement. That conversion, he maintains, is for Congress to make. Assuming that the question is retained, it would be beneficial to include in the form a list of sample reasons why the one-year statute of limitations is not applicable; he includes a suggested list.

Finally, regarding Question 12, he states that the second sample ground, (Conviction obtained by use of coerced confession) is already subsumed into the fifth sample ground, relating to violation of the privilege against self-incrimination. He also states that the fourth ground, concerning searches and seizures, should be removed because those grounds are not ordinarily cognizable in federal habeas corpus proceedings. He continues by suggesting that if a list is to be included in Question 12, some additional grounds should be added — *Batson* issue, denial of cross-examination, denial of conflict-free counsel, statements obtained in violation of sixth amendment right to counsel, improper jury instructions, insufficient evidence, and denial of trial by impartial jury.

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, notes that while Rule 2 now permits someone other than the petitioner to sign the petition, the form still requires the petitioner's signature.

He suggests that the list of possible grounds for relief, in Question 12, be omitted. He is philosophically opposed to the courts providing what amounts to legal advice to a party. If the courts are bound to include a list, then the list should be correct; here the list is incomplete. He offers several other grounds that could be listed.

GAP REPORT—RULES GOVERNING § 2254 PROCEEDINGS

Rule 1. Scope of Rules

In response to at least one commentator on the published rules, the Committee modified Rule 1(b) to reflect the point that if the court was considering a habeas petition not covered by s2254, the court could apply some or all of the rules.

Rule 2. The Petition

The Committee changed Rule 2(c)(2) to read "state the facts" rather than "briefly summarize the facts." As one commentator noted, the current language may actually mislead the petitioner and is also redundant. The Committee modified Rule (2)(c)(5) to emphasize that any person, other than the petitioner, who signs the petition must be authorized to do so; the revised rule now specifically cites § 2242. The Note was changed to reflect that point.

Rule 2(c)(4) was modified to account for those cases where the petitioner prints the petition on a computer word-processing program.

Rule 3. Filing the Petition; Inmate Filing

The Committee Note was changed to reflect that the clerk must file a petition, even in those instances where the necessary filing fee or in forma pauperis form is not attached. The Note also includes new language concerning the equitable tolling of the statute of limitations.

Rule 4. Preliminary Review; Serving the Petition and Order

The Rule was modified slightly to reflect the view of some commentators that it is common practice in some districts for the government to file a pre-answer motion to dismiss. The Committee agreed with that recommendation and changed the word "pleading" in the rule to "response." It also made several minor changes to the Committee Note.

Rule 5. The Answer and the Reply

Rule 5(a) was modified to read that the government is not required to "respond" to the petition unless the court so orders; the term "respond" was used because it leaves open the possibility that the government's first response (as it is in some districts) is in the form of a pre-answer motion to dismiss the petition. The Note has been changed to reflect the fact that although the rule itself does not

reflect that particular motion, it is used in some districts and refers the reader to Rule 4.

The Committee also deleted the reference to "affirmative defenses," because the Committee believed that that term was a misnomer in the context of habeas petitions. The Note was also changed to reflect that there has been a potential substantive change from the current rule, to the extent that the published rule now requires that the answer address procedural bars and any statute of limitations. The Note states that the Committee believes the new language reflects current law.

The Note was modified to address the use of the term "traverse." One commentator noted that that is the term that is commonly used but that it does not appear in the rule itself.

Rule 6. Discovery

Rule 6(b) was modified to require that discovery requests be supported by reasons, to assist the court in deciding what, if any, discovery should take place. The Committee believed that the change made explicit what has been implicit in current practice.

Rule 7. Expanding the Record

The Committee modified Rule 7(a) by removing the reference to the "merits" of the petition. One commentator had commented that the court might wish to expand the record for purposes other than the merits of the case. The Committee agreed to the change and also changed the rule to reflect that someone other than a party may authenticate the materials.

Rule 8. Evidentiary Hearing

The Committee changed the Committee Note to reflect the view that the amendments to Rule 8 were not intended to supercede the restrictions on evidentiary hearings contained in § 2254(e)(2).

Rule 9. Second or Successive Petitions

The Committee made no changes to Rule 9.

Rule 10. Powers of a Magistrate Judge

The Committee restyled the proposed rule.

Rule 11. Applicability of Federal Rules of Civil Procedure

The Committee made no changes to Rule 11

GAP REPORT—RULES GOVERNING § 2255 PROCEEDINGS

Rule 1. Scope

The Committee made no changes to Rule 1.

Rule 2. The Motion

The Committee changed Rule 2(b)(2) to read "state the facts" rather than "briefly summarize the facts; " One commentator had written that the current language may actually mislead the petitioner and is also redundant.

Rule 2(b)(4) was also modified to reflect that some motions may be printed using a word processing program

Finally Rule (2)(b)(5) was changed to emphasize that any person, other than the petitioner, who signs the petition must be authorized to do so.

Rule 3. Filing the Motion; Inmate Filing

The Committee modified the Committee Note to reflect that the clerk must file a motion, even in those instances where the necessary filing fee or in forma pauperis form is not attached. The Note also includes new language concerning the equitable tolling of the statute of limitations.

Rule 4. Preliminary Review

The Committee modified Rule 4 to reflect the view of some commentators that it is common practice in some districts for the government to file a pre-answer motion to dismiss the § 2255 motion. The Committee agreed with that recommendation and changed the word "pleading" in the rule to "response." It also made several minor changes to the Committee Note.

Rule 5. The Answer and the Reply

Rule 5(a) was modified to read that the government is not required to "respond" to the motion unless the court so orders; the term "respond" was used because it leaves open the possibility that the government's first response (as it is in some districts) is in the form of a pre-answer motion to dismiss the motion. The Note has been changed to reflect the fact that

although the rule itself does not reflect that particular motion, it is used in some districts and refers the reader to Rule 4.

Finally, the Committee changed the Note to addresses the use of the term "traverse," a point raised by one of the commentators on the proposed rule.

Rule 6. Discovery

The Committee modified Rule 6(b), to require that discovery requests be supported by reasons, to assist the court in deciding what, if any, discovery should take place. The Committee amended the Note to reflect the view that it believed that the change made explicit what has been implicit in current practice.

Rule 7. Expanding the Record

Rule 7(a) was changed by removing the reference to the "merits" of the petition. One commentator had stated that the court may wish to expand the record for purposes other than the merits of the case. The Committee agreed and also changed the rule to reflect that someone other than a party may authenticate the materials.

Rule 8. Evidentiary Hearing

The Committee made no changes to Rule 8, as published for public comment.

Rule 9. Second or Successive Petitions

The Committee made no changes to Rule 9, as published.

Rule 10. Powers of a Magistrate Judge

The Committee restyled the proposed rule

Rule 11. Time to Appeal

The Committee made no changes to Rule 11, as published..

Rule 12. Applicability of Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure

The Committee made no changes to Rule 12.

GAP REPORT—FORMS ACCOMPANYING RULES GOVERNING § 2254 AND § 2255 PROCEEDINGS

Responding to a number of comments from the public, the Committee deleted from both sets of official forms the list of possible grounds of relief. The Committee made additional minor style corrections to the forms.

APPENDIX D

PROPOSED AMENDMENTS TO RULES — FOR PUBLICATION

Proposed Amendment to Rule 12.2 & Committee Note

Proposed Amendment to Rules 29, 33, 34, and 45 & Committee Notes

Proposed Amendment to Rule 32 & Committee Note

Proposed Amendment to Rule 32.1 & Committee Note

Proposed New Rule 59 & Committee Note

Rule 12.2. Notice of Insanity Defense; Mental Examination

* * * * *

(d) Failure to Comply.

(1) ***Failure to Give Notice or to Submit to Examination.*** ~~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~~ 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~~.~~ if the defendant fails to:

(A) give notice under Rule 12.2(b); or

(B) submit to an examination when ordered under Rule 12.2(c).

(2) ***Failure to Disclose.*** The court may exclude any expert evidence for which the defendant has failed to comply with the disclosure requirement of Rule 12.2(c)(3).

* * * * *

COMMITTEE NOTE

The amendment to Rule 12.2(d) fills a gap created in the 2002 amendments to the rule. The substantively amended rule that took effect December 1, 2002, permits a sanction of exclusion of "any expert evidence" for failure to give notice or failure to submit to an examination, but provides no sanction for failure to disclose reports. The proposed amendment is designed to address that specific issue.

Rule 12.2(d)(1) is a slightly restructured version of current Rule 12.2(d). Rule 12.2(d)(2) is new and permits the court to exclude any expert evidence for failure to comply with the disclosure requirement in Rule 12.2(c)(3). The sanction is intended to apply only to the evidence related to the matters addressed in the report that the defense failed to disclose. Unlike the broader sanction for the two violations listed in Rule 12.2(d)(1)—which can substantially affect the entire hearing—the Committee believed that it would be overbroad to expressly authorize exclusion of "any" expert evidence, even evidence unrelated to the results and reports that were not disclosed as required in Rule 12.2(c)(3).

As with sanctions for violating other parts of the rule, the amendment entrusts to the court the discretion to fashion an appropriate sanction proportional to the failure to disclose the results and reports of the defendant's expert examination. *See Taylor v. Illinois*, 484 U.S. 400, 414 n. 19 (1988) (court should 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"), citing *Fendler v. Goldsmith*, 728 F.2d 1181 (9th Cir. 1983).

Rule 29. Motion for a Judgment of Acquittal

* * * * *

(c) After Jury Verdict or Discharge.

(1) Time for a Motion. A defendant may move for a 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 sets during the 7-day period~~.

* * * * *

COMMITTEE NOTE

Rule 29(c) has been amended to remove the requirement that the court must act within seven days after a guilty verdict or after the court discharges the jury, if it sets another time for filing a motion for a judgment of acquittal. This amendment parallels similar changes to Rules 33 and 34. Further, a conforming amendment has been made to Rule 45(b)(2).

Currently, Rule 29(c) requires the defendant to move for a judgment of acquittal within seven days of the guilty verdict, or after the court discharges the jury, whichever occurs later, or some other time set by the court in an order issued within that same seven-day period. Similar provisions exist in Rules 33 and 34. Courts have held that the seven-day rule is jurisdictional. Thus, if a defendant files a request for an extension of time to file a motion for a judgment of acquittal within the seven-day period, the court must rule on that motion or request within the same seven-day period. If for some reason the court does not rule on the request within the seven days, it loses jurisdiction to act on the underlying substantive motion. *See, e.g., United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to fix a time for filing a motion for new trial within seven days of the verdict").

Assuming that the current rule was intended to promote finality, there is nothing to prevent the court from granting a very significant delay to the defendant a significant extension of time, so long as it does so within the seven-day period. Thus, the

Committee believed that the rule should be amended to be consistent with all of the other timing requirements in the rules, which do not force the court to act on a motion to extend the time for filing within a particular period of time or lose jurisdiction to do so.

Accordingly, the amendment deletes the language regarding the court's acting within seven days to set the time for filing. Read in conjunction with the conforming amendment to Rule 45(b), the defendant is still required to file a timely motion for a judgment of acquittal under Rule 29 within the seven-day period specified. The defendant may, under Rule 45, seek an extension of time to file the underlying motion as the defendant does so within the seven-day period. But the court itself is not required to act on that motion within any particular time. Further, under Rule 45(b)(1)(B), if for some reason the defendant fails to file the underlying motion within the specified time, the court may nonetheless consider that untimely motion if the court determines that the failure to file it on time was the result of excusable neglect.

Rule 33. New Trial

* * * * *

(b) Time to File.

* * * * *

(2) Other Grounds. Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty. ~~, or within such further time as the court sets during the 7-day period~~.

COMMITTEE NOTE

Rule 33(b)(2) has been amended to remove the requirement that the court must act within seven days after a verdict or finding of guilty if it sets another time for filing a motion for a new trial. This amendment parallels similar changes to Rules 29 and 34. Further, a conforming amendment has been made to Rule 45(b)(2).

Currently, Rule 33(b)(2) requires the defendant to move for a new trial within seven days after the verdict or the finding of guilty verdict, or within some other time set by the court in an order issued during that same seven-day period. Similar provisions exist in Rules 29 and 34. Courts have held that the seven-day rule is jurisdictional. Thus, if a defendant files a request for an extension of time to file a motion for a judgment of acquittal within the seven-day period, the court must rule on that motion or request within the same seven-day period. If for some reason the court does not rule on the request within the seven days, it loses jurisdiction to act on the underlying substantive motion. *See, e.g., United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to fix a time for filing a motion for new trial within seven days of the verdict").

Assuming that the current rule was intended to promote finality, there is nothing to prevent the court from granting a very significant delay to the defendant a significant extension of time, so long as it does so within the seven-day period. Thus, the Committee believed that the rule should be amended to be consistent with all of the other

timing requirements in the rules, which do not force the court to act on a motion to extend the time for filing within a particular period of time or lose jurisdiction to do so.

Accordingly, the amendment deletes the language regarding the court's acting within seven days to set the time for filing. Read in conjunction with the conforming amendment to Rule 45(b), the defendant is still required to file a timely motion for a new trial under Rule 33(b)(2) within the seven-day period specified. The defendant may, under Rule 45, seek an extension of time to file the underlying motion as long the defendant does so within the seven-day period. But the court itself is not required to act on that motion within any particular time. Further, under Rule 45(b)(1)(B), if for some reason the defendant fails to file the underlying motion for new trial within the specified time, the court may nonetheless consider that untimely underlying motion if the court determines that the failure to file it on time was the result of excusable neglect.

Rule 34. Arresting Judgment

* * * * *

(b) Time to File. The defendant must move to arrest judgment within 7 days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere. ~~, or within such further time as the court sets during the 7-day period~~.

COMMITTEE NOTE

Rule 34(b) has been amended to remove the requirement that the court must act within seven days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere if it sets another time for filing a motion to arrest a judgment. The amendment parallels similar amendments to Rules 29 and 33. Further, a conforming amendment has been made to Rule 45(b).

Currently, Rule 34(b) requires the defendant to move to arrest judgment acquittal within seven days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere, or within some other time set by the court in an order issued by the court within that same seven-day period. Similar provisions exist in Rules 29 and 33. Courts have held that the seven-day rule is jurisdictional. Thus, if a defendant files a request for an extension of time to file a motion for a judgment of acquittal within the seven-day period, the judge must rule on that motion or request within the same seven-day period. If for some reason the court does not rule on the request within the seven days, the court loses jurisdiction to act on the underlying substantive motion, if it is not filed within the seven days. *See, e.g., United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to fix a time for filing a motion for new trial within seven days of the verdict").

Assuming that the current rule was intended to promote finality, there is nothing to prevent the court from granting a very significant delay to the defendant a significant extension of time, so long as it does so within the seven-day period. Thus, the Committee believed that the rule should be amended to be consistent with all of the other timing requirements in the rules, which do not force the court to rule on a motion to extend the time for filing within a particular period of time or lose jurisdiction to do so.

Accordingly, the amendment deletes the language regarding the court's acting within seven days to set the time for filing. Read in conjunction with the conforming amendment to Rule 45(b), the defendant is still required to file a timely motion to arrest judgment under Rule 34 within the seven-day period specified. The defendant may, under Rule 45, seek an extension of time to file the underlying motion as long as the defendant does so within the seven-day period. But the court itself is not required to act on that motion within any particular time. Further, under Rule 45(b)(1)(b), if for some reason the defendant fails to file the underlying motion within the specified time, the court may nonetheless consider that untimely motion if the court determines that the failure to file it on time was the result of excusable neglect.

Rule 45. Computing and Extending Time

* * * * * *

(b) **Extending Time.**

(1) In General. When an act must or may be done within a specified time period, or 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 because of excusable neglect.

(2) **Exceptions**. The court may not extend the time to take any action under Rule ~~Rules 29, 33, 34 and~~ 35, except as stated in ~~those rules~~ that rule.

* * * * *

COMMITTEE NOTE

Rule 45(b) has been amended to conform to amendments to Rules 29, 33, and 34, which have been amended to remove the requirement that the court must act within the seven-day period specified in each of those rules if it sets another time for filing a motion under those rules.

Currently, Rules 29(c)(1), 33(b)(1), and 34(b) require the defendant to move for relief under those rules within the seven-day periods specified in those rules or within some other time set by the court in an order issued during that same seven-day period. Courts have held that the seven-day rule is jurisdictional. Thus, for example, if a defendant files a request for an extension of time to file a motion for a judgment of acquittal or a motion for new trial within the seven-day period, the court must rule on that motion or request within the same seven-day period. If for some reason the court does not rule on the request for an extension of time within the seven days, the court loses jurisdiction to act on the underlying substantive motion. *See, e.g., United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to fix a time for filing a motion for new trial within seven days of the verdict").

Rule 45(b)(2) specifies that a court may not extend the time for taking action under Rules 29, 33, or 34, except as provided in those rules.

Assuming that the current provisions in Rules 29, 33, and 34 were intended to promote finality, there is nothing to prevent the court from granting the defendant a significant extension of time, under those rules, as long as it does so within the seven-day period. Thus, the Committee believed that those rules should be amended to be consistent with all of the other timing requirements in the rules, which do not force the court to rule on a motion to extend the time for filing, within a particular period of time or lose jurisdiction to do so. The change to Rule 45(b)(2) is thus a conforming amendment.

The defendant is still required to file motions under Rules 29, 33, and 34 within the seven-day period specified in those rules. The defendant, however, may consistently with Rule 45, seek an extension of time to file the underlying motion as long as the defendant does so within the seven-day period. But the court itself is not required to act on that motion within any particular time. Further, under Rule 45(1)(b), if for some reason the defendant fails to file the underlying motion within the specified time, the court may nonetheless consider that untimely motion if the court determines that the failure to file it on time was the result of excusable neglect.

Rule 32. Sentencing and Judgment

* * * * *

(i). Sentencing.

* * * * *

(4) Opportunity to Speak

* * * * *

(B) *By a Victim of a Crime of Violence or Sexual Abuse*. Before imposing sentence, the court must address any victim of any crime of violence or sexual abuse who is present at sentencing and must permit the victim to speak or submit any information about 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) *By a Victim of a Felony Offense.* Before imposing sentence, the court must address any victim of a felony offense, not involving violence or sexual abuse, who is present at sentencing and must permit the victim to speak

or submit any information about the sentence. If the felony offense involved multiple victims, the court may limit the number of victims who will address the court.

* * * * *

~~(C)~~ (D) *In Camera Proceedings.* Upon a party's motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).

* * * * *

COMMITTEE NOTE

In a series of amendments, Rule 32 has been modified to provide allocution for victims of violent crimes, and more recently for victims of sexual offenses. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-222, 108 Stat. 1796 (amending Rule 32 to provide for victim allocution in crimes of violence). In 2002, Rule 32 was amended to extend the right of victim allocution to victims of sexual abuse. See Rule 32(a)(1)(B). The amendment to Rule 32(i)(4) expands the right of victim-allocution to all felony cases.

The role of victim allocution has become part of the accepted landscape in federal sentencing. *See generally* J. Barnard, *Allocution for Victims of Economic Crimes*, 77 NOTRE DAME L. REV. 39 (2001). And although the actual practice varies, some courts currently permit statements from victims of crimes that do not involve violence or sexual abuse. Typical examples include statements from victims of fraud and other economic crimes. Victims of non-violent felonies may have pertinent information that could affect application of a particular sentencing guideline. At the same time, however, there are potential problems with victim allocution, particularly in cases involving a large number of victims. *See* Barnard, *supra*, at 65-78 (noting arguments against victim allocution).

Rule 32(i)(4)(C) is a new provision that extends the right of allocution to victims of felonies that do not involve either sexual abuse or violence. The amendment attempts to strike a reasonable balance between the interest of victims in being heard and the ability of the court to efficiently move its sentencing docket. Although the rule requires

the court to hear from victims if any are present and wish to speak, it gives the court some discretion about the manner in which victims are to be heard. In a particular case, the court may permit, or require some or all of the victims to present their information in the form of written statements. The rule explicitly states that if there are multiple victims, the court may properly limit the number of persons who will be permitted to address the court during sentencing.

The amendment does not include any provision requiring a court to permit a representative to speak on behalf of a victim, as the court must do for victims of sexual abuse or violence. The Committee believed that the policy reasons for permitting a victim to speak through a representative in a case involving sexual abuse or violence do not exist in most other types of cases. Nonetheless, there is nothing in the rule that would prohibit the court from permitting a third person to represent the views of one or more victims of a felony not involving violence or sexual assault.

Rule 32.1. Revoking or Modifying Probation or Supervised Release

* * * * *

(b) Revocation.

* * * * *

(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 any adverse witness 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 ~~.~~ ; and

(E) an opportunity to make a statement and present any information in mitigation.

(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 counsel ~~.~~ and an opportunity to make a statement and present any information in mitigation.

* * * * *

COMMITTEE NOTE

The amendments to Rule 32.1(b) and (c) are intended to address a gap in the rule. As noted by the court in United States v. Frazier, 283 F.3d 1242 (11th Cir. 2002) (per curiam), there is no explicit provision in current Rule 32.1 for allocution rights for a person upon resentencing. In that case the court noted that several circuits had concluded that the right to allocution in Rule 32 extended to supervised release revocation hearings. *See United States v. Patterson*, 128 F.3d 1259, 1261 (8th Cir. 1997) (Rule 32 right to allocution applies); *United States v. Rodriguez*, 23 F.3d 919, 921 (5th Cir. 1997) (right of allocution, in Rule 32, applies at revocation proceeding). But the court agreed with the Sixth Circuit that the allocution right in Rule 32 was not incorporated into Rule 32.1. *See United States v. Waters*, 158 F.3d 933 (6th Cir. 1998) (allocution right in Rule 32 does not apply to revocation proceedings). The *Frazier* court observed that the problem with the incorporation approach is that it would require application of other provisions specifically applicable to sentencing proceedings under Rule 32, but not expressly addressed in Rule 32.1. 283 F.3d at 1245. The court, however, believed that it would be "better practice" for courts to provide for allocution at revocation proceedings and stated that "[t]he right of allocution seems both important and firmly embedded in our jurisprudence." *Id.*

The amended rule recognizes the importance of allocution and now explicitly recognizes that right at revocation hearings, Rule 32.1(b)(2) and extends it as well to modification hearings where the court may decide to modify the terms or conditions of the defendant's probation, Rule 32.1(c)(1). In each instance the court is required to give the defendant the opportunity to make a statement and present any mitigating information.

Rule 59 Matters Before a Magistrate Judge.

(a) ***Nondispositive Matters***. A district judge may refer to a magistrate judge for determination a matter that does not dispose of the case. The magistrate judge must promptly conduct the required proceedings and, when appropriate, enter on the record an oral or written order stating the determination. A party may serve and file any objections to the order within 10 days after being served with a copy of a written order or after the oral order is made on the record, or at some other time the court sets. The district judge must consider any timely objections and modify or set aside any part of the order that is clearly erroneous or contrary to law. Failure to object in accordance with this rule waives a party's right to review.

(b) ***Dispositive Matters***.

(1) ***Referral to magistrate judge.*** A district judge may refer to a magistrate judge for recommendation any matter that may dispose of the case including a defendant's motion to dismiss or quash an indictment or information, or a motion to suppress evidence. The magistrate judge must promptly conduct the required proceedings. A record must be made of any evidentiary proceeding before the magistrate judge and of any other proceeding if the magistrate judge considers it necessary. The magistrate judge must enter on

the record a recommendation for disposing of the matter, including any proposed findings of fact. The clerk must immediately mail copies to all parties.

(2) Objections to findings and recommendations. Within 10 days after being served with a copy of the recommended disposition, or such other period as fixed by the court, a party may serve and file any specific written objections to the proposed findings and recommendations. Unless the district judge directs otherwise, the party objecting to the recommendation must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient. Failure to object in accordance with this rule waives a party's right to review.

(3) De novo review of recommendations. The district judge must consider de novo any objection to the magistrate judge's recommendation. The district judge may accept, reject, or modify the recommendation, receive further evidence, or may resubmit the matter to the magistrate judge with instructions.

COMMITTEE NOTE

Rule 59 is a new rule that creates a procedure for a district judge to review nondispositive and dispositive decisions by magistrate judges. The rule is derived in part from Federal Rule of Civil Procedure 72.

The Committee's consideration of a new rule on the subject of review of magistrate judge's decisions resulted from *United States v. Abonce-Barrera*, 257 F.3 959 (9th Cir. 2001). In that case the Ninth Circuit held that the Criminal Rules do not require appeals from nondispositive decisions by magistrate judges to district judges as a requirement for review by a court of appeals. The court suggested that Federal Rule of Civil Procedure 72 could serve as a suitable model for a criminal rule.

New Rule 59(a) sets out procedures to be used in reviewing nondispositive matters, that is, those matters that do not dispose of the case. The rule requires that if the district judge has referred a matter to a magistrate judge, that the magistrate judge must issue an oral or written order on the record. To preserve the issue for further review, a party must object to that order within 10 days after being served with a copy of the order or after the oral order is made on the record or at some other time set by the court. If an objection is made, the district court is required to consider the objection. If the court determines that the magistrate judge's order, or a portion of the order, is clearly erroneous or contrary to law, the court must set aside the order, or the affected part of the order. *See also* 28 U.S.C. § 636(b)(1)(A).

Rule 59(b) provides for assignment and review of recommendations made by magistrate judges on dispositive matters, including motions to suppress or quash an indictment or information. The rule directs the magistrate judge to consider the matter promptly, hold any necessary evidentiary hearings, and enter his or her recommendation on the record. After being served with a copy of the magistrate judge's recommendation, under Rule 59(b)(2), the parties have a period of 10 days to file any objections. If any objections are filed, the district court must consider the matter de novo and accept, reject, or modify the recommendation, or return the matter to the magistrate judge for further consideration.

Both Rule 59(a) and (b) contain a provision that explicitly states that failure to file an objection in accordance with the rule amounts to a waiver of the issue. This waiver provision is intended to establish the requirements for objecting in a district court in order to preserve appellate review of magistrate judges' decisions. In *Thomas v. Arn*, 474 U.S. 140, 155 (1985), the Supreme Court approved the adoption of waiver rules on matters for which a magistrate judge had made a decision or recommendation. The Committee believes that the waiver provisions will enhance the ability of a district court to review a magistrate judge's decision or recommendation by requiring a party to promptly file an

objection to that part of the decision or recommendation at issue. Further, the Supreme Court has held that a de novo review to a magistrate judge's decision or recommendation is required to satisfy Article III concerns only where there is an objection. *Peretz v. United States*, 501 U.S. 293 (1991).

Despite the waiver provisions, the district judge retains the authority to review any magistrate judge's decision or recommendation by a magistrate judge whether or not objections are timely filed. This discretionary review is in accord with the Supreme Court's decision in *Thomas v. Arn, supra,* at 154. *See also Matthews v. Weber*, 423 U.S. 261, 270-271 (1976).

APPENDIX E

MINUTES OF APRIL 2003 MEETING

MINUTES (DRAFT)
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

April 27-28, 2003
Santa Barbara, California

The Advisory Committee on the Federal Rules of Criminal Procedure met at Santa Barbara, California on April 27 and 28, 2003. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Carnes, Chair of the Committee, called the meeting to order at 8:30 a.m. on Monday, April 27, 2003. The following persons were present for all or a part of the Committee's meeting:

Hon. Edward E. Carnes, Chair
Hon. John M. Roll
Hon. Susan C. Bucklew
Hon. David G. Trager
Hon. Harvey Bartle III
Hon. Tommy E. Miller
Hon. Reta M. Strubhar
Prof. Nancy J. King
Mr. Lucien B. Campbell
Mr. Jonathan Wroblewski, 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. A. Wallace Tashima, member of the Standing Committee and liaison to the Criminal Rules Committee; Mr. Peter McCabe and Mr. James Ishida of the Administrative Office of the United States Courts, and Mr. John Rabiej Chief of the Rules Committee Support Office of the Administrative Office of the United States Courts.

Judge Carnes noted later in the meeting that Judge Miller's and Judge Roll's terms of appointment would expire in September 2003 and expressed deep appreciation for their hard work on a number of significant projects in their six years on the Committee. Judge Carnes pointed out that Judge Tashima's term on the Standing Committee would also end in September 2003, and thanked him for his contributions as a liaison member to the Criminal Rules Committee.

II. APPROVAL OF MINUTES

Judge Miller moved that the minutes of the Committee's meeting in Cape Elizabeth, Maine in September 2002 be approved. The motion was seconded by Judge Roll and following minor corrections to the Minutes, carried by a unanimous vote.

III. RULES PENDING BEFORE THE CONGRESS

Professor Schlueter informed the Committee that the package of Style amendments to Rules 1-60, the proposed substantive amendments to Rules 5, 10, 12.2, 12.4, 30, and 35 had become effective on December 1, 2002.

IV. RULES PUBLISHED FOR PUBLIC COMMENT:

A. Rule 41. Tracking-Device Warrants

Judge Miller informed the Committee that the comment period for the proposed amendments to Rule 41, regarding tracking-device warrants, and other amendments, had closed on February 15, 2003, and that the Committee had received written comments from seven persons or organizations. He added that those comments had been considered by the Rule 41 Subcommittee (Judge Miller, chair, Judge Bartle, Prof. King, Mr. Campbell, and Mr. Jaso), which in turn recommended only minor changes to the rule and note as published.

The Committee discussed a proposal from the National Assn' of Criminal Defense Lawyers (NACDL) that the rule contain a cross-reference to Rule 1(c), regarding the authority of federal judicial officers, other than magistrate judges, to issue search warrants. The Committee decided not to make the change to the rule. The Committee did agree with NACDL that the words "has authority" should be inserted in Rule 41(c)(3) and (4) to parallel similar language in Rule 41(c)(1) and (2). The Committee also considered, but rejected, a proposal from NACDL to completely redraft Rule 41(d), regarding the finding of probable cause.

Mr. Wroblewski stated that the Department of Justice had raised the issue of whether the proposed rule should contain any reference to the point that some justification less than probable cause might support issuance of a warrant to install and use a tracking device. The Committee believed that doing so could be a significant change from the published version of the amendment and that that issue should be left to the courts for resolution.

Judge Miller noted that Mr. Campbell had proposed several changes to Rule 41(e)(2)(B) concerning the time to be set for using a tracking device. His suggestion, that the word "reasonable" be inserted at several places in the rule, was adopted. The

Committee rejected a suggestion from NACDL that the rule place a limit of 90 days on monitoring activity.

Following additional discussion concerning the Committee Note, Judge Miller moved that the proposed amendments to Rule 41 be approved and forwarded to the Standing Committee for transmittal to the Judicial Conference. Judge Bartle seconded the motion, which passed with a unanimous vote.

B. Restyled Rules Governing § 2254 and § 2255 Proceedings and Forms Accompanying Rules

Judge Trager, chair of the Habeas Rules Subcommittee, provided a brief overview of the process of reviewing the public comments the Committee had received on the proposed amendments to the Rules Governing §§ 2254 and 2255 Proceedings and the forms that accompany those rules.

1. Rules Governing § 2254 Proceedings.

Rule 1. Scope of Rules

It was noted that one of the commentators had suggested that Rule 1(b) be modified to reflect that for a habeas corpus petition not covered by § 2254, the court may apply some or all of the rules. Following a brief discussion, Rule 1(b) was modified to reflect that point.

Rule 2. The Petition

Judge Trager noted that the Subcommittee recommended that Rule 2(c)(2) should read "state the facts" rather than "briefly summarize the facts." As one commentator noted, the current language may actually mislead the petitioner and is also redundant.

Also, Judge Trager noted Rule (2)(c)(5) should be changed to emphasize that any person, other than the petitioner, who signs the petition must be authorized to do so, as recognized in the caselaw. The revised rule now specifically cites § 2242. The Reporter added that the Committee Note has been amended to reflect that point.

Several members raised the question whether the proposed language in Rule 2(c)(4) would include petitions typed or printed on a computer. Following a brief discussion the Committee decided to insert the word "printed" in the rule.

Rule 3. Filing the Petition; Inmate Filing

Judge Trager pointed out that the Committee Note has been changed so that the clerk must file a petition, even in those instances where the necessary filing fee or in

forma pauperis form is not attached. The Note also includes new language concerning the equitable tolling of the statute of limitations.

Rule 4. Preliminary Review; Serving the Petition and Order

Judge Trager explained that the Subcommittee recommended that this rule be modified to reflect the view of some commentators that it is common practice in some districts for the government to file a pre-answer motion to dismiss. The Committee agreed with that recommendation and changed the word "pleading" in the rule to "response." It also made several minor changes to the Committee Note.

Rule 5. The Answer and the Reply

Judge Trager pointed out that the Subcommittee recommended that Rule 5(a) be modified to read that the government is not required to "respond" to the petition unless the court orders; the term "respond" is used instead of "answer" to leave open the possibility that the government's first response (as it is in some districts) is in the form of a pre-answer motion to dismiss the petition. The Note has been changed to reflect the fact that although the rule itself does not refer to a motion to dismiss, it is used in some districts and the Note refers to this practice as described in Rule 4.

Judge Trager also informed the Committee that the proposed rule was potentially confusing to the extent that it required that the answer address "affirmative defenses." That term, he noted, was a misnomer. Following additional discussion, the Committee agreed to delete the term from Rule 5(b). It also changed the Note to indicate that the published rule requires that the answer address not only the failure to exhaust state remedies but also procedural bars and any statute of limitations, while the current rule addresses only exhaustion of remedies. The Note states that the Committee believes the new language reflects current law and practice.

The Committee discussed proposed Rule 5(e), which would provide the petitioner with the right to file a response to the answer. Judge Miller moved, and Judge Trager seconded, a motion that the rule remain as published, that is, petitioners would have the right to reply in all cases. The motion carried by a vote of 5 to 3.

The Note also mentions the term "traverse." One commentator to the published rule had noted that term is commonly used but does not appear in the rule itself.

Rule 6. Discovery

Judge Trager pointed out that the Subcommittee had recommended new language for Rule 6(b) to require that discovery requests include reasons for the request, which will assist the court in deciding what, if any, discovery should take place. The Committee agreed with the change and amended the Note to reflect the view that the change made explicit what has been implicit in current practice.

Rule 7. Expanding the Record

Judge Trager noted that the Subcommittee had recommended a minor change to Rule 7(a), which was to remove the reference to the "merits" of the petition. One commentator, he observed, had suggested that the court might wish to expand the record for purposes other than the deciding the merits of the case. The Committee agreed to the change and also changed the rule to reflect that someone other than a party may authenticate materials.

Rule 8. Evidentiary Hearing

Following a brief discussion, the Committee decided to change the Committee Note to reflect the view that the amendments to Rule 8 were not intended to supersede the restrictions on evidentiary hearings contained in § 2254(e)(2).

Rule 9. Second or Successive Petitions

Judge Trager pointed out the Subcommittee had recommended that new language be added to Rule 9 that would require the court to transfer a second or successive petition to the court of appeals. That practice, he observed, is currently used in several circuits, as reflected in the Note. Judge Carnes stated that practice was not followed in all circuits, and it could impose an unnecessary burden on the courts of appeal by forcing them to consider every petition denied by the district courts on second or successive petition grounds, even if the petitioner did not attempt to pursue the matter further. Judge Trager pointed out that for pro se petitioners, the proposed rule would expedite the process and insure that they had their day in court. Ultimately, the Committee voted to delete the new language.

Rule 10. Powers of a Magistrate Judge

Following a brief discussion, the Committee restyled the proposed rule

Rule 11. Applicability of Federal Rules of Civil Procedure

Judge Trager stated that the Subcommittee had no proposed changes to Rule 11.

2. Rules Governing § 2255 Proceedings.

Rule 1. Scope

Judge Trager stated that the Subcommittee had no proposed changes to Rule 1.

Rule 2. The Motion

Judge Trager stated that the Subcommittee recommended that Rule 2(b)(2) should read "state the facts" rather than "briefly summarize the facts." He pointed out that one commentator had written that the current language may actually mislead the petitioner and is also redundant.

Several members raised the question whether the proposed language in Rule 2(b)(4) would include petitions typed or printed on a computer. Following a brief discussion the Committee decided to insert the word "printed" in the rule.

Judge Trager also noted Rule (2)(b)(5) should be changed to emphasize that any person, other than the petitioner, who signs the petition must be authorized by caselaw to do so. Following discussion on whether § 2254 applied to § 2255 proceedings, the Committee decided not to specifically cross-reference that statute.

Rule 3. Filing the Motion; Inmate Filing

Judge Trager stated that the Subcommittee had recommended a revision to the Committee Note to require the clerk to file the motion, even where the necessary filing fee or in forma pauperis form is not attached. The Note also includes new language concerning the equitable tolling of the statute of limitations.

Rule 4. Preliminary Review

Judge Trager observed that the Subcommittee recommended that Rule 4 be changed to reflect the view of some commentators that it is common practice in some districts for the government to file a pre-answer motion to dismiss the § 2255 motion. The Committee agreed with that recommendation, changing the word "pleading" to "response." It also made several minor changes to the Committee Note.

Rule 5. The Answer and the Reply

Judge Trager pointed out that the Subcommittee recommended that Rule 5(a) be modified to read that the government is not required to "respond" to the motion unless the court so orders; the term "respond" has been suggested because it leaves open the possibility that the government's first response (as it is in some districts) is in the form of a pre-answer motion to dismiss the motion. The Note has been changed, he stated, to indicate that although the rule itself does not refer to that practice, it is followed in some districts, and to refer the reader to Rule 4.

The Committee had previously discussed the amendment to proposed Rule 5(e) of the § 2254 rules that would provide the petitioner with the right to file a response to the respondent's answer. That change had been approved by a vote of 5 to 3, *supra*. The

Committee agreed that the approach should be followed with Rule 5(d) of the § 2255 rules, also.

Finally, he stated that the Subcommittee recommended a change to the Note to address the use of the term "traverse," a point raised by one of the commentators on the proposed rule.

Rule 6. Discovery

Judge Trager stated that the Subcommittee had recommended changing Rule 6(b) to require that discovery requests be supported by reasons which would assist the court in deciding what, if any, discovery should be allowed. The Committee agreed with the change and amended the Note to reflect the view that the change made explicit what has been implicit in current practice.

Rule 7. Expanding the Record

Judge Trager stated that the Habeas Rules Subcommittee had recommended a minor change to Rule 7(a) to remove the reference to the "merits" of the petition. He pointed out that one commentator had stated that a court may wish to expand the record in order to assist it in deciding some issue other than the merits of the case. The Committee agreed to the change and also changed the rule to reflect that someone other than a party may authenticate materials.

Rule 8. Evidentiary Hearing

The Committee made no changes to Rule 8.

Rule 9. Second or Successive Petitions

Judge Trager pointed out that the Subcommittee had recommended that new language be added to Rule 9 that would require the district court to transfer a second or successive motion to the court of appeals. That practice is currently used in several circuits, as reflected in the Note. Applying its decision, supra, regarding Rule 9 of the § 2254 Rules, the Committee decided not to include the recommended language.

Rule 10. Powers of a Magistrate Judge

Following a brief discussion, the Committee restyled the proposed rule.

Rule 11. Time to Appeal

Following a brief discussion on whether the rule should include any reference to a certificate of appeal, the Committee made no changes to Rule 11.

Rule 12. Applicability of Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure

The Committee made no changes to Rule 12.

3. Forms Accompanying the § 2254 and § 2255 Rules

Judge Trager initiated discussion regarding the official forms for the § 2254 proceedings and § 2255 proceedings, by observing that a number of commentators had addressed the wisdom of including possible grounds for relief in the official forms. Several members pointed out that listing possible grounds for relief might lead to petitioners and movants raising more nonmeritorius arguments; other members responded that the list would provide useful guidance for petitioners and movants in framing the issues for the court's consideration. Following additional discussion, Judge Bartle moved that the list of possible grounds for relief be deleted from the forms accompanying the § 2254 Rules. Judge Miller seconded the motion, which carried by a vote of 6 to 4. Following additional brief discussion, Judge Bartle moved, and Judge Miller seconded, a motion to delete the list of possible grounds of relief from the § 2255 forms. That motion also passed by a vote of 6 to 4.

Judge Trager moved that the Committee approve the §§ 2254 and 2255 Rules and the accompanying forms, and forward them to the Standing Committee for transmittal to the Judicial Conference. Judge Miller seconded the motion, which carried by a unanimous vote.

C. Rule 35. Definition of Sentencing

Professor Schlueter pointed out that at the Committee's Spring 2002, meeting the Committee had approved a change to Rule 35 that would have substituted the term "oral announcement of the sentence" in place of the term "sentencing," throughout the rule. He continued by noting that that task had proved cumbersome and that at the September 2002 meeting, the Committee had agreed to insert a new Rule 35(a) that would include a definition of sentencing for purposes of Rule 35. He also pointed out that he had drafted a proposed Note to accompany that new provision.

Following brief discussion, the Committee agreed to designate the new definitional provision as Rule 35(c) in order to maintain the current numbering within the rule, in particular Rule 35(b), which is readily identifiable to courts and counsel. The Committee ultimately approved the rule and voted to forward the amendment to the Standing Committee with a recommendation to transmit it to the Judicial Conference.

V. PENDING PROPOSED AMENDMENTS TO RULES

A. Rule 11(b)(1)(A). Use of Defendant's Statements; Proposal to Clarify Restyled Language.

Judge Carnes informed the Committee that Judge Brock Hornby had written to the Committee, suggesting that restyled Rule 11 now contains an ambiguity. In his view, as rewritten, Rule 11(b)(1)(A) seems to require that the judge need only advise a defendant of the consequences of making a false statement under oath, if the defendant is entering a guilty plea to a charge involving perjury or false statement. The Committee discussed the issue and concluded that no corrective action was required.

B. Rule 11. Proposal to Require Judge to Address Defendant re Collateral Consequences of Plea.

Judge Friedman, participating by telephone, recommended that the Committee amend Rule 11 to require the court to inform an alien who is pleading guilty that deportation might result. Judge Friedman pointed out the suggestion had originated in a memo prepared by Mr. Roger Pauley, after he had left the Committee. The Reporter pointed out that the Committee had considered and rejected a similar proposal in 1992. Judge Trager responded that since 1992, there had been a change in the law so that currently, a finding of guilt for an aggravated felony results in mandatory deportation. Judge Tashima added that offenses other than an aggravated felony may serve as grounds for deportation, but that requiring the advice could prove to be a slippery slope. Professor King noted that she was aware of cases where defendants had alleged ineffective assistance of counsel because defense counsel had not informed the defendant of the possibility of deportation, resulting from a plea of guilty to an aggravated felony.

Mr. Campbell expressed the view that general advice regarding possible collateral consequences would be sufficient and Judge Roll observed that immigration statutes and regulations was a highly technical area and that it would be dangerous to require judges to give any specific warning about possible deportation.

Mr. Wroblewski pointed out the possible legal implications of amending Rule 11 to require the warning and noted that the ABA is studying the issue of collateral consequences. Judge Miller added that if the proposal were adopted, there might be other areas where a warning about collateral consequences would be required, e.g., tax consequences, civil liability, etc. Judge Trager believed that no amendment was required; judges may give the advice without being required to do so.

Following additional comments, Judge Trager moved, and Mr. Campbell seconded, a motion to table the proposal. That motion failed by a vote of 5-6. Judge Roll then moved that Rule 11 not be amended to include a warning requirement concerning collateral consequences relating to immigration matters. Judge Miller seconded the motion, which carried by a vote of 6-3-1.

C. Rule 12.2. Notice of Insanity Defense; Mental Examination and Sanctions for Failure to Disclose.

The Reporter noted that Mr. Pauley had written to the Committee in July 2001 suggesting that the revised Rule 12.2, currently pending before the Supreme Court, was missing a sanction provision for those cases where the defense fails to disclose the results of a mental examination conducted by the defense expert. The issue had been discussed briefly at the April 2002 meeting and again at the September 2002 meeting. At that meeting Judge Carnes had appointed a subcommittee, consisting of Mr. Campbell and Mr. Jaso, to consider language for the amendment.

Using language submitted by that Subcommittee, the Reporter presented the proposed language and suggested Committee Note.

Several members suggested rewriting the last paragraph of the Committee Note to recognize that the court's sanction should be proportional to counsel's failure to disclose. The matter was referred to the Reporter. Following additional discussion, Mr. Campbell moved that the Committee approve the proposed amendment and submit it to the Standing Committee with a recommendation to publish the rule for public comment. Judge Roll seconded the motion, which carried with a unanimous vote.

D. Rules 29, 33, 34, and 45; Proposed Amendments re Rulings by Court and Setting Times for Filing Motions.

Judge Carnes reviewed briefly the Committee's consideration of amendments to Rules 29, 33, 34, and 45, proposed by Judge Friedman, who participated by telephone. He noted that under the rules a court is required to rule on any motion for an extension of time, within the seven-day period specified for filing the underlying motion. Failure to do so deprives the court of jurisdiction to consider an underlying motion, filed after the seven-day period. Those proposals, said Judge Carnes, had been under consideration for several years and the Reporter had drafted language to make the necessary changes. Judge Friedman urged the Committee to make the amendment and endorsed the language suggested by the Reporter.

Following additional brief discussion, Judge Miller moved that the Committee approve the proposed language and forward the amendments to the Standing Committee with a recommendation to publish them for public comment. Professor King seconded the motion, which carried by a vote of 8 to 2.

E. Rule 29; Proposed Amendment Regarding Appeal From Judgments of Acquittal.

Judge Carnes informed the Committee that the Department of Justice had submitted a lengthy memo regarding a proposed change to Rule 29, that would preserve

the government's right to appeal an adverse ruling on a motion for a judgment of acquittal. Mr. Wroblewski explained that the current rule permits the judge to reserve ruling on a motion for a judgment of acquittal until after the jury has returned a verdict. Rulings made before a verdict cannot be appealed by the government, no matter how erroneous. In his view, the Department's proposal would correct an anomaly in the Rules, that is, the ability of a court to grant an unappealable judgment of acquittal. He offered several examples of cases in which the court had granted a motion after jeopardy has attached, but before the jury returned a verdict, and where the reasons given by the courts to support granting the motion plainly were unsupportable. He noted that the proposal was controversial and believed that it was important to publish a proposed amendment and obtain public comment.

Judge Carnes noted the gravity of the proposed amendment and recognized there are instances where a district court may have abused its discretion, but he questioned whether an amendment to Rule 29 was the only remedy available to correct those possible abuses. Judge Trager noted that he supported the proposal. Professor King observed that there were weighty policy considerations involved in any decision to expand the government's right to appeal.

Judge Miller recommended that the matter be deferred to a later meeting and that it would be helpful to obtain additional data on the scope of the problem. The Committee discussed the possibility of calling upon the Federal Judicial Center to study the issue.

Judge Roll added that it would be helpful to address related matters, for example, lesser-included offenses or multiple-count cases, and also to consider cases where is clear that acquittal is mandated and the court does not want to put the jury through deliberations.

Finally, several members observed that after the jury returns a guilty verdict in a high-profile case, the judge may face additional political pressure not to grant the motion.

F. Rule 32, Sentencing; Proposed Amendment re Allocution Rights of Victims of Non-Violent and Non-Sexual Abuse Felonies.

Judge Carnes pointed out that at its September 2002, meeting the Committee had agreed to amend Rule 32 to provide for allocution for victims of non-violent and non-sexual abuse felonies. The Reporter explained that based upon those discussions he had drafted proposed language for the amendment, including a provision stemming from concerns raised at the September meeting, which would provide that a court's decision regarding allocution would not be reviewable.

Several members expressed concern over the advisability of including a nonreviewability provision in the rules. Others observed that there was already authority for the view that victims did not have standing to appeal a court's decision denying them the ability to address the court. Following additional discussion, Judge Miller moved and

Judge Bartle seconded, a motion to delete the nonreviewability provision. That motion carried by a vote of 9-0-1.

The Reporter also explained that the draft amendment did not make any specific provision for hearing from representatives of victims of non-violent or non-sexual abuse felonies, because the policy reasons for permitting statements through third persons did not seem as compelling in cases which would usually involve "economic" crimes. Judge Roll agreed and stated that he would be opposed to an amendment extending the allocution right to third persons in these types of cases. Judge Bartle observed that in any event, the court could decide to hear from third persons speaking on behalf of a victim.

Judge Miller moved that the Committee approve the amendment and forward it to the Standing Committee with a recommendation that it be published for public comment. Judge Bartle seconded the motion, which carried by a vote of 7-2-1.

G. Rule 32.1. Revoking Or Modifying Probation Or Supervised Release. Proposed Amendments To Rule Concerning Defendant's Right Of Allocution.

The Reporter briefly reminded the Committee that in 2002, Judge Carnes had provided the Committee with a copy of *United States v. Frazier*, 283 F.3d 1242 (11th Cir. 2002), in which the court observed that there is no explicit provision in Rule 32.1 providing the defendant with a right to allocution; he pointed out that the court had recommended that the Advisory Committee might wish to address the matter. At the April 2002 meeting, the Committee had voted to amend Rule 32.1 and in response to that vote, the Reporter had drafted proposed language, which would add a new Paragraph (E) in Subdivision (b)(2). He added that although the Committee had addressed only the question of allocution rights at revocation hearings, a similar provision might be appropriate at proceedings to modify a sentence. The Committee had agreed with that view and asked the Reporter to consider the issue and prepare an additional draft amendment. He noted that he had done so.

Following a brief discussion of the draft, Judge Miller moved that the Committee approve the proposed amendment to Rule 32.1 and forward it to the Standing Committee with a recommendation that it be published for public comment. Judge Roll seconded the motion, which carried by a unanimous vote.

H. Rule 32.1. Revoking Or Modifying Probation Or Supervised Release; Proposed Amendment To Remove Requirement For Production Of Certified Copies Of Judgment..

Judge Carnes noted that Magistrate Judge Sanderson had recommended that Rule 32.1 be amended to remove the requirement that the government provide certified copies of the judgment. Judge Miller observed that Rule 5 did not contain that requirement and that the language in Rule 32.1 was probably a carry-over from the attempt to move parts

of former Rule 40 to Rules 5 and 32.1. He noted that some deficiencies in Rule 40 continue to surface and recommended deferring this proposal to see if other problems with the restyled rules surface. He offered to poll other magistrate judges to see if this is a problem, and if there are other problems that should be addressed.

I. Rule 59; Proposed New Rule Concerning Rulings by Magistrate

Judge Miller provided a brief history of the proposed new rule that would address the issue of review of magistrate judge decisions: Judge Tashima had originally proposed that the Committee consider adding a new rule to the Rules of Criminal Procedure that would parallel Rule of Civil Procedure 72(a). The issue had been raised by *United States v. Abonce-Barerra*, 257 F.3d 959, 969 (9th Cir. 2001). At its April 2002 meeting, the Committee had voted consider the issue further and at its September 2002 meeting Judge Roll had presented language for the Committee's consideration in the form of an amendment to Rule 12. Following discussion at that meeting the subcommittee had amended the proposal to include reference to magistrate judges taking guilty pleas. After that September meeting, Judge Miller had solicited the views of the Magistrate Judges Committee on the proposed amendment.

After further consideration, the Subcommittee now recommended that any proposed rule not include reference to guilty pleas. First, Judge Miller noted, the Magistrate Judges' Committee was opposed to any reference in the rule to taking guilty pleas. And second, the Ninth Circuit had granted *en banc* review in *United States v. Reyna-Tapia*, 294 F.3d 1192 (9th Cir.), *vacated by* 315 F.3d 1107 (9th Cir. 2002), the case that had provided the impetus for including reference to guilty pleas in the proposed rule.

Judge Miller also explained that the Subcommittee had redrafted the rule as a new Rule 59.

In considering the proposed language, several members noted that there was no provision for appealing a magistrate judge's oral orders. Additional language addressing that point was discussed and added to the draft.

Following a brief discussion concerning the differences between "nondispositive" and "dispositive" matters, Judge Trager moved that the Committee approve the new Rule 59 and forward it to the Standing Committee with a recommendation that it be published for public comment. Judge Roll seconded the motion, which carried by a vote of 8 to 1.

VI. OTHER RULES AND PROJECTS PENDING BEFORE ADVISORY COMMITTEES, STANDING COMMITTEE AND JUDICIAL CONFERENCE

A. Status Report on Legislation Affecting the Federal Rules of Criminal Procedure

1. Rule 6. Grand Jury

Mr. Rabiej reported that as the restyled Criminal Rules were going into effect in December 2002, Congress had further amended Rule 6 to permit the government to share grand jury information with foreign governments in terrorism cases. But the amendment was based on the former version of the rule, and therefore the legislation could not be executed.. Mr. Rabiej noted that he, the Reporter, Judge Carnes, and the Department of Justice had prepared conforming language to remedy the conflict in the language, but to date Congress had not acted on it. Thus, there is a potential conflict between the rule that went into effect on December 1, 2002, and the subsequent legislative amendment. The Department of Justice considers the legislation a nullity and will not rely on it. Finally, he noted that for now no action was required by the Committee.

2. Congressional Consideration of an Amendment to Rule 46.

Mr. Rabiej briefly reported that Congress had considered an amendment to Rule 46, urged by bail bondsmen that would prevent judges from revoking surety bonds for violation of any condition other than for failure to appear in court. Mr. Rabiej added that the bail bondsmen were concerned that if left intact, Rule 46 might serve as the basis for similar treatment in state practice. Judge Carnes indicated that he had testified on the matter and presented additional statistical data supporting the current version of the rule. He also complimented the staff of the Administrative Office for all of their excellent work on the matter.

VII. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Committee tentatively agreed to hold its next meeting in October 2003, in Oregon, depending on availability of accommodations.

Respectfully submitted

David A. Schlueter
Professor of Law
Reporter, Criminal Rules Committee

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

SAMUEL A. ALITO, JR.
APPELLATE RULES

A. THOMAS SMALL
BANKRUPTCY RULES

DAVID F. LEVI
CIVIL RULES

EDWARD E. CARNES
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

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

From: **David F. Levi, Chair, Advisory Committee on the Federal Rules of Civil Procedure**

Date: **May 21, 2003**

Re: **Report of the Civil Rules Advisory Committee**

Introduction

The Civil Rules Advisory Committee met on May 1 and 2 at the Administrative Office of the United States Courts in Washington, D.C. Its Style Subcommittee B met there on April 30, while Style Subcommittee A met on May 2 following the conclusion of the Advisory Committee meeting. Subcommittees A and B also met in Scottsdale, Arizona, on January 25 and 26. Draft Minutes of the Advisory Committee meeting are attached.

Part I of this report describes recommendations to publish for comment in two parts. Part IA recommends four proposals for immediate publication along with the amendments to Admiralty Rules B and C approved for publication at the January meeting. Part IB recommends Style Rules 1-15 for publication at a later time.

Part II of this report is an informational summary of matters described more fully in the draft Minutes.

I ACTION ITEMS: NEW RULE 5.1 AND AMENDED RULES 6(e), 27(a), AND 45(a) FOR PUBLICATION; STYLE RULES 1-15 FOR DEFERRED PUBLICATION

Part IA recommends immediate publication for comment of a new Rule 5.1 and amended Rules 6(e), 27(a), and 45(a). Part IB recommends approval for later publication of Style Rules 1-15.

A. Rules For Immediate Publication

The Advisory Committee recommends publication for comment of new Civil Rule 5.1 and amendments to Rules 6(e), 27(a), and 45(a).

Rule 5.1

The project that led to development of proposed Rule 5.1 arose from a suggestion stimulated by the publication of Appellate Rule 44(b) for comment. Rule 44(b) expanded Rule 44 to address the procedure for notifying a court of appeals that a party questions the constitutionality of a state statute. Judge Barbara B. Crabb responded to publication of the proposed amendment by suggesting

that the Civil Rules should emulate Appellate Rule 44, implying that the provisions in present Civil Rule 24(c) are inadequate. The Department of Justice has taken up the proposal.

Appellate Rule 44 and present Civil Rule 24(c) implement the provisions of 28 U.S.C.A. § 2403:

> (a) In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, @and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. * * *
>
> (b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible, and for argument on the question of constitutionality. * * *

Appellate Rule 44, including a new subdivision (b) that took effect on December 1, 2002, provides:

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

Civil Rule 24(c), describing the procedure for intervention, includes these three sentences, the final two of which were added in 1991:

> **(c) Procedure.** * * * When the constitutionality of an Act of Congress affecting the public interest is drawn in question in any action in which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C., § 2403. When the constitutionality of any statute of a State affecting the public interest is drawn in question in any action in which that State or any agency, officer, or employee thereof is not a party, the court shall notify the attorney general of the State as provided in Title 28, U.S.C. § 2403. A party challenging the constitutionality of legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted.

It seems likely that these provisions were attached to Rule 24 because the purpose of notice is to support the right to intervene. This location, however, is not calculated to catch the attention of any but the most devoted students of procedure. Rule 24 is likely to be consulted by a party who knows of a lawsuit and wants to join it, but may not be consulted by a party who has joined an action

and may not remember the duty to call the court's attention to a constitutional question and § 2403. Relocation as a new Rule 5.1, sandwiched between rules that deal with service and notice, may make the rule more effective.

Apart from the question of location, the Department of Justice reports that too often it fails to receive notice that the constitutionality of an Act of Congress has been drawn in question in a district-court action. It believes that it is particularly important to have notice while the action is in the district court, because that is where the record is made, and to have notice as soon as the constitutional question is drawn. For this reason, it believes that just as Appellate Rule 44 was drafted in terms quite different from Civil Rule 24(c), a new Civil Rule 5.1 should do more than Appellate Rule 44 to assure notice to the Attorney General.

The relationship between proposed Rule 5.1 and Appellate Rule 44 is important. Cognate provisions and the Civil and Appellate Rules should differ only when the differences are justified by the need to respond to the distinctive needs of trial-court procedure and appellate procedure. The relationship between the rules and the statute they implement, § 2403, also is important. The description of proposed Rule 5.1 thus begins by describing the ways in which it departs from § 2403 and then carries on to describe the ways in which it departs from Appellate Rule 44.

Both the Rule 5.1 draft and Appellate Rule 44 depart from § 2403 in at least three ways.

First, each imposes an obligation a party, while § 2403 imposes an obligation only on the court.

Second, § 2403 applies only to a statute "affecting the public interest." Both draft Rule 5.1 and Appellate Rule 44 delete this restriction, requiring notice when a challenge addresses any Act of Congress or state statute. Rule 5.1(b) also requires certification, going beyond Appellate Rule 44. This expansion of the statutory certification requirement flows from the belief that the Attorney General should be the first to determine whether an act affects the public interest and to argue for intervention on that view. The court retains control at the stage of determining whether § 2403 establishes a right to intervene.

Third, § 2403 does not require notice to the Attorney General if a United States officer or employee is a party. Both Appellate Rule 44 and draft Rule 5.1 require notice when an officer or employee is a party, but is not sued in an official capacity. With respect to an Act of Congress, the United States Attorney General often will have notice under Civil Rule 4(i) of an action against a United States officer or employee in an individual capacity, but not always.

Draft Rule 5.1 departs from Appellate Rule 44 in six ways, one of them drawing from the provisions of Civil Rule 24(c).

First, Appellate Rule 44 addresses a party who "questions" the constitutionality of an Act of Congress or a state statute. Draft Rule 5.1, drawing directly from § 2403, applies to a party who "draws in question" the constitutionality of an Act of Congress or state statute. This direct incorporation of statutory language avoids any dispute whether an argument that a challenged interpretation should be rejected to avoid a constitutional question "questions" the constitutionality of the statute.

Second, draft Rule 5.1 provides greater detail than Rule 44 in addressing the notice that a party must file. The notice must state the question and identify the pleading, written motion, or other paper that raises the question.

Third, draft Rule 5.1 goes beyond the Rule 44 requirement that the notice be filed with the court. It also requires that the notice be served promptly on the Attorney General. Service would be accomplished in the manner provided by Civil Rule 4(i)(1)(B), which calls for certified or registered mail. The draft does not substitute this requirement for the court's § 2403 duty to certify the fact of the challenge to the Attorney General, but adds to it. The Attorney General thus may get notice twice, once from the party who raises the question and once from the court. This dual-notice requirement was drafted because the Department of Justice wishes to make quite sure that notice comes to its attention in timely fashion. The dual notice is less burdensome than might appear on first blush. The party must file a notice with the court; it is little additional burden to serve the notice by mail on the Attorney General. Similarly, the court must set a time for intervention by the Attorney General; it is little additional effort to include a certification. The major benefit of the dual notice may be that the party notice will be served early in the litigation, often well before any activity by the court concerning the action.

Fourth, adhering to the statute, draft Rule 5.1 provides that the court certifies the question to the Attorney General. Appellate Rule 44 transfers the certification duty to the clerk. (It may be that on appeal it is easier to substitute the clerk for the court because Rule 44, in common with draft Rule 5.1, dispenses with the need under to determine whether the challenged statute affects the public interest. The substitution may be complicated, however, by the need under Rule 44 to determine whether a United States officer or employee who is a party has been made a party in an official capacity.)

Fifth, draft Rule 5.1 includes a specific provision for setting a time to intervene. Appellate Rule 44 has no similar provision. This difference reflects the great variability of time to disposition in a trial-court as compared to the more predictable schedule on appeal.

Finally, draft Rule 5.1, adapting a provision in Civil Rule 24(c), provides that a party's failure to file the required notice, or a court's failure to make a required certification, "does not forfeit a constitutional right otherwise timely asserted." Appellate Rule 44 has no similar provision.

Rule 6(e)

Moved by comments on the Appellate Rules amendments that conformed appellate time-counting conventions to the Civil Rules conventions, the Appellate Rules Committee referred to the Civil Rules Committee a nice question arising from the relationship between Civil Rules 6(a) and 6(e). Rule 6(e), set out below, adds 3 days to some prescribed time periods. Unfortunately, it does not do so in a way that is as clear as time-counting rules should be. The proposed amendment aims to increase clarity in a way that will support, not disrupt, the general present understanding.

As recently amended, Rule 6(e) says:

> 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 under Rule 5(b)(2)(B), (C), or (D), 3 days shall be added to the prescribed period.

(Rule 5(b)(2)(B) governs service by mail. (C) governs service by leaving a copy with the court clerk. (D) governs service by "any other means, including electronic means, consented to in writing.")

Rule 6(a) says that intervening Saturdays, Sundays, and legal holidays are excluded when computing a prescribed or allowed "period of time" that is "less than 11 days."

Four possible methods of integrating Rules 6(a) and 6(e) have been recognized. Two can be rejected without regret. One would "add" the 3 days "to the prescribed period" directly — a 10-day period becomes a 13-day period, Rule 6(a) is ousted because the period is no longer less than 11 days, and the time to respond is shorter than it would be if Rule 6(e) did not exist. That is not the intent. The other would treat the three Rule 6(e) days as an independent time period, so that intervening Saturdays, Sundays, and legal holidays are excluded, often lengthening the time to respond by many more than three days.

The two plausible alternatives are to "add" the three Rule 6(e) days before beginning to count the ten days or after completing the ten-day count. Perhaps surprisingly, the choice makes a difference. It is easier to illustrate the difference than to articulate the explanation.

One illustration: The paper is mailed on Wednesday. If we count Thursday, Friday, and Saturday as the three days added by Rule 6(e), Monday is day 1 of the 10-day period; the tenth day is Friday, sixteen days after mailing. If we count Thursday and Friday as days 1 and 2 of the 10-day period, day 10 is a Wednesday; the third day added under Rule 6(e) is Saturday, and the response is due on Monday, 19 days after mailing.

The reason for this difference is that adding three days at the beginning of the period means that if service is made on a Wednesday, Thursday, or Friday, the first Saturday and often Sunday are double-counted. Saturday is omitted both because it is one of three added days and also because it is Saturday. (An intervening legal holiday may trigger the same phenomenon.) If the three days are added at the end, there is no opportunity for double counting. The extension may be greater.

So there is a difference. How should it be resolved? In the abstract, there is much to be said for adding the three days before beginning to count the ten-day period. Using mail service as an illustration, the three additional days are provided to allow for the time that may be required to deliver the mail. That happens at the beginning. Apart from the abstract, this approach would move things along a bit quicker than if the three days are added at the end.

Adding three days at the end has proved more attractive despite these arguments. Perhaps it is desirable to allow more time. However that may be, informal surveys of practicing lawyers show two things. One is substantial uncertainty and a strong desire to achieve greater clarity. The second is an overwhelmingly common practice. Lawyers add the three days at the end, perhaps because it may allow more time, perhaps because that is the natural reading of the present language.

If clarity is the overriding goal, smooth implementation also is important. Conforming to general present practice will mean that the clarified rule does not trap many lawyers during the learning period that follows any rule change. Indeed no lawyer should be trapped, since the time never will be shorter than if the three days were added at the beginning.

The proposal recommended for publication adds three days after the prescribed period. It is based on the Style version of Rule 6(e) that is presented below for approval for publication at a later time. If publication of Rule 6(e) is approved now, it may become appropriate in the cycle of the Style Project to substitute amended Rule 6(e) for the present Style version.

One final note. Every discussion of this proposal has prompted the anguished protest made during every other discussion of time-counting rules. It is said that the rules are too complicated, and by more than half. Instead of excluding intervening days, we should set realistic time periods and adhere to them without further complication. The only rules needed would address the problems that would arise if a time period terminates on a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible. (These problems arise also when an order sets a time measured by an

interval before another event — a brief must be filed ten days before trial. If ten days before trial is a Sunday, must the brief be filed on Friday, or will Monday do?)

The Advisory Committee suggested that when competing demands allow, it may be desirable to establish an ad hoc committee cutting across all the advisory committees to consider a general approach to counting short time periods.

Rule 27(a)(2)

Rule 27(a) sets the procedure for a petition to perpetuate testimony before an action is filed. Paragraph (a)(2) provides for notice to expected adverse parties and directs that the notice be served "in the manner provided in Rule 4(d)." This cross-reference to Rule 4(d) has been outdated since the 1993 Rule 4 amendments. Rule 4(d) now governs waiver of service. The cross-reference must be fixed.

Fixing the cross-reference is not entirely easy. The service provisions of former Rule 4(d) have been dispersed among present Rules 4(e), (g), (h), (i), and (j)(2). Even as to these provisions, new methods of service have been added to those provided by former Rule 4(d). Former Rule 4(d), moreover, did not provide for service on an individual in a foreign country — that matter was covered by former Rule 4(i), now found in Rule 4(f). And present Rule 4(j)(1) provides for service on a foreign state or political subdivision. Recreation of the precise circumstances of former Rule 4(d) would be difficult.

It is not only that recreation of former Rule 4(d) would be difficult. More importantly, recreation would be pointless. The purpose of Rule 27(a)(2) is to provide a reliable means of notice to expected adverse parties so that the pre-action discovery will function as well as can be. Duplication later would be wasteful, and — given the very purpose of allowing discovery before an action is filed — often would be impossible. The sensible approach is to invoke Rule 4 methods of service as to all categories of expected adverse parties. Although service may seem a cumbersome means of notice to parties in foreign countries, notice by other means may be offensive to foreign law.

The substantive change in Rule 27(a)(2), then, is to correct the superseded cross-reference to former Rule 4(d) by cross-referring to all means of Rule 4 service. The proposal is presented in the Style version of Rule 27(a)(2) that is under consideration by the Style Subcommittee. If publication of Rule 27(a)(2) is approved now, it may become appropriate in the cycle of the Style Project to substitute amended Rule 27(a)(2) for the present Style version.

Rule 45(a)(2)

Rules 30 and 45 interplay in a way that may not notify a deponent of the means of recording a deposition. Rule 30(b)(2) directs that a notice of deposition state the manner for recording the testimony, but the notice need not be served on the deponent. The deponent will get notice of the first-designated recording medium only if the deponent is a party or is informed by a party. Rule 30(b)(3) provides that any party may designate another method to record "[w]ith prior notice to the deponent and other parties." If two or more methods of recording are used, the deponent does have notice of the recording media. The proposed amendment completes the circle by directing that the subpoena served on the deponent state the method for recording the testimony.

Notice of the method for recording may be important to the deponent simply for psychological reasons — video recording may work better if the deponent anticipates it in advance

in matters as simple as dressing for the occasion. Notice also may be important for other reasons. A deponent may have valid reasons to object to the means of recording, or — perhaps more commonly — to seek a protective order to guard against misuse of the recording. Raising these issues after the deponent has appeared for the deposition can be disruptive and inefficient. Advance notice will ensure an orderly opportunity to raise these issues and, if need be, to seek a protective order.

As with Rules 6(e) and 27(a)(2), the proposal is presented in the Style version of Rule 45(a)(2) that is under consideration by the Style Subcommittee. If publication of Rule 45(a)(2) is approved now, it may become appropriate in the cycle of the Style Project to substitute amended Rule 45(a)(2) for the present Style version.

B. Style Rules 1-15 For Deferred Publication

The Advisory Committee has completed the pre-publication phase of the Style Project for Rules 1 through 15. The drafts prepared by the Style Subcommittee were reviewed in January by Subcommittee A (Rules 1 to 7.1) and Subcommittee B (Rules 8 to 15). The Style Subcommittee prepared revised drafts that were reviewed by the Advisory Committee in May. The Style Subcommittee then prepared the draft set out below.

Style Rules 1-15 are presented for review now to amortize the burden of approving them for publication. It also will be useful to discuss the schedule for publication. The Advisory Committee has no firm recommendation as to the schedule. If all goes well, it would be possible to publish Style Rules 1-37 and 45 in August 2004. Although fewer than half of the rules by number, these rules use more than half of the rules words and pages. They also include the most sensitive topics that regularly appear on the agenda, including pleading, pretrial practice, party joinder, and discovery. It may be desirable to publish them together as the first package, saving the remainder of the rules for a second package. The alternative of publishing smaller packages more frequently has some attraction. The individuals and committees that will be a vitally important part of this process would have more sharply defined targets and could focus greater energy on each rule. But multiple publications might also diffuse attention — it is a familiar phenomenon that the first topics proposed for discussion draw great attention, while later topics draw gradually less attention.

Without purporting to resolve the time for publication, then, Style Rules 1-15 are presented with a recommendation that they be approved for publication at a time to be finally set at a later meeting.

The scope of the Civil Rules Style Project was more sharply defined at the time of the Subcommittee A and Subcommittee B meetings. It was determined that no substantive changes should be made in the Style package. Minor departures from this principle will be allowed only when necessary, defining necessity in very narrow terms. It may happen that the literal meaning of a present rule makes no sense, or does not conform to established interpretations. Two examples illustrate the nature of these exceptions. Present Rule 4(c)(2) says that the court may direct that service be made by a marshal, a deputy marshal, "or other person or officer specially appointed by the court for that purpose. Such an appointment must be made when the plaintiff" is proceeding in forma pauperis or is a seaman. It is not the "appointment" that must be made for a forma pauperis or seaman plaintiff, but the "direction" for service by any of these people. Style Rule 4(c)(3) makes the correction. Present Rule 5(b)(2)(D) seems to say that a court may by local rule authorize use of the court's transmission facilities for service by non-electronic means agreed to by the parties. It was intended to refer only to service by electronic means. Style Rule 5(b)(3) makes the correction. Apart from such narrow matters, substantive changes are avoided even when that requires deliberate continuation of an identified ambiguity.

The decision not to make substantive changes in the Style Project is important to help focus public comment and to ease the way for acceptance of the project. Style change will engender resistance enough. Even if the project is presented as an attempt to achieve clearer statement of present meaning — or continuation of present ambiguity — there will be great fear and suspicion that hidden substantive changes will result. The Project should not be asked to bear the added confusion and divisiveness that would flow from substantive changes. It is neither cynical nor a mark of frustration to observe that many a proposed change cannot be made because it would improve the present rule.

Although the Style Project is itself a full-time job for the Advisory Committee, substantive rules changes cannot all be suspended for the uncertain — but certainly lengthy — duration of the Style Project. Urgent needs to act may arise. Even apart from urgent need, an accumulation of small and large proposals could overwhelm all actors in the Enabling Act process after the Style Project is finished. Some smaller projects can be launched and even concluded while the Style Project is pursued. All of the four proposals for publication presented in part IA are of this nature. Some larger projects also may be undertaken. One current example is the Department of Justice proposal to adopt a new Admiralty Rule G to govern civil forfeiture procedure. Another is the continuing project to study discovery of computer-based information. Substantive matters such as these will be pursued, as capacity permits, in the ordinary manner.

The Style Project itself inevitably stimulates other proposals for substantive change. The intense scrutiny of each rule, word-by-word, undertaken by more than a score of people, reaps a remarkable harvest of shortcomings. Many topics are proposed for an amorphous "reform agenda." Some of these topics are likely to drop by the way for simple lack of capacity, just as other worthy reform proposals have been put aside over the years. Others are likely to be postponed for an intermediate or rather remote future. Still others will be placed promptly on the substantive agenda. An Advisory Committee consultant has, for example, found many problems in Rule 12. A thoroughly revised draft Rule 12 may be ready for Advisory Committee consideration this year.

Special Style Project questions arise as substantive rules amendments progress to publication for comment. The Part IA proposals to publish new Rule 5.1 and amended Rules 6(e), 27(a)(2) and 45(a)(2) all adopt Style Project conventions. If approved for publication in this form, a means must be found to integrate the ongoing amendments into the Style Project publications. The best means may depend on the circumstances. If Style Rule 6(d) [present Rule 6(e) is redesignated as 6(d)] is published for comment in August 2004, for example, it may be possible to substitute the amended version in the Style Rule box. In other circumstances it may be better to rely on a footnote that calls attention to a pending substantive proposal, leaving the present rule and the no-substantive-change Style proposal as they appear.

Framing discussion of Style Rules 1 through 15 is not easy. The most important issues are described in the brief Committee Notes that have been prepared for some of the rules. Other issues do not deserve separate explanation in a Committee Note, but may deserve scrutiny by the Standing Committee. Some of these issues may test the line between style and substantive change. Others may present general style questions that will benefit from Standing Committee consideration. One example may illustrate both categories. It is possible to maintain that a simple statement that a court "may" do an act suffices to capture all appropriate shades of discretion and to imply the authority to impose conditions. This is a general question that arches across many variations in many rules. Rule 8(c) in the current Style package illustrates the point. Present Rule 8(c) states that when a counterclaim or affirmative defense is mistakenly designated, "the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation." Style Rule 8(c)(2) worked its way around to saying: "the court may treat the pleading as if the party had used the correct designation." "May" is used to substitute for "shall," and to include both "on terms" and "if justice

so requires." Following Advisory Committee discussion, this was changed to: "the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so." Continued discussion may well conclude that such elaborate variations must be carried forward for fear that substantive changes will flow from a simple "may." Few such issues should be brought to the Standing Committee, but some may deserve a place on the agenda.

II INFORMATION ITEMS

A. Local Rules Project

The Local Rules Project Report that was presented to the Standing Committee in January was discussed in general terms that did not focus on any of the problems that might be posed by specific local rules. Attention focused primarily on two general issues. Inconsistency with a national rule may present subtle and difficult questions, as with an argument that a local rule is inconsistent with the "spirit" of a national rule. Even clear inconsistency may deserve toleration — a local rule may improve on the national rule and stimulate the lengthy amendment process, or a local rule may provide valuable experience to test whether a change would be an improvement. Duplication is a second general issue. A local rule may be clearly bad if it copies most but not all of a national rule, or if it inaccurately mimics a national rule. But brief duplications may be desirable reminders of the national rule that operates in the vicinity of the local rule and guides its meaning. Model local rules also were noted briefly, with a suggestion that they should be created sparingly and only for subjects that are not likely to be addressed by a national rule in the foreseeable future.

B. Ongoing Rules Projects

A number of ongoing rules projects are in various stages of consideration. They are described here in a sequence that approximates Civil Rules numbers, recognizing that it is difficult to guess where to lodge any rule on filing sealed settlement agreements.

Rule 12(f): Striking in the electronic filing era. The Committee on Court Administration and Case Management has asked that the Advisory Committee consider the means of implementing a Civil Rule 12(f) order that material be stricken from a pleading. The question was prompted by concern whether the action taken with respect to paper records is easily duplicated with respect to electronic records. Often enough a striking order means only that the parties should pursue the litigation without further reference to the stricken matters. If the material is "scandalous," however, the court may wish both to preserve the record for possible appellate review and at the same time deny access to it. This topic will be considered as part of a broader consideration of Rule 12.

Rule 15: Relation back and general issues. Prompted by a Third Circuit opinion, consideration of Rule 15 began with a very specific question framed by the relation-back provisions of Rule 15(c)(3). As many courts of appeals read Rule 15(c)(3), relation back is more readily available if the plaintiff has made a mistake in identifying an intended defendant than if the plaintiff begins the action knowing that an intended defendant cannot be identified. This result seems curious. But experience with "Doe Defendant" pleading practices suggests that the "unknown-named" defendant problem should be approached with caution. Caution is further warranted by the uneasy case for using the Rules Enabling Act to defeat a limitations bar that state law would erect against a state-created claim. Consideration of this specific issue, moreover, has identified other causes for dissatisfaction with current Rule 15(c)(3). The Style Project, finally, has generated several other Rule 15 questions that supplement still different Rule 15 questions that have lingered for some years on the Advisory Committee agenda. There does not seem to be an urgent need for prompt action. Further work on these questions will be paced to fit with competing agenda demands.

Rule 23: Class Actions. The Rule 23 amendments recommended to the Judicial Conference by the Standing Committee in June 2002 have been transmitted without change to Congress by the Supreme Court. That package of amendments did not address settlement classes, a topic that the Advisory Committee and the Rule 23 Subcommittee have studied for many years. Deliberation on these questions was suspended to assess the effects of the *Amchem* and *Ortiz* decisions. To assist further deliberation, the Federal Judicial Center has undertaken a study designed to test the effects these decisions have had on settling class actions, and also to explore the common assertion that one effect has been to encourage some class-action lawyers to move from federal courts to state courts. The study will soon be completed, providing a foundation for further work by the Rule 23 Subcommittee.

Discovery of computer-based information. The Discovery Subcommittee has been studying discovery of computer-based information for some years. Mini-conferences have been held to gather information from judges and practicing lawyers, and representatives have been sent to bar groups for further discussion. The Federal Judicial Center is studying these questions, gathering information about state practices and local district rules, and tracking continuing legal education programs (the prominence of these problems is indicated by the pace of about 100 CLE programs a year). The Special Reporter for the Discovery Subcommittee, Professor Marcus, sent an inquiring letter to a long list of recipients; although the responses have been modest in number, they reflect careful thought, often by large groups of people.

The results of this work increasingly suggest that rules amendments should be considered. To be sure, present discovery rules may provide all the tools and all the flexibility needed to adapt to the myriad opportunities and risks that arise from computer-based information storage. The problems that were identified in earlier years, however, do not appear to have been resolved by these means. If anything, more voices are asking for change.

As with everything else touched by computers, the pace of change in technological capabilities and technological conundrums has suggested caution. It is clear that information technology will develop rapidly and unpredictably during the period required to deliberate and adopt any rules amendments. It is not clear that any amendments that finally emerge will be usefully addressed to the situation existing at the moment of adoption, much less for a reasonable future period. Specific rules would be so risky that they may not be attempted. More general rules, however, may usefully frame general approaches that can be adapted better than present rules to the continual evolution of computer data storage.

The Discovery Subcommittee has identified seven topics that will provide the initial focus of drafting efforts over the summer. These seven include: (1) Amending Rules 26(f) and 16(b), and perhaps Form 35, to focus attention on the need to discuss computer-based discovery at the Rule 26(f) conference and the scheduling conference. (2) Expanding Rule 26(a)(1) initial disclosures to provide information about each party's information systems. (3) Revising the Rule 34 definition of a "document." (4) Addressing the form of production — whether in print-out or electronic form, and perhaps what sort of electronic form. (5) Considering the extent to which "heroic efforts" should be required to retrieve data that are not retrievable "in the ordinary course of business." (6) Reviving a long-simmering and more general project to consider protection against inadvertent privilege waiver — the risks of inadvertent waiver may be multiplied by some forms of computer-based discovery. (7) Adopting a "safe harbor" for preserving computer-based information.

This list of initial topics is not a commitment to recommend amendments that address all of them. It does not exclude other possible topics. It does not promise recommendations for publication on any firm time table. But the next steps are being taken.

Rule 50(b). The Committee on Federal Procedure of the Commercial and Federal Litigation Section of the New York State Bar Association has urged that Rule 50(b) be amended to modify the requirement that a post-verdict motion for judgment as a matter of law be supported by a motion made at the close of all the evidence. The argument is that 65 years of fictionalizing the Seventh Amendment rationalization that first permitted judgment notwithstanding the verdict is enough. What we need now is a rule that preserves the functional values served by the present requirement without imposing an easily overlooked procedure that sacrifices the right to a warranted judgment as a matter of law. The draft submitted for consideration would allow a post-verdict motion to be supported by any motion made at trial under Rule 50(a), on the theory that what counts is notice of the evidentiary insufficiency during trial so that there is an opportunity to correct the deficiency. Preliminary discussion, reflecting the frequent appellate explorations of this topic, suggested that even lawyers who are keenly aware of the close-of-the-evidence requirement may inadvertently fail at trial's end to make a motion that simply repeats a motion earlier made. This topic will continue on the active agenda.

Rule "62.1." The Appellate Rules Committee has referred to the Civil Rules Committee a suggestion by the Solicitor General that a rule should be adopted to address relief from a judgment that is pending on appeal. Most of the courts of appeals have converged on a common rule with respect to Rule 60(b) motions to vacate. A district court has jurisdiction to deny a motion to vacate a judgment that is pending on appeal. The district court does not have jurisdiction to grant the motion, but can indicate that it would grant the motion if the court of appeals were to remand. The Solicitor General urges three reasons for embodying this "indicative ruling" practice in a court rule. Some variations remain among the courts of appeals, and it is desirable to have a uniform national practice. Frequent appellate litigators are aware of the problem and the general answer, but many other lawyers and even some district courts find the matter unfamiliar and occasionally confusing. And the decade-old rule that a court of appeals is not required to vacate a district-court judgment when an appeal is mooted by settlement means that the opportunity to settle on appeal will be enhanced if it can be supported by advice from the district court that it is prepared to vacate the judgment if the parties settle. If a rule is to be adopted, it will be appropriate to consider situations outside Rule 60(b) relief from a traditionally final judgment. Modification of an order pending on collateral-order appeal is one example — a court that has denied a motion for summary judgment on official-immunity grounds, for example, may be prepared to grant a renewed motion. So too, authority to vacate a preliminary injunction pending appeal is not clearly resolved by Rule 62(c). This topic is likely to continue on the active agenda.

Sealing Filed Settlement Agreements. The media have attracted public attention to the question whether public welfare may be threatened by orders sealing settlement agreements filed with the court. The subjects of recent concern have been product-defect and sexual abuse cases. This general attention has been focused for lawyers by the adoption of a local rule in the District of South Carolina that purports to prohibit sealing of a settlement agreement filed with the court (the seeming prohibition apparently can be avoided by invoking another local rule that allows departure from any local rule for good cause). Three questions have framed the initial approach to this question: Why are settlement agreements filed with the court? How often are settlement agreements filed with the court under seal? Do other case file materials typically provide access to any information that might be important to the public welfare? These empirical questions are being addressed by a Federal Judicial Center study undertaken at the Advisory Committee's request. The Federal Judicial Center also has compiled a complete list of state statutes and local district rules that bear on the general question. Preliminary results suggest that settlement agreements are rarely filed under seal, and that ordinarily other file materials are not sealed and reveal any information that may be important to protect public health and safety. The topic is important, however, and work will continue under the direction of a subcommittee charged with this topic as one of its two major responsibilities.

Civil Forfeiture Procedure: Proposed Admiralty Rule G. Many forfeiture statutes direct that the procedure for civil forfeiture be the procedure for in rem admiralty proceedings. Recent Admiralty Rules amendments have undertaken to establish some distinctions to account for the needs that distinguish good forfeiture procedure from good admiralty procedure. The Department of Justice believes that the time has come to strip forfeiture procedure from the present Admiralty Rules and to consolidate it in a new comprehensive Admiralty Rule G. This treatment will reduce the risk of cross-pollution through which the needs of forfeiture procedure dilute good admiralty procedure, and vice versa. The Maritime Law Association shares the belief that separation is a good idea, so long as the "real" admiralty procedures are not affected. The new rule, further, can address many forfeiture topics that are not now addressed anywhere in the Admiralty Rules, including such matters as individual notice to potential claimants. Some of these new topics have emerged from statutory amendments, most notably the Civil Asset Forfeiture Reform Act of 2000. Others have emerged from decisional law, such as the rule that the Excessive Fines Clause imposes proportionality limits on civil forfeiture.

It should not be surprising that some of these forfeiture procedures generate significant controversy. The National Association of Criminal Defense Lawyers has responded to requests for comments on early drafts with lengthy, detailed, and forceful criticisms. Perhaps the most controversial issues surround standing to make a claim. The Civil Asset Forfeiture Reform Act revised former procedure, so that now anyone who has standing to claim can force the United States to prove forfeitability by a preponderance of the evidence. That makes standing to claim more important than under the earlier practice, which required that the United States only establish probable cause, shifting the burden to the claimant to show nonforfeitability.

Initial Rule G drafts have been revised substantially. The subcommittee that is considering sealed settlement agreements also is working on Rule G. This topic is on the front of the active agenda, and may soon justify a recommendation to publish.

PROPOSED AMENDMENTS TO THE

FEDERAL RULES OF CIVIL PROCEDURE *

Rule 5.1. Constitutional Challenge to Statute — Notice and Certification

(a) *Notice.* A party that files a pleading, written motion, or other paper that draws in question the constitutionality of an Act of Congress or a state statute must promptly:

(1) if the question addresses an Act of Congress and no party [to the action] is the United States, a United States agency, or an officer or employee of the United States sued in an official capacity:

(A) file a Notice of Constitutional Question, stating the question and identifying the pleading, written motion, or other paper that raises the question, and

(B) serve the Notice and the pleading, written motion, or other paper that raises the question on the Attorney General of the United States in the manner

---

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

provided by Rule 4(i)(1)(B);

(2) if the question addresses a state statute and no party [to the action] is the state or a state officer, agency, or employee sued in an official capacity:

(A) file a Notice of Constitutional Question, stating the question and identifying the pleading, written motion, or other paper that raises the question, and

(B) serve the Notice and the pleading, written motion, or other paper that raises the question on the State Attorney General.

(b) ***Certification.*** When the constitutionality of an Act of Congress or a state statute is drawn in question the court must certify that fact to the Attorney General of the United States or to the State Attorney General under 28 U.S.C. § 2403.

(c) ***Intervention.*** The court must set a time not less than 60 days from the Rule 5.1(b) certification for intervention by the Attorney General or State Attorney General.

(d) ***No forfeiture.*** A party's failure to file and serve a Rule 5.1(a) notice, or a court's failure to make a Rule 5.1(b)

certification, does not forfeit a constitutional right otherwise timely asserted.

Committee Note

Rule 5.1 implements 28 U.S.C. § 2403, replacing the final three sentences of Rule 24(c). New Rule 5.1 requires a party who files a pleading, written motion, or other paper that draws in question the constitutionality of an Act of Congress or a state statute to file a Notice of Constitutional Challenge and serve it on the United States Attorney General or State Attorney General. The notice must be promptly filed and served. This notice requirement supplements the court's duty to certify a constitutional challenge to the United States Attorney General or the State Attorney General. The notice will ensure that the Attorney General is notified of constitutional challenges and has an opportunity to exercise the statutory right to intervene at the earliest possible point in the litigation. The court's § 2403 certification obligation remains, and is the only notice when the constitutionality of an Act of Congress or state statute is drawn in question by means other than a party's pleading, written motion, or other paper.

Moving the notice and certification provisions from Rule 24(c) to a new rule is designed to attract the parties' attention to these provisions by locating them in the vicinity of the rules that require notice by service and pleading.

Rule 5.1 goes beyond the requirements of § 2403 and the former Rule 24(c) provisions by requiring notice and certification of a constitutional challenge to any Act of Congress or state statute, not only those "affecting the public interest." It is better to assure, through notice, that the Attorney General is able to determine whether to seek intervention on the ground that the Act or statute affects a public interest.

The 60-day period for intervention mirrors the time to answer set by Rule 12(a)(3)(A). Pretrial activities may continue without

interruption during this period, and the court retains authority to grant any appropriate interlocutory relief. But to make this period effective, the court should not make a final determination sustaining a challenge before the Attorney General has responded or the period has expired without response. The court may, on the other hand, reject a challenge at any time. This rule does not displace any of the statutory or rule procedures that permit dismissal of all or part of an action — including a constitutional challenge — at any time, even before service of process.

Rule 6. Time

* * * * *

(e) Additional Time After Certain Kinds of Service ~~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~~ must or may act 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~~ service and service is made under Rule 5(b)(2)(B), (C), or (D), 3 days ~~shall be~~ are added ~~to~~ after the prescribed period.

Committee Note

Rule 6(e) is amended to remove any doubt as to the method for extending the time to respond after service by mail, leaving with the clerk of court, electronic means, or other means consented to by the

party served. Three days are added after the prescribed period expires. All the other time-counting rules apply unchanged.

One example illustrates the operation of Rule 6(e). A paper is mailed on Wednesday. The prescribed time to respond is 10 days. Assuming there are no intervening legal holidays, the prescribed period ends on Wednesday two weeks later. Three days are added, expiring on the following Saturday. Because the last day is a Saturday, the time to act extends to the next day that is not a legal holiday, ordinarily Monday.

Other changes are made to conform Rule 6(e) to current style conventions.

Rule 27. Depositions Before Action or Pending Appeal

(a) Before Action.

* * * * *

~~**(2) Notice and Service.** The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing the notice shall be served either within or without the district or state in the manner provided in Rule 4(d) for service of summons; but if such service~~

~~cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4(d), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17(c) apply.~~

(2) **Notice and Service.** At least 20 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing on the petition. The notice may be served either inside or outside the district or state in the manner provided in Rule 4. If service cannot be made with due diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner

provided by Rule 4 and to cross-examine the deponent on behalf of persons not served and not otherwise represented. Rule 17(c) applies if any expected adverse party is a minor or is incompetent.

Committee Note

The outdated cross-reference to former Rule 4(d) is corrected to incorporate all Rule 4 methods of service. Former Rule 4(d) has been allocated to many different subdivisions of Rule 4. Former Rule 4(d) did not cover all categories of defendants or modes of service, and present Rule 4 reaches further than all of former Rule 4. But there is no reason to distinguish between the different categories of defendants and modes of service encompassed by Rule 4. Rule 4 service provides effective notice. Notice by such means should be provided to any expected adverse party that comes within Rule 4.

Other changes are made to conform Rule 27(a)(2) to current style conventions.

Rule 45. Subpoena

(a) ***Form; Issuance.***

* * * * *

~~**(2)** A subpoena commanding attendance at a trial or hearing shall issue from the court for the district in which the hearing or trial is to be held. A subpoena for attendance at a deposition shall issue from the court for~~

~~the district designated by the notice of deposition as the district in which the deposition is to be taken. If separate from a subpoena commanding the attendance of a person, a subpoena for production or inspection shall issue from the court for the district in which the production or inspection is to be made.~~

(2) A subpoena must issue as follows:

(A) for attendance at a trial or hearing, in the name of the court [for the district where the trial or hearing is to be held]{that will hold the trial or hearing};

(B) for attendance at a deposition, in the name of the court for the district where the deposition is to be taken, stating the method for recording the testimony; and

(C) for production and inspection, if separate from a subpoena commanding a person's attendance, in the name of the court for the district where the production or inspection is to be made.

Committee Note

This amendment closes a small gap in regard to notifying witnesses of the manner for recording a deposition. A deposition subpoena must state the method for recording the testimony.

Rule 30(b)(2) directs that the party noticing a deposition state in the notice the manner for recording the testimony, but the notice need not be served on the deponent. The deponent learns of the recording method only if the deponent is a party or is informed by a party. Rule 30(b)(3) permits another party to designate an additional method of recording with prior notice to the deponent and the other parties. The deponent thus has notice of the recording method when an additional method is designated. This amendment completes the notice provisions to ensure that a nonparty deponent has notice of the recording method when the recording method is described only in the deposition notice.

A subpoenaed witness does not have a right to refuse to proceed with a deposition due to objections to the manner of recording. But under rare circumstances, a nonparty witness might have a ground for seeking a protective order under Rule 26(c) with regard to the manner of recording or the use of the deposition if recorded in a certain manner. Should such a witness not learn of the manner of recording until the deposition begins, undesirable delay or complication might result. Advance notice of the recording method affords an opportunity to raise such protective issues.

Other changes are made to conform Rule 45(a)(2) to current style conventions.

STYLE 277

Proposed Amendments to the Federal Rules of Civil Procedure

Restyled Rules 1 through 15

May 23, 2003

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Current wording	Potential Stylistic Revision
I. SCOPE OF RULES — ONE FORM OF ACTION Rule 1. Scope and Purpose of Rules	TITLE I. SCOPE OF RULES; FORM OF ACTION Rule 1. Scope and Purpose
These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.	These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.

COMMITTEE NOTE

The language of Rule 1 has been amended as part of the general restyling of the Civil 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 merger of law, equity, and admiralty practice is complete. There is no need to carry forward the phrases that initially accomplished the merger.

[The former reference to "suits of a civil nature" is changed to the more modern "actions and proceedings." This change does not affect the question whether the Civil Rules apply to summary proceedings created by statute. See *SEC v. McCarthy*, 322 F.3d 650 (9th Cir. 2003); see also *New Hampshire Fire Ins. Co. v. Scanlon*, 362 U.S. 404 (1960).]

Rule 2. One Form of Action	Rule 2. One Form of Action
There shall be one form of action to be known as "civil action".	There is one form of action — the "civil action."

COMMITTEE NOTE

The language of Rule 2 has been amended as part of the general restyling of the Civil 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.

II. COMMENCEMENT OF ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS Rule 3. Commencement of Action	TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS Rule 3. Commencing an Action
A civil action is commenced by filing a complaint with the court.	A civil action is commenced by filing a complaint with the court.

COMMITTEE NOTE

The caption of Rule 3 has been amended as part of the general restyling of the Civil 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 4. Summons	Rule 4. Summons
(a) Form. The summons shall be signed by the clerk, bear the seal of the court, identify the court and the parties, be directed to the defendant, and state the name and address of the plaintiff's attorney or, if unrepresented, of the plaintiff. It shall also state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in a judgment by default against the defendant for the relief demanded in the complaint. The court may allow a summons to be amended.	**(a) Contents; Amendments.** **(1)** ***Contents.*** The summons must: **(A)** name the court and the parties; **(B)** be directed to the defendant; **(C)** state the name and address of the plaintiff's attorney or — if unrepresented — of the plaintiff; **(D)** state the time within which the defendant must appear and defend; **(E)** notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint; **(F)** be signed by the clerk; and **(G)** bear the court's seal. **(2)** ***Amendments.*** The court may allow a summons to be amended.
(b) Issuance. Upon or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is in proper form, the clerk shall sign, seal, and issue it to the plaintiff for service on the defendant. A summons, or a copy of the summons if addressed to multiple defendants, shall be issued for each defendant to be served.	**(b) Issuance.** Upon or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. A summons — or a copy of a summons that is addressed to multiple defendants — must be issued for each defendant to be served.
(c) Service with Complaint; by Whom Made. **(1)** A summons shall be served together with a copy of the complaint. The plaintiff is responsible for service of a summons and complaint within the time allowed under subdivision (m) and shall furnish the person effecting service with the necessary copies of the summons and complaint. **(2)** Service may be effected by any person who is not a party and who is at least 18 years of age. At the request of the plaintiff, however, the court may direct that service be effected by a United States marshal, deputy United States marshal, or other person or officer specially appointed by the court for that purpose. Such an appointment must be made when the plaintiff is authorized to proceed in forma pauperis pursuant to 28 U.S.C. § 1915 or is authorized to proceed as a seaman under 28 U.S.C. § 1916.	**(c) Service.** **(1)** ***In General.*** A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service. **(2)** ***By Whom.*** Any person who is at least 18 years old and not a party may serve a summons and complaint. **(3)** ***By a Marshal or Someone Specially Appointed.*** At the plaintiff's request, the court may direct that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so direct if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. § 1915 or as a seaman under 28 U.S.C. § 1916.

(d) Waiver of Service; Duty to Save Costs of Service; Request to Waive. **(1)** A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant. **(2)** An individual, corporation, or association that is subject to service under subdivision (e), (f), or (h) and that receives notice of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons. To avoid costs, the plaintiff may notify such a defendant of the commencement of the action and request that the defendant waive service of a summons. The notice and request **(A)** shall be in writing and shall be addressed directly to the defendant, if an individual, or else to an officer or managing or general agent (or other agent authorized by appointment or law to receive service of process) of a defendant subject to service under subdivision (h); **(B)** shall be dispatched through first-class mail or other reliable means; **(C)** shall be accompanied by a copy of the complaint and shall identify the court in which it has been filed; **(D)** shall inform the defendant, by means of a text prescribed in an official form promulgated pursuant to Rule 84, of the consequences of compliance and of a failure to comply with the request; **(E)** shall set forth the date on which the request is sent; **(F)** shall allow the defendant a reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent, or 60 days from that date if the defendant is addressed outside any judicial district of the United States; and **(G)** shall provide the defendant with an extra copy of the notice and request, as well as a prepaid means of compliance in writing. If a defendant located within the United States fails to comply with a request for waiver made by a plaintiff located within the United States, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown.	**(d) Waiving Service.** **(1)** ***Requesting a Waiver.*** An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary costs of serving the summons. To avoid costs, the plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must: **(A)** be in writing and be addressed: **(i)** to the individual defendant; or **(ii)** for a defendant subject to service under Rule 4(h), to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process; **(B)** name the court where the complaint has been filed and be accompanied by a copy of the complaint, two copies of a waiver form, and a prepaid means for returning the form; **(C)** inform the defendant, using text prescribed in an official form promulgated under Rule 84, of the consequences of waiving and not waiving service; **(D)** state the date when the request is sent; **(E)** give the defendant a reasonable time of at least 30 days after the request was sent — or at least 60 days if the defendant is addressed outside any judicial district of the United States[1] — to return the waiver; and **(F)** be sent by first-class mail or other reliable means. **(2)** ***Failure To Waive.*** If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant the costs later incurred in making service, together with the costs, including a reasonable attorney's fee, of any motion required to collect these service costs.

1. The Style Subcommittee would prefer to say "or at least 60 days if sent to the defendant outside any judicial district of the United States."

(3) A defendant that, before being served with process, timely returns a waiver so requested is not required to serve an answer to the complaint until 60 days after the date on which the request for waiver of service was sent, or 90 days after that date if the defendant was addressed outside any judicial district of the United States. (4) When the plaintiff files a waiver of service with the court, the action shall proceed, except as provided in paragraph (3), as if a summons and complaint had been served at the time of filing the waiver, and no proof of service shall be required. (5) The costs to be imposed on a defendant under paragraph (2) for failure to comply with a request to waive service of a summons shall include the costs subsequently incurred in effecting service under subdivision (e), (f), or (h), together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service.	(3) ***Time To Answer After a Waiver.*** A defendant that, before being served with process, timely returns a waiver need not serve an answer to the complaint until 60 days after the date when the request was sent — or until 90 days after it was sent if the defendant was addressed outside any judicial district of the United States.[2/] (4) ***Results of Filing a Waiver.*** When the plaintiff files a waiver, proof of service is not required and, except as provided in Rule 4(d)(3), these rules apply as if a summons and complaint had been served at the time of filing the waiver. (5) ***Jurisdiction and Venue Not Waived.*** Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.
(e) Service Upon Individuals Within a Judicial District of the United States. Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in any judicial district of the United States: (1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or (2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.	**(e) Serving an Individual Within a Judicial District of the United States.** Unless federal law provides otherwise, an individual — other than a minor, an incompetent person, or a person whose waiver of service has been filed — may be served in a judicial district of the United States by: (1) following state law for serving a summons in an action brought in courts of general jurisdiction of the state where the district court is located or where service is made; or (2) doing any of the following: (A) delivering a copy of the summons and of the complaint to the individual personally; (B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or (C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

2. The Style Subcommittee would prefer to say "until 90 days after it was sent to the defendant outside any judicial district of the United States."

(f) Service Upon Individuals in a Foreign Country. Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in a place not within any judicial district of the United States: **(1)** by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or **(2)** if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice: **(A)** in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or **(B)** as directed by the foreign authority in response to a letter rogatory or letter of request; or **(C)** unless prohibited by the law of the foreign country, by **(i)** delivery to the individual personally of a copy of the summons and the complaint; or **(ii)** any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or **(3)** by other means not prohibited by international agreement as may be directed by the court.	**(f) Serving an Individual in a Foreign Country.** Unless federal law provides otherwise, an individual — other than a minor, an incompetent person, or a person whose waiver of service has been filed — may be served at a place not within any judicial district of the United States: **(1)** by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; **(2)** if there is no internationally agreed means of service or if an international agreement allows other means of service, by a method that is reasonably calculated to give notice: **(A)** as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction; **(B)** as the foreign authority directs in response to a letter rogatory or letter of request; or **(C)** unless prohibited by the foreign country's law, by: **(i)** delivering a copy of the summons and of the complaint to the individual personally; or **(ii)** using any form of mail requiring a signed receipt, addressed and sent by the clerk to the individual; or **(3)** by other means not prohibited by international agreement, as the court directs.
(g) Service Upon Infants and Incompetent Persons. Service upon an infant or an incompetent person in a judicial district of the United States shall be effected in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state. Service upon an infant or an incompetent person in a place not within any judicial district of the United States shall be effected in the manner prescribed by paragraph (2)(A) or (2)(B) of subdivision (f) or by such means as the court may direct.	**(g) Serving a Minor or an Incompetent Person.** A minor or an incompetent person in a judicial district of the United States must be served by following state law for service of summons or like process on such a defendant in an action brought in the courts of general jurisdiction of the state where service is made. A minor or an incompetent person in a place not within any judicial district of the United States must be served in the manner prescribed by Rule 4(f)(2)(A), (f)(2)(B), or (f)(3).

(h) Service Upon Corporations and Associations. Unless otherwise provided by federal law, service upon a domestic or foreign corporation or upon a partnership or other unincorporated association that is subject to suit under a common name, and from which a waiver of service has not been obtained and filed, shall be effected: **(1)** in a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1), or by delivering a copy of the summons and of the complaint to an officer, 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 defendant, or **(2)** in a place not within any judicial district of the United States in any manner prescribed for individuals by subdivision (f) except personal delivery as provided in paragraph (2)(C)(i) thereof.	**(h) Serving a Corporation, Partnership, or Association.** Unless federal law provides otherwise or the defendant's waiver of service has been filed, a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be served: **(1)** in a judicial district of the United States: **(A)** in the manner prescribed by Rule 4(e)(1) for serving an individual; or **(B)** by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and — if the agent is one authorized by statute and the statute so requires — by also mailing a copy of each to the defendant; or **(2)** at a place not within any judicial district of the United States, in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under Rule 4(f)(2)(C)(i).

(i) Serving the United States, Its Agencies, Corporations, Officers, or Employees.

(1) Service upon the United States shall be effected

(A) by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court or by sending a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States attorney and

(B) by also sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and

(C) in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to the officer or agency.

(2) (A) Service on an agency or corporation of the United States, or an officer or employee of the United States sued only in an official capacity, is effected by serving the United States in the manner prescribed by Rule 4(i)(1) and by also sending a copy of the summons and complaint by registered or certified mail to the officer, employee, agency, or corporation.

(B) Service on an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States — whether or not the officer or employee is sued also in an official capacity — is effected by serving the United States in the manner prescribed by Rule 4(i)(1) and by serving the officer or employee in the manner prescribed by Rule 4(e), (f), or (g).

(3) The court shall allow a reasonable time to serve process under Rule 4(i) for the purpose of curing the failure to serve:

(A) all persons required to be served in an action governed by Rule 4(i)(2)(A), if the plaintiff has served either the United States attorney or the Attorney General of the United States, or

(B) the United States in an action governed by Rule 4(i)(2)(B), if the plaintiff has served an officer or employee of the United States sued in an individual capacity.

(i) Serving the United States and Its Agencies, Corporations, Officers, or Employees.

(1) ***United States.*** To serve the United States, a party must:

(A) (i) deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought — or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk — or

(ii) send a copy of the summons and of the complaint by registered or certified mail to the civil-process clerk at the United States attorney's office;

(B) send a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D.C.; and

(C) if the action challenges an order of a nonparty agency or officer of the United States, send a copy of each by registered or certified mail to the agency or officer.

(2) ***Agency; Corporation; Officer or Employee Sued in an Official Capacity.*** To serve an agency or corporation of the United States, or an officer or employee of the United States sued only in an official capacity, a party must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the agency, corporation, officer, or employee.

(3) ***Officer or Employee Sued Individually.*** To serve an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States (whether or not the officer or employee is also sued in an official capacity), a party must serve the United States and also serve the officer or employee under Rule 4(e), (f), or (g).

(4) ***Extending Time.*** The court must allow a party a reasonable time to cure its failure to:

(A) serve a person required to be served under Rule 4(i)(2), if the party has served either the United States attorney or the Attorney General of the United States; or

(B) serve the United States under Rule 4(i)(3), if the party has served an officer or employee of the United States sued in an individual capacity.

(j) Service Upon Foreign, State, or Local Governments. **(1)** Service upon a foreign state or a political subdivision, agency, or instrumentality thereof shall be effected pursuant to 28 U.S.C. § 1608. **(2)** Service upon a state, municipal corporation, or other governmental organization subject to suit shall be effected by delivering a copy of the summons and of the complaint to its chief executive officer or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.	**(j) Serving a Foreign, State, or Local Government.** **(1)** ***Foreign State.*** A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608. **(2)** ***State or Local Government.*** A state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be served by: **(A)** delivering a copy of the summons and of the complaint to its chief executive officer; or **(B)** serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant.
(k) Territorial Limits of Effective Service. **(1)** Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant **(A)** who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located, or **(B)** who is a party joined under Rule 14 or Rule 19 and is served at a place within a judicial district of the United States and not more than 100 miles from the place from which the summons issues, or **(C)** who is subject to the federal interpleader jurisdiction under 28 U.S.C. § 1335, or **(D)** when authorized by a statute of the United States. **(2)** If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.	**(k) Territorial Limits of Effective Service.** **(1)** ***In General.*** Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant: **(A)** who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located; **(B)** who is a party joined under Rule 14 or Rule 19 and is served at a place within a judicial district of the United States and not more than 100 miles from the place where the summons was issued; **(C)** who is subject to federal interpleader jurisdiction under 28 U.S.C. § 1335; or **(D)** when authorized by a United States statute. **(2)** ***Federal Claim Outside State-Court Personal Jurisdiction.*** With respect to a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if: **(A)** the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and **(B)** exercising jurisdiction is consistent with the United States Constitution and laws.

(l) **Proof of Service.** If service is not waived, the person effecting service shall make proof thereof to the court. If service is made by a person other than a United States marshal or deputy United States marshal, the person shall make affidavit thereof. Proof of service in a place not within any judicial district of the United States shall, if effected under paragraph (1) of subdivision (f), be made pursuant to the applicable treaty or convention, and shall, if effected under paragraph (2) or (3) thereof, include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court. Failure to make proof of service does not affect the validity of the service. The court may allow proof of service to be amended.	(l) **Proving Service.** (1) ***Affidavit Required.*** Unless service is waived, proof of service must be made to the court. Except for service by a United States marshal or deputy marshal, proof must be by the server's affidavit. (2) ***Service Outside the United States.*** Service not within any judicial district of the United States must be proved as follows: (A) if made under Rule 4(f)(1), as provided in the applicable treaty or convention; or (B) if made under Rule 4(f)(2) or (f)(3), by a receipt signed by the addressee, or by other evidence satisfying the court that the summons and complaint were delivered to the addressee. (3) ***Validity of Service.*** Failure to prove service does not affect the validity of service. The court may allow proof of service to be amended.
(m) **Time Limit for Service.** If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).	(m) **Time Limit for Service.** If a defendant is not served within 120 days after the complaint is filed, the court — on motion or on its own after notice to the plaintiff — must dismiss the action without prejudice against that defendant or direct that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).
(n) **Seizure of Property; Service of Summons Not Feasible.** (1) If a statute of the United States so provides, the court may assert jurisdiction over property. Notice to claimants of the property shall then be sent in the manner provided by the statute or by service of a summons under this rule. (2) Upon a showing that personal jurisdiction over a defendant cannot, in the district where the action is brought, be obtained with reasonable efforts by service of summons in any manner authorized by this rule, the court may assert jurisdiction over any of the defendant's assets found within the district by seizing the assets under the circumstances and in the manner provided by the law of the state in which the district court is located.	(n) **Asserting Jurisdiction over Property or Assets.** (1) ***Federal Law.*** The court may assert jurisdiction over property if authorized by a United States statute. Notice to claimants of the property must be given in the manner specified by the statute or by serving a summons under this rule. (2) ***State Law.*** Upon a showing that personal jurisdiction over a defendant cannot, in the district where the action is brought, be obtained with reasonable efforts by serving a summons under this rule, the court may assert jurisdiction over the defendant's assets found within the district. Jurisdiction is acquired by seizing the assets under the circumstances and in the manner provided by state law in that district.

COMMITTEE NOTE

The language of Rule 4 has been amended as part of the general restyling of the Civil 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 4(d)(1)(B) corrects an inadvertent error in former Rule 4(d)(2)(G). The defendant needs two copies of the waiver form, not an extra copy of the notice and request.

Rule 4(g) changes "infant" to "minor." "Infant" in the present rule means "minor." Modern word usage suggests that "minor" will better maintain the intended meaning. The same change from "infant" to "minor" is made throughout the rules. In addition, subdivision (f)(3) is added to the description of methods of service that the court may order; the addition ensures the evident intent that the court not order service by means prohibited by international agreement.

Rule 4(i)(4) corrects a misleading reference to "the plaintiff" in former Rule 4(i)(3). A party other than a plaintiff may need a reasonable time to effect service. Rule 4(i)(4) properly covers any party.

Former Rule 4(j)(2) refers to service upon an "other governmental organization subject to suit." This is changed to "any other state-created governmental organization that is subject to suit." The change entrenches the meaning indicated by the caption ("Serving a Foreign, State, or Local Government"), and the invocation of state law. It excludes any risk that this rule might be read to govern service on a federal agency, or other entities not created by state law.

Rule 4.1. Service of Other Process	Rule 4.1. Serving Other Process
(a) Generally. Process other than a summons as provided in Rule 4 or subpoena as provided in Rule 45 shall be served by a United States marshal, a deputy United States marshal, or a person specially appointed for that purpose, who shall make proof of service as provided in Rule 4(l). The process may be served anywhere within the territorial limits of the state in which the district court is located, and, when authorized by a statute of the United States, beyond the territorial limits of that state.	**(a) In General.** Process — other than a summons under Rule 4 or a subpoena under Rule 45 — must be served by a United States marshal or deputy marshal or by a person specially appointed for that purpose. It may be served anywhere within the territorial limits of the state where the district court is located and, if authorized by a United States statute, beyond those limits. Proof of service must be made under Rule 4(l).
(b) Enforcement of Orders: Commitment for Civil Contempt. An order of civil commitment of a person held to be in contempt of a decree or injunction issued to enforce the laws of the United States may be served and enforced in any district. Other orders in civil contempt proceedings shall be served in the state in which the court issuing the order to be enforced is located or elsewhere within the United States if not more than 100 miles from the place at which the order to be enforced was issued.	**(b) Enforcing Orders: Committing for Civil Contempt.** An order committing a person for civil contempt of a decree or injunction issued to enforce United States law may be served and enforced in any district. Any other order in a civil-contempt proceeding may be served only in the state where the issuing court is located or elsewhere in the United States at a location within 100 miles from the place where the order was issued.

COMMITTEE NOTE

The language of Rule 4.1 has been amended as part of the general restyling of the Civil 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 5. Serving and Filing Pleadings and Other Papers	Rule 5. Serving and Filing Pleadings and Other Papers
(a) Service: When Required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4. In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.	**(a) Service: When Required.** **(1)** ***In General.*** Except as these rules provide otherwise, each of the following papers must be served on every party: **(A)** an order stating that service is required; **(B)** a pleading filed after the original complaint, unless the court orders otherwise under Rule 5(c) because there are numerous defendants; **(C)** a discovery paper required to be served on a party, unless the court orders otherwise; **(D)** a written motion, except one that may be heard ex parte; and **(E)** a written notice, appearance, demand, or offer of judgment, or any similar paper. **(2)** ***If a Party Fails to Appear.*** No service is required on a party who is in default for failing to appear. But a pleading that asserts a new claim for relief against such a party must be served on that party under Rule 4. **(3)** ***Seizing Property.*** If an action is begun by seizing property and no person is or need be named as a defendant, service — if required before the filing of an answer, claim, or appearance — must be made on the person who had custody or possession of the property at the time of seizure.

(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.	**(b) Service: How Made.** **(1)** ***Serving an Attorney.*** If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party. **(2)** ***Service in General.*** A paper is served under this rule by: **(A)** handing it to the person; **(B)** leaving it: **(i)** at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or **(ii)** if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there; **(C)** mailing it to the person's last known address — in which event service is complete upon mailing; **(D)** leaving it with the court clerk if the person's address is unknown; **(E)** sending it by electronic means if the person consented in writing — in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or **(F)** delivering it by any other means that the person consented to in writing — in which event service is complete when the person making service delivers it to the agency designated to make delivery. **(3)** ***Using Court Facilities.*** If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).

(c) Same: Numerous Defendants. In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.	**(c) Serving Numerous Defendants.** **(1)** ***In General.*** If an action involves an unusually large number of defendants, the court may, on motion or on its own, order that: **(A)** defendants' pleadings and replies to them need not be served on other defendants; **(B)** any crossclaim, counterclaim, avoidance, or affirmative defense in those pleadings and replies to them will be treated as denied or avoided by all other parties; and **(C)** the filing of any such pleading and service on the plaintiff or plaintiffs constitutes due notice of the pleading to all parties. **(2)** ***Notifying Parties.*** A copy of every such order must be served on the parties as the court directs.
(d) Filing; Certificate of Service. All papers after the complaint required to be served upon a party, together with a certificate of service, must be filed with the court within a reasonable time after service, but disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: (i) depositions, (ii) interrogatories, (iii) requests for documents or to permit entry upon land, and (iv) requests for admission. **(e) Filing With the Court Defined.** The filing of papers with the court as required by these rules shall be made by filing them with the clerk of court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. A court may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.	**(d) Filing.** **(1)** ***Required Filings; Certificate of Service.*** A party must, within a reasonable time after service, file any paper after the complaint that is required to be served, and must include a certificate of service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or to permit entry onto land, and requests for admission. **(2)** ***How Made—In General.*** A paper is filed by delivering it: **(A)** to the court[1] clerk; or **(B)** to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk. **(3)** ***Electronic Filing, Signing, or Verification.*** A court may, by local rule, permit papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A paper filed by electronic means in compliance with a local rule is a written paper for purposes of these rules. **(4)** ***Acceptance by Clerk.*** The clerk must not refuse to accept a paper presented for filing solely because it is not in the form prescribed by these rules or by a local rule or practice.

1. The Style Subcommittee does not believe that "court" is needed to clarify the meaning of "clerk" in this context.

COMMITTEE NOTE

The language of Rule 5 has been amended as part of the general restyling of the Civil 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 5(a)(1)(E) omits the former reference to a designation of record on appeal. Appellate Rule 10 is a self-contained provision for the record on appeal, and provides for service.

Former Rule 5(b)(2)(D) literally provided that a local rule may authorize use of the court's transmission facilities to make service by non-electronic means agreed to by the parties. That was not intended. Rule 5(b)(3) restores the intended meaning — court transmission facilities can be used only for service by electronic means.

Rule 5(d)(2)(B) provides that "a" judge may accept a paper for filing, replacing the reference in former Rule 5(e) to "the" judge. Some courts do not assign a designated judge to each case, and it may be important to have another judge accept a paper for filing even when a case is on the individual docket of a particular judge. The ministerial acts of accepting the paper, noting the time, and transmitting the paper to the court clerk do not interfere with the assigned judge's authority over the action.

Rule 6. Time	Rule 6. Computing and Extending Time
(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default 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 a 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 the 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 this rule and in Rule 77(c), "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 time period specified in these rules or in any local rule, court order, or statute: **(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 — if the act to be done is filing a paper in court — 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 these rules, "legal holiday" means: **(A)** the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and **(B)** any other day declared a holiday by the President, Congress, or the state where the district court is located.
(b) Enlargement. When by these rules or by a notice given thereunder or by order of court 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 where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.	**(b) Extending Time.** **(1)** ***In General.*** When an act may or must be done within a specified time, the court in its discretion may for good cause extend the time: **(A)** with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or **(B)** on motion made after the time has expired if the party failed to act because of excusable neglect. **(2)** ***Exceptions.*** A court may not extend the time for acting under Rules 50(b) and (c)(2), 52(b), 59(b), (d), and (e), and 60(b), except as those rules permit.
(c) [Rescinded].	

(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 these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.	**(c) Motions, Notices of Hearing, and Affidavits.** **(1)** ***In General.*** A written motion and notice of the hearing must be served at least 5 days before the time specified for the hearing, with the following exceptions: **(A)** when the motion may be heard ex parte; **(B)** when these rules set a different period; or **(C)** when a court order — which a party may, for good cause, apply for ex parte — sets a different period. **(2)** ***Supporting Affidavit.*** Any affidavit supporting a motion must be served with the motion. Except as Rule 59(c) provides otherwise, any opposing affidavit must be served at least 1 day before the hearing, unless the court permits service at another time.
(e) Additional Time After Service 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 under Rule 5(b)(2)(B), (C), or (D), 3 days shall be added to the prescribed period.	**(d) Additional Time After Certain Kinds of Service.** Whenever a party must or may act within a prescribed period after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added to the period.[1/]

COMMITTEE NOTE

The language of Rule 6 has been amended as part of the general restyling of the Civil 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.

1. The Advisory Committee report to the Standing Committee includes a recommendation to publish a substantive revision of the current Rule 6(e). If the Standing Committee decides to publish the Rule 6(e) proposal, a decision on whether to include the substantive revision in restyled Rule 6(d) should be made at the time when restyled Rules 1-15 are to be published.

III. PLEADINGS AND MOTIONS **Rule 7. Pleadings Allowed; Form of Motions**	**TITLE III. PLEADINGS AND MOTIONS** **Rule 7. Pleadings Allowed; Form of Motions and Other Papers**
(a) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.	**(a) Pleadings.** Only these pleadings are allowed: **(1)** a complaint; **(2)** an answer to a complaint; **(3)** an answer to a counterclaim designated as a counterclaim; **(4)** an answer to a crossclaim; **(5)** a third-party complaint[1]; **(6)** an answer to a third-party complaint; and **(7)** if the court orders, a reply to an answer or a third-party answer.
(b) Motions and Other Papers. **(1)** An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion. **(2)** The rules applicable to captions and other matters of form of pleadings apply to all motions and other papers provided for by these rules. **(3)** All motions shall be signed in accordance with Rule 11.	**(b) Motions and Other Papers.** **(1)** ***In General.*** A request for a court order must be made by motion. The motion must: **(A)** be in writing unless made during a hearing or trial; **(B)** state with particularity the grounds for seeking the order; and **(C)** state the relief sought. **(2)** ***Form.*** The rules governing captions and other matters of form in pleadings apply to motions and other papers.
(c) Demurrers, Pleas, Etc., Abolished. Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.	

1. The Style Subcommittee omitted as redundant the qualifying phrase "if a person not an original party is brought in under Rule 14."

COMMITTEE NOTE

The language of Rule 7 has been amended as part of the general restyling of the Civil 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.

Former Rule 7(a) stated that "there shall be * * * an answer to a cross-claim, if the answer contains a cross-claim * * *." Former Rule 12(a)(2) provided more generally that "[a] party served with a pleading stating a cross-claim against that party shall serve an answer thereto * * *." New Rule 7(a) corrects this inconsistency by providing for an answer to a crossclaim.

For the first time, Rule 7(a)(7) expressly authorizes the court to order a reply to a counterclaim answer. A reply may be as useful in this setting as a reply to an answer, a third-party answer, or a crossclaim answer.

Former Rule 7(b)(1) stated that the writing requirement is fulfilled if the motion is stated in a written notice of hearing. This statement was deleted as redundant because a single written document can satisfy the writing requirements both for a motion and for a Rule 6(c)(1) notice.

The cross-reference to Rule 11 in former Rule 7(b)(3) is deleted as redundant. Rule 11 applies by its own terms. The force and application of Rule 11 are not diminished by the deletion.

Former Rule 7(c) is deleted because it has done its work. If a motion or pleading is described as a demurrer, plea, or exception for insufficiency the court will treat the paper as if properly captioned.

Rule 7.1. Disclosure Statement	Rule 7.1. Disclosure Statement
(a) Who Must File: Nongovernmental Corporate Party. A nongovernmental corporate party to an action or proceeding in a district court must file two copies of a statement that 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.	**(a) Who Must File.** A nongovernmental corporate party must file two copies of a disclosure statement that:[1] **(1)** identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or **(2)** states that there is no such corporation.
(b) Time for Filing; Supplemental Filing. A party must: **(1)** file the Rule 7.1(a) statement with 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.	**(b) Time for Filing; Supplemental Filing.** A party must: **(1)** file the disclosure statement with 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 required information.

COMMITTEE NOTE

The language of Rule 7.1 has been amended as part of the general restyling of the Civil 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.

1. In endorsing this change, the Style Subcommittee notes that deleting "in a district court" is inconsistent stylistically (though not substantively) with the disclosure statement provisions of the Appellate Rules and Criminal Rules, which specify the court. The subcommittee, however, believes that this kind of inconsistency should be permitted to assure the internal consistency of the Civil Rules (which otherwise assume that the forum is a district court).

Rule 8. General Rules of Pleading	Rule 8. General Rules of Pleading
(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.	**(a) Claims for Relief.** A pleading that states a claim for relief — whether an original claim, a counterclaim, a crossclaim, or a third-party claim — must contain: **(1)** a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; **(2)** a short and plain statement of the claim showing that the pleader is entitled to relief; and **(3)** a demand for the relief sought, which may include relief in the alternative or different types of relief.
(b) Defenses; Form of Denials. A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs or may generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11.	**(b) Defenses and Denials.** **(1)** ***In General.*** In responding to a pleading, a party must: **(A)** state in short and plain terms its defenses to each claim asserted against it; and **(B)** admit or deny the averments[1/] asserted against it by an opposing party. **(2)** ***Denials — Responding to the Substance.*** A denial must fairly respond to the substance of the averment denied. **(3)** ***General and Specific Denials.*** A party that intends in good faith to deny all the averments of a pleading — including the jurisdictional grounds — may do so by a general denial. A party that does not intend to deny all the averments must either specifically deny designated averments or generally deny all except those specifically admitted. **(4)** ***Denying Part of an Averment.*** A party that intends in good faith to deny only part of an averment must admit the part that is true and deny the rest. **(5)** ***Lacking Knowledge or Information.*** A party that lacks knowledge or information sufficient to form a belief about the truth of an averment must so state, and the statement has the effect of a denial. **(6)** ***Effect of Failing to Deny.*** An averment — other than one relating to the amount of damages — is admitted if a responsive pleading is required and the averment is not denied. If a responsive pleading is not required, an averment is considered denied or avoided.

1. As a global comment, the Style Subcommittee would prefer to use "allegation" or "allege," rather than "averment" or "aver," wherever the latter appear in the current rules.

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.	**(c) Affirmative Defenses.** **(1)** ***In General.*** In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including: • accord and satisfaction; • arbitration and award; • assumption of risk; • contributory negligence; • discharge in bankruptcy; • duress; • estoppel; • failure of consideration; • fraud; • illegality; • injury by fellow servant; • laches; • license; • payment; • release; • res judicata; • statute of frauds; • statute of limitations; and • waiver. **(2)** ***Mistaken Designation.*** If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.
(d) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.	
(e) Pleading to Be Concise and Direct; Consistency. **(1)** Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required. **(2)** A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.	**(d) Pleading to Be Concise and Direct; Alternative Statements; Inconsistency.** **(1)** ***In General.*** Each averment must be simple, concise, and direct. No technical form is required. **(2)** ***Alternative Statements of a Claim or Defense.*** A party may include two or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient. **(3)** ***Inconsistent Claims or Defenses.*** A party may state as many separate claims or defenses as it has, regardless of consistency.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.	**(e) Construing Pleadings.** Pleadings must be construed so as to do substantial justice.

COMMITTEE NOTE

The language of Rule 8 has been amended as part of the general restyling of the Civil 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 former Rule 8(b) and 8(e) cross-references to Rule 11 are deleted as redundant. Rule 11 applies by its own terms. The force and application of Rule 11 are not diminished by the deletion.

Former Rule 8(b) required a pleader denying part of an averment to "specify so much of it as is true and material and * * * deny only the remainder." "[A]nd material" is deleted to avoid the implication that it is proper to deny something that the pleader believes to be true but not material.

Deletion of former Rule 8(e)(2)'s "whether based on legal, equitable, or maritime grounds" reflects the parallel deletions in Rule 1 and elsewhere. Merger is now successfully accomplished.

Rule 9. Pleading Special Matters	Rule 9. Pleading Special Matters
(a) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, the party desiring to raise the issue shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.	**(a) Capacity or Authority to Sue; Legal Existence.** **(1)** ***In General.*** Except when required to show that the court has jurisdiction, a pleading need not aver: **(A)** a party's capacity to sue or be sued; **(B)** a party's authority to sue or be sued in a representative capacity; or **(C)** the legal existence of an organized association of persons that is made a party. **(2)** ***Raising Those Issues.*** To raise any of those issues, a party must do so by a specific negative averment,[1/] which must state any supporting facts that are peculiarly within the party's knowledge.
(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.	**(b) Fraud, Mistake; Conditions of Mind.** In averring fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally.
(c) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.	**(c) Conditions Precedent.** In pleading conditions precedent, it suffices to aver generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.
(d) Official Document or Act. In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.	**(d) Official Document or Act.** In pleading an official document or official act, it suffices to aver that the document was legally issued or the act legally done.
(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.	**(e) Judgment.** In pleading a judgment or decision of a domestic or foreign court, a judicial or quasi-judicial tribunal, or a board or officer, it suffices to plead the judgment or decision without showing jurisdiction to render it.
(f) Time and Place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.	**(f) Time and Place.** An averment of time or place is material when testing the sufficiency of a pleading.
(g) Special Damage. When items of special damage are claimed, they shall be specifically stated.	**(g) Special Damages.** If an item of special damage is claimed, it must be specifically stated.

1. The Style Subcommittee would prefer to say "a specific denial."

(h) Admiralty and Maritime Claims. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. § 1292(a)(3).	**(h) Admiralty or Maritime Claim.** **(1)** ***How Designated.*** If a claim for relief is within the admiralty or maritime jurisdiction and also within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim for purposes of Rules 14(c), 38(e), and 82 and the Supplemental Rules for Certain Admiralty and Maritime Claims. A claim cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for those purposes, whether or not so designated. **(2)** ***Amending a Designation.*** Amending a pleading to add or withdraw a designation is governed by Rule 15. **(3)** ***Designation for Appeal.*** A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. § 1292(a)(3).

COMMITTEE NOTE

The language of Rule 9 has been amended as part of the general restyling of the Civil 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 10. Form of Pleadings	Rule 10. Form of Pleadings
(a) Caption; Names of Parties. Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.	**(a) Caption; Names of Parties.** Every pleading must have a caption with the court's name, the title of the action, the file number, and a Rule 7(a) designation. In the complaint, the title of the action must include the names of all parties; in other pleadings, the title may name the first party on each side and refer generally to other parties.
(b) Paragraphs; Separate Statements. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.	**(b) Paragraphs; Separate Statements.** A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. If it would promote clarity, each claim founded on a separate transaction or occurrence — and each defense other than a denial — must be stated in a separate count or defense.
(c) Adoption by Reference; Exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.	**(c) Adoption by Reference; Exhibits.** A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument attached to a pleading is a part of the pleading for all purposes.

COMMITTEE NOTE

The language of Rule 10 has been amended as part of the general restyling of the Civil 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 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions	Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions
(a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.	**(a) Signature.** Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name — or by a party personally if the party is not represented by an attorney. The paper must state the signer's address and telephone number, if any. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.
(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, — **(1)** it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; **(2)** the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; **(3)** the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and **(4)** the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.	**(b) Representations to the Court.** By presenting to the court a pleading, written motion, or other paper — whether by signing, filing, submitting, or later advocating it — an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: **(1)** it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or expense; **(2)** the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; **(3)** the factual contentions have evidentiary support or, if specifically so identified, likely will have evidentiary support after a reasonable opportunity for further investigation or discovery; and **(4)** the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) **Sanctions.** If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(c) Sanctions.

(1) ***In General.*** If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may (subject to the conditions below) impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) ***Motion for Sanctions.*** A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it may not be filed with or presented to the court if the challenged paper, claim, defense, contention, allegation, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.

(3) ***On the Court's Initiative.*** On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) ***Nature of a Sanction.*** A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) ***Limitations on Monetary Sanctions.*** The court must not impose monetary sanctions:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) ***Requirements for an Order.*** An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.	**(d) Inapplicability to Discovery.** This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

COMMITTEE NOTE

The language of Rule 11 has been amended as part of the general restyling of the Civil 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 12. Defenses and Objections — When and How Presented — By Pleading or Motion — Motion for Judgment on the Pleadings	Rule 12. Defenses and Objections: When and How Presented — By Pleading or Motion; Motion for Judgment on the Pleadings; Pretrial Hearing; Consolidating and Waiving Defenses
(a) When Presented. **(1)** Unless a different time is prescribed in a statute of the United States, a defendant shall serve an answer **(A)** within 20 days after being served with the summons and complaint, or **(B)** if service of the summons has been timely waived on request under Rule 4(d), within 60 days after the date when the request for waiver was sent, or within 90 days after that date if the defendant was addressed outside any judicial district of the United States. **(2)** A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within 20 days after being served. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer, or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. **(3) (A)** The United States, an agency of the United States, or an officer or employee of the United States sued in an official capacity, shall serve an answer to the complaint or cross-claim — or a reply to a counterclaim — within 60 days after the United States attorney is served with the pleading asserting the claim. **(B)** An officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States shall serve an answer to the complaint or cross-claim — or a reply to a counterclaim — within 60 days after service on the officer or employee, or service on the United States attorney, whichever is later.	**(a) Time to Present a Responsive Pleading.** **(1)** ***In General.*** Except when another time is prescribed by this rule or a United States statute, the time for filing a responsive pleading is as follows: **(A)** A defendant must serve an answer: **(i)** within 20 days after being served with the summons and complaint; or **(ii)** if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent if the defendant was addressed outside any judicial district of the United States.[1/] **(B)** A party must serve an answer to a counterclaim within 20 days after being served with the pleading that states the counterclaim. **(C)** A party must serve an answer to a crossclaim within 20 days after being served with the pleading that states the crossclaim. **(D)** A party must serve a reply to an answer within 20 days after being served with an order to reply unless the order specifies a different time. **(2)** ***United States and Its Agencies, Officers, or Employees Sued in an Official Capacity.*** The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint or crossclaim — or an answer to a counterclaim — within 60 days after service on the United States attorney. **(3)** ***United States Officers or Employees Sued in an Individual Capacity.*** A United States officer or employee sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States must serve an answer to a complaint or crossclaim — or an answer to a counterclaim — within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

1. The Style Subcommittee would prefer to say "within 90 days after it was sent to the defendant outside any judicial district of the United States."

(4) Unless a different time is fixed by court order, the service of a motion permitted under this rule alters these periods of time as follows: (A) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; or (B) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.	(4) ***Effect of a Motion.*** Unless the court sets a different time, serving a motion under this rule alters these periods as follows: (A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 10 days after notice of the court's action; or (B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 10 days after the more definite statement is served.
(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.	(b) **How to Present Defenses.** Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: (1) lack of subject-matter jurisdiction; (2) lack of personal jurisdiction; (3) improper venue; (4) insufficient process; (5) insufficient service of process; (6) failure to state a claim upon which relief can be granted; and (7) failure to join a party under Rule 19. A motion asserting any of these defenses must be made before pleading if a responsive pleading is permitted. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion. If a pleading sets forth a claim for relief that does not require a responsive pleading, an adverse party may assert at trial any defense to that claim.
(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.	(c) **Motion for Judgment on the Pleadings.** After the pleadings are closed — but early enough not to delay trial — a party may move for judgment on the pleadings.
	(d) **Matters Outside the Pleadings.** If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(d) Preliminary Hearings. The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.	[*Present Rule 12(d) has become restyled Rule 12(i).*]
(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.	**(e) Motion for a More Definite Statement.** A party may move for a more definite statement of a pleading to which a responsive pleading is permitted but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 10 days after notice of the order or within the time the court sets, the court may strike the pleading or make any other order that it considers appropriate.
(f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.	**(f) Motion to Strike.** The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may take this action on its own or on a motion made by a party either before responding to the pleading or, if not permitted to respond, within 20 days after being served with the pleading.
(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.	**(g) Consolidating Defenses in a Motion.** **(1)** ***Consolidating Defenses.*** A motion under this rule may include any other motion allowed under this rule. **(2)** ***Limitation on Further Motions.*** Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule may not make another motion under this rule raising a defense or objection that was available to the party at the time of its earlier motion.

(h) Waiver or Preservation of Certain Defenses. **(1)** A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course. **(2)** A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits. **(3)** Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.	**(h) Waiving and Preserving Certain Defenses.** **(1)** ***When Waived.*** A party waives any defense under Rule 12(b)(2)-(5) by: **(A)** omitting the defense from a motion in the circumstances described in Rule 12(g)(2); or **(B)** neither making the defense by motion under this rule nor including it in a responsive pleading or in an amendment permitted by Rule 15(a)(1) as a matter of course. **(2)** ***When to Raise Certain Defenses.*** Failure to state a claim upon which relief can be granted, to join an indispensable party under Rule 19, or to state a legal defense to a claim may be raised: **(A)** in any pleading permitted or ordered under Rule 7(a); **(B)** by any motion under Rule 12(c); or **(C)** at trial. **(3)** ***Lack of Subject-Matter Jurisdiction.*** If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.
	(i) Hearing Before Trial. If a party so moves, any defense listed in Rule 12(b)(1)-(7) — whether made in a pleading or by motion — and a motion under Rule 12(c) must be heard and determined before trial unless the court orders a deferral until trial.

COMMITTEE NOTE

The language of Rule 12 has been amended as part of the general restyling of the Civil 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.

Former Rule 12(a)(4) referred to an order that postpones disposition of a motion "until the trial on the merits." Rule 12(a)(4) now refers to postponing disposition "until trial." The new expression avoids the ambiguity that inheres in "trial on the merits," which may become confusing when there is a separate trial of a single issue or another event different from a single all-encompassing trial.

Rule 13. Counterclaim and Cross-Claim	Rule 13. Counterclaim and Crossclaim
(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.	**(a) Compulsory Counterclaim.** **(1)** ***In General.*** A pleading must state as a counterclaim any claim that — at the time of service — the pleader has against an opposing party if the claim: **(A)** arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and **(B)** does not require adding another party of whom[1/] the court cannot acquire jurisdiction. **(2)** ***Exceptions.*** The pleader need not state the claim if: **(A)** when the action was commenced, the claim was the subject of another pending action; or **(B)** the opposing party sued on its claim by attachment or other process by which the court did not acquire personal jurisdiction over the pleader on that claim, and the pleader does not assert any counterclaim under this rule.
(b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.	**(b) Permissive Counterclaim.** A pleading may state as a counterclaim any claim against an opposing party.
(c) Counterclaim Exceeding Opposing Claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.	**(c) Relief Sought in a Counterclaim.** A counterclaim need not diminish or defeat the recovery sought by the opposing party. It may request relief exceeding in amount or differing in kind from that sought by the opposing party.
(d) Counterclaim Against the United States. These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof.	**(d) Counterclaim Against the United States.** These rules do not expand the right to assert a counterclaim — or to claim a credit — against the United States or a United States officer or agency.
(e) Counterclaim Maturing or Acquired After Pleading. A claim which either matured or was acquired by the pleader after serving a pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.	**(e) Counterclaim Maturing or Acquired After Pleading.** The court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading.
(f) Omitted Counterclaim. When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, the pleader may by leave of court set up the counterclaim by amendment.	**(f) Omitted Counterclaim.** The court may permit a party to amend a pleading to add a counterclaim if it was omitted through oversight, inadvertence, or excusable neglect or if justice so requires.

1. The Style Subcommittee would prefer, on style grounds, to use "over whom" rather than "of whom." The subcommittee cannot conceive of a substantive difference between the two phrases.

(g) Cross-Claim Against Co-party. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.	**(g) Crossclaim Against a Coparty.** A pleading may state as a crossclaim any claim by one party against a coparty if the claim arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim, or if the claim relates to any property that is the subject matter of the original action. The crossclaim may include a claim that the coparty is or may be liable to the crossclaimant for all or part of a claim asserted in the action against the crossclaimant.
(h) Joinder of Additional Parties. Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20.	**(h) Joining Additional Parties.** Rules 19 and 20 govern the addition of a person as a party to a counterclaim or crossclaim.
(i) Separate Trials; Separate Judgments. If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54(b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.	**(i) Separate Trials; Separate Judgments.** If it orders separate trials under Rule 42(b), a court may render judgment on a counterclaim or crossclaim under Rule 54(b) when the court has jurisdiction to do so, even if the opposing party's claims have been dismissed or otherwise resolved.

COMMITTEE NOTE

The language of Rule 13 has been amended as part of the general restyling of the Civil 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 meaning of former Rule 13(b) is better expressed by deleting "not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." Both as a matter of intended meaning and current practice, a party may state as a permissive counterclaim a claim that does grow out of the same transaction or occurrence as an opposing party's claim even though one of the exceptions in Rule 13(a) means the claim is not a compulsory counterclaim.

Rule 14. Third–Party Practice	Rule 14. Third-Party Practice
(a) When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than 10 days after serving the original answer. Otherwise the third-party plaintiff must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make any defenses to the third-party plaintiff's claim as provided in Rule 12 and any counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert any defenses as provided in Rule 12 and any counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to the third-party defendant for all or part of the claim made in the action against the third-party defendant. The	**(a) When a Defending Party May Bring in a Third Party.** **(1)** ***Timing of the Summons and Complaint.*** A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court's leave if it files the third-party complaint more than 10 days after serving its original answer. **(2)** ***Third-Party Defendant's Claims and Defenses.*** The person served with the summons and third-party complaint — the "third-party defendant": **(A)** must assert any defense against the third-party plaintiff's claim under Rule 12; **(B)** must assert any counterclaim against the third-party plaintiff under Rule 13(a), and may assert any counterclaim against the third-party plaintiff under Rule 13(b) or any crossclaim against another third-party defendant under Rule 13(g); **(C)** may assert against the plaintiff any defense that the third-party plaintiff has to the plaintiff's claim; and **(D)** may also assert against the plaintiff any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. **(3)** ***Plaintiff's Claims Against a Third-Party Defendant.*** The plaintiff may assert against the third-party defendant any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff; and the third-party defendant must assert any defense under Rule 12 and any counterclaim under Rule 13(a), and may assert any counterclaim under Rule 13(b) or any crossclaim under Rule 13(g). **(4)** ***Motion to Strike, Sever, or Try Separately.*** Any party may move to strike the third-party claim, to sever it, or to try it separately. **(5)** ***Third-Party Defendant's Claim Against a Nonparty.*** A third-party defendant may proceed under this rule against a nonparty who is or may be liable to the third-party defendant for all or part of any claim against it.

third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, a person who asserts a right under Supplemental Rule C(6)(b)(i) in the property arrested.	(6) ***Third-Party Complaint In Rem.*** If within the admiralty or maritime jurisdiction, a third-party complaint may be in rem. In that event, a reference in this rule to the "summons" includes the warrant of arrest, and a reference to the defendant or third-party plaintiff includes, where appropriate, a person who asserts a right under Supplemental Rule C(6)(b)(i) in the property arrested.
(b) When Plaintiff May Bring in Third Party. When a counterclaim is asserted against a plaintiff, the plaintiff may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.	**(b) When a Plaintiff May Bring in a Third Party.** When a counterclaim is asserted against a plaintiff, the plaintiff may bring in a third party if this rule would allow a defendant to do so.
(c) Admiralty and Maritime Claims. When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or person who asserts a right under Supplemental Rule C(6)(b)(i), as a third-party plaintiff, may bring in a third-party defendant who may be wholly or partly liable, either to the plaintiff or to the third-party plaintiff, by way of remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. In such a case the third-party plaintiff may also demand judgment against the third-party defendant in favor of the plaintiff, in which event the third-party defendant shall make any defenses to the claim of the plaintiff as well as to that of the third-party plaintiff in the manner provided in Rule 12 and the action shall proceed as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff.	**(c) Admiralty or Maritime Claim.** (1) ***Scope of Impleader.*** If a plaintiff asserts an admiralty or maritime claim under Rule 9(h), the defendant or a person who asserts a right under Supplemental Rule C(6)(b)(i) may, as a third-party plaintiff, bring in a third-party defendant who may be wholly or partly liable — either to the plaintiff or to the third-party plaintiff — for remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. (2) ***Defending Against a Demand for Judgment for the Plaintiff.*** The third-party plaintiff may demand judgment in the plaintiff's favor against the third-party defendant. In that event, the third-party defendant must defend under Rule 12 against the plaintiff's claim as well as the third-party plaintiff's claim; and the action proceeds as if the plaintiff had sued both the third-party defendant and the third-party plaintiff.

COMMITTEE NOTE

The language of Rule 14 has been amended as part of the general restyling of the Civil 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.

Former Rule 14 twice refers to counterclaims under Rule 13. In each case, the operation of Rule 13(a) depends on the state of the action at the time the pleading is filed. If plaintiff and third-party defendant have become opposing parties because one has made a claim for relief against the other, Rule 13(a) requires assertion of any counterclaim that grows out of the transaction or occurrence that is the subject matter of that claim. Rules 14(a)(2)(B) and (a)(3) reflect the distinction between compulsory and permissive counterclaims.

Rule 15. Amended and Supplemental Pleadings	Rule 15. Amended and Supplemental Pleadings
(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.	**(a) Amendments Before Trial.** **(1)** ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course: **(A)** before being served with a responsive pleading; or **(B)** within 20 days after serving the pleading if a responsive pleading is not permitted and the action is not yet on the trial calendar. **(2)** ***Other Amendments.*** Except as allowed in Rule 15(a)(1), a party may amend its pleading only with the adverse party's written consent or by leave of court. The court should freely give leave when justice so requires. **(3)** ***Time to Respond.*** Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 10 days after service of the amended pleading, whichever is later.
(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.	**(b) Amendments During and After Trial.** **(1)** ***During Trial.*** If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may allow the pleadings to be amended. The court should freely allow an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that admitting the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence. **(2)** ***After Trial.*** When issues not raised by the pleadings are tried by the parties' express or implied consent, they must be treated in all respects as if raised in the pleadings. A party may move — at any time, even after judgment — to amend the pleadings to conform them to the evidence and to raise the unpleaded issues. But failure to amend does not affect the result of the trial of these issues.

(c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when **(1)** relation back is permitted by the law that provides the statute of limitations applicable to the action, or **(2)** the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or **(3)** the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party. The delivery or mailing of process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.	**(c) Relation Back of Amendments.** **(1)** ***When an Amendment May Relate Back.*** An amendment to a pleading relates back to the date of the original pleading when: **(A)** the law that provides the applicable statute of limitations permits relation back; **(B)** the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set forth — or attempted to be set forth — in the original pleading; or **(C)** the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment: **(i)** received such notice of the action that it will not be prejudiced in defending on the merits; and **(ii)** knew or should have known that, but for a mistake concerning[1/] the proper party's identity, the action would have been brought against it. **(2)** ***Notice to the United States.*** When the United States or a United States agency or officer is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency.
(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.	**(d) Supplemental Pleadings.** On motion and reasonable notice, the court may, upon just terms, permit a party to serve a supplemental pleading setting forth any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. And if the court considers it advisable, the court may order that the adverse party plead to the supplemental pleading by a specified time.

1. The Style Subcommittee would prefer to use "about" rather than "concerning."

COMMITTEE NOTE

The language of Rule 15 has been amended as part of the general restyling of the Civil 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.

Former Rule 15(c)(3)(A) called for notice of the "institution" of the action. Rule 15(c)(1)(C)(i) omits the reference to "institution" as potentially confusing. What counts is that the party to be brought in have notice of the existence of the action, whether or not the notice includes details as to its "institution."

DRAFT MINUTES
CIVIL RULES ADVISORY COMMITTEE
MAY 1-2, 2003

The Civil Rules Advisory Committee met on May 1 and 2, 2003, at the Administrative Office of the United States Courts. The meeting was attended by Judge David F. Levi, Chair; Sheila Birnbaum, Esq.; Justice Nathan L. Hecht; Robert C. Heim, Esq.; Judge Paul J. Kelly, Jr.; Judge Richard H. Kyle; Professor Myles V. Lynk; Hon. Robert D. McCallum, Jr.; Judge H. Brent McKnight; Judge Lee H. Rosenthal; Judge Thomas B. Russell; and Judge Shira Ann Scheindlin; and Andrew M. Scherffius, Esq.. Professor Edward H. Cooper was present as Reporter, Professor Richard L. Marcus was present as Special Reporter, and Professor Thomas D. Rowe, Jr., was present as Consultant. Judge Anthony J. Scirica, Chair, Judge Sidney A. Fitzwater, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge James D. Walker, Jr., attended as liaison from the Bankruptcy Rules Committee. Judge J. Garvan Murtha, chair of the Standing Committee Style Subcommittee, and Style Subcommittee members Dean Mary Kay Kane and Judge Thomas W. Thrash, Jr. attended. Professor R. Joseph Kimble and Joseph F. Spaniol, Jr., Style Consultants to the Standing Committee, also attended. Peter G. McCabe, John K. Rabiej, Jeffrey A. Hennemuth, and James Ishida represented the Administrative Office. Thomas E. Willging, Marie Leary, and Timothy Reagan represented the Federal Judicial Center. Theodore Hirt, Esq. and Stefan Cassella, Esq., Department of Justice, were present. Professor Francis McGovern participated in the report of the Class-Action Subcommittee. Observers included Lorna Schofield, Peter Freeman, and Irwin Warren (ABA Litigation Section); Jim Rooks (ATLA); Ira Schochet (NASCAT); Barry Bauman (Lawyers for Civil Justice); John Beisner; and Alfred W. Cortese, Jr.

Judge Levi opened the meeting by observing that Judge McKnight has been nominated for appointment as a United States District Judge, and wished him a speedy and uninteresting confirmation proceeding.

Judge Levi further noted that the terms of some members are set to expire this year, but that all are expected to attend the October meeting. Lavish but deserved praises will be bestowed then. Judge Scirica is scheduled to vacate the chair of the Standing Committee to adjust his schedule to meet the duties of Chief Judge. He brings to mind the story of the High Court judges who, disagreeing about the seemliness of opening a letter to Queen Victoria with "conscious as we are of our own shortcomings," resolved the problem by beginning instead: "conscious as we are of one another's shortcomings." We are not aware of any shortcoming in Judge Scirica or his stewardship of the Standing Committee and earlier service as a member of the Civil Rules Advisory Committee.

Judge Scirica replied with a reminder of his near encounter with a rattlesnake during a Civil Rules Committee meeting in Arizona. A judge of another circuit patiently explained that the viper had recognized a Philadelphia Lawyer and extended professional courtesy. The explanation was but one of countless great pleasures in these years of rules committees service.

Judge Levi noted that the Supreme Court has sent to Congress the proposed amendments to Civil Rules 23, 51, and 53 recommended by the Standing Committee to the Judicial Conference. The amendments are scheduled to take effect this December 1, absent action by Congress.

Judge Levi reported that "minimal diversity" class-action legislation has been pending in Congress for several years, and that there seems to be heightened interest this year. The main bills appear to be S. 274 and H.R. 1115, which are nearly identical. Some provisions in these bills overlap the pending Rule 23 amendments that deal with notice and settlement, and appear to supersede the recent amendment that added the permissive interlocutory appeal provisions of Rule 23(f). The provisions that overlap with the pending amendments create the possibility of a supersession nightmare should legislation be enacted before the December 1 effective date of the amendments.

Judge Rosenthal observed that the pending bills call for very detailed class-action notices. Even as it would be amended, Rule 23 does not require so much detail. It is difficult to understand how so much information can meet the desire for plain expression.

Judge Levi concluded the discussion by noting that in March the Judicial Conference adopted a resolution on minimal-diversity class-action legislation that is consistent with the position urged by the Advisory Committee and Standing Committee last year. The resolution was adopted on a joint recommendation of the Standing Committee and the Judicial Conference Federal-State Jurisdiction Committee. This is the first time the Judicial Conference has recognized that minimal-diversity jurisdiction may prove useful in addressing the challenges posed by overlapping, duplicating, and competing class actions. The Judicial Conference has properly refused to advance more specific suggestions, leaving the details to be developed by Congress.

Minutes

The minutes of the October 3-4, 2002 meeting were approved.

Local Rules Project

The Standing Committee launched the Local Rules Project nearly twenty years ago. Congress was concerned then, and continues to be concerned, about the proliferation of local court rules. Local rules are authorized by statute, 28 U.S.C. § 2071, and have proved very useful in addressing details of practice that are too fine for resolution by national rule and that may accommodate distinctive local circumstances. At the same time, local rules may surprise even local practitioners and often prove confusing to lawyers from other districts. And local rules are adopted without review by Congress. Earlier phases of the Local Rules Project identified several good practices developed in local rules and led to adoption of these practices into the national rules. Problem rules were identified and addressed by the individual districts. The impetus was provided for adopting the requirement that local rules conform to a uniform numbering system developed by the Judicial Conference.

After this beginning, the Local Rules Project has once again undertaken a massive catalogue and survey of local rules. Even on a conservative approach to counting, there are nearly 6,000 local rules. Mary Squiers has completed the catalogue and has come a long way with a report that seeks to identify local rules that may be invalid because they violate the command of § 2071, repeated in Civil Rule 83, that local rules must be, as Rule 83 says, "consistent with — but not duplicative of — Acts of Congress and rules adopted under 28 U.S.C. §§ 2072 and 2075." The first phase of the report focuses on relationships between local rules and the Civil Rules. One hundred forty-six pages of this Report were presented to the Standing Committee in January. The Standing Committee has asked the several advisory committee reporters to review this work, and has asked that the work and the Reporters' comments be presented to the Civil Rules Committee.

Discussion of the Local Rules Report began by examining three general areas of inquiry. How far should the Standing Committee pursue perceived inconsistencies between local rules and national rules? What level and type of duplication deserves challenge? How frequently should the Judicial Conference attempt to develop "model" "local" rules?

Inconsistency between a local rule and a national rule or statute may be apparent. But few district courts are likely to defy controlling law in this way. Inconsistency is more likely to involve

an attempt to limit discretion conferred by a national rule, or more vaguely to interfere with the "spirit" of a national rule. Local rules of this sort may be adopted in response to wide and persisting differences among judges of a single court. Achieving consistency in local practices may be a valuable goal. We may not wish to adopt an approach that challenges every practice that may seem to depart from the subtler implications of national law.

Another dilemma arises when a local rule is both inconsistent with a national rule and better than the national rule. One recent episode provides a clear illustration. The Ninth Circuit Judicial Council, surveying local rules within the Circuit, found many rules that authorize a direction to submit proposed jury instructions before trial begins. Those rules are inconsistent with Civil Rule 51. But when the Ninth Circuit suggested that Rule 51 should be amended to authorize these local rules, the Advisory Committee concluded that there is no reason for disparity among district courts — and that Rule 51 should be amended to authorize all districts to follow this practice. This amendment is now pending in Congress. An older illustration is provided by the numerical limits on numbers of Rule 33 interrogatories. The Rule 33 limits were adopted after years of experience with different local rules that were at least arguably inconsistent with Rules 26 and 33.

The interrogatory limits illuminate another dimension of the inconsistency dilemma. Local rules may provide excellent tests of the desirability of new rules. These tests cannot meet the criteria of rigorous social science, but they nonetheless can provide information far more valuable than intuition and imagination. The Civil Justice Reform Act reflected a great faith in the value of local experimentation. Not long ago, the Advisory Committee considered amending Rule 83 to permit limited-time experiments with local rules inconsistent with the national rules. The idea was put aside, without finally determining its worth, for fear that it would be inconsistent with the § 2071 direction that local rules be consistent with the national rules.

Duplication of the national rules also presents some complications. It is indeed undesirable simply to incorporate large portions of a national rule in a local rule — at best much time is wasted, and at worst the omissions may mislead. Inaccurate paraphrasing is at least as bad. Some duplications, on the other hand, may be useful guides. The Report, for example, notes that 24 districts direct that their local rules must be construed consistently with the national rules and statutes. Although these provisions duplicate § 2071 and Rule 83, they can be important reminders to practitioners who have not thought to look to those sources or who may fear that the local district is not sympathetic to those constraints. Another example is provided by local rules that state that the local arbitration plan is voluntary. Although the underlying statutes make it clear that arbitration is voluntary, a reminder that the court is aware of this fact can provide useful reassurance.

Model rules also present problems. Many difficulties arise if they are drafted by Rules Enabling Act bodies. The full Enabling Act process is bypassed, losing the important contributions made by many different actors. One of the actors bypassed in the model rule process is Congress, a fact that may stir genuine concern both in Congress and the rules committees. Careful development of model local rules, moreover, could distract a rules committee from its central responsibility to attend to the national rules. There even is an inherent contradiction in choosing to work toward uniformity through model local rules, not a national rule.

If it is generally unwise for a national rules committee to sponsor a model local rule, the alternatives are even more fragile. Other Judicial Conference committees, or judicial administration officers, act completely outside the national rules-making process. The danger to the national rules is apparent.

These observations are not meant to deny any role for model rules. Model local rules may be useful as to topics that are not addressed by national rules and that do not seem likely to be soon addressed by national rules. The model rule on attorney conduct is a good example. Years of study by the Standing Committee's project on Federal Rules of Attorney Conduct show that these questions do not yield readily to national rulemaking.

Professor Coquillette noted that the Local Rules Project Report on local civil rules is continuing, and that action will be taken carefully.

Judge Scirica explained further that the troubling instances of inconsistency or duplication will be pointed out to the chief district judges. The circuit councils may become involved. Inevitably there will be some disagreements over the findings of inconsistency or duplication. But it seems likely that satisfactory resolutions will be reached in most cases. The Standing Committee is not now asking for formal reactions by the advisory committees, but all advice is welcome.

Judge Levi observed that one important problem arises when there is no national rule and an aggressive local rule takes on a complicated and sensitive problem. One example might be posed by the local rule in the District of South Carolina that appears to prohibit sealing any settlement agreement filed with the court. A flat-out bar on sealing would be very troubling, given the compelling reasons for protecting privacy and the occasional need to file a settlement agreement. But the force of the local rule is drawn by another local rule that permits a judge to depart from any other local rule when there is good cause. They do permit sealed settlement agreements to be filed when there is good reason. Another illustration is provided by a local rule that prohibits an attorney who seeks to represent a class from seeking out class members before the class is certified. That direction does not seem inconsistent with Rule 23, which is silent on the issue, but it deals with a very important aspect of class-action practice.

Judge Scirica added further cautions about the approach to local rules. The project may identify rules that should be adopted as national rules. On the other hand, the project — like Rule 83 and § 2071 — does not deal with "standing orders." Vigorous attempts to cabin local rules could easily drive distinctive local practices into standing orders or even further underground.

Professor Coquillette concluded this discussion by stating that it is important to remember that the focus of the Local Rules Project is on assisting the district courts. Mutual education is important.

Legislation Report

John Rabiej noted that the Administrative Office has focused its energy on three areas of legislation: minimal-diversity class-action bills; a Senate "sunshine" bill; and the e-government act.

In the class-action area, the Senate Judiciary Committee has reported out S. 274. Action by the Senate could come soon. HR 1115 seems to differ from S. 274 only by retaining a right to appeal a certification decision. The chair of the House Judiciary Committee is interested in pursuing this bill.

Senator Kohl has introduced a "sunshine" bill in each Congress for several years. In the past, the bill has been resisted primarily because of its restrictions on Civil Rule 26(c) protective orders.

Attention in the Senate is now being focused on sealed settlement agreements. The District of South Carolina local rule has drawn publicity. The Federal Judicial Center is studying the incidence and use of settlement agreements that are filed under seal; a report on the study's progress will be made at this meeting.

The electronic government statute has been enacted. It requires that in a few years the public have access to all electronically filed cases. The judiciary is working on implementing electronic filing; all courts should have the necessary equipment by 2006. The statute requires that all local rules be posted on the court's web site; almost all districts do that now, and post standing orders as well.

The electronic government statute also requires the Supreme Court to adopt rules that protect privacy. The judiciary is seeking amendment of the statute provision that requires courts to accept unredacted documents. Some courts now, under Judicial Conference policy, require redaction of social security numbers. Legislation has been introduced to undo the statutory provision, and to delete the requirement to adopt court rules. The Federal Judicial Center is working on these privacy issues, particularly for the Court Administration and Case Management Committee, which has primary Judicial Conference jurisdiction in these matters.

The concern with redacted documents arises in part from the Department of Justice's wish to submit unredacted documents as well as redacted documents. It believes that the full unredacted document may become relevant in a later proceeding, and prefers that the court be required to keep it rather than force the parties to keep it.

It was noted that the question of filing unredacted documents ties to our agenda item on Civil Rule 12(f). As electronic filing takes over, it becomes increasingly important to define what it means to "strike" a portion of a pleading. It also becomes important to know just what electronic capabilities the court systems have, or can develop.

Style Project

Subcommittees A and B have worked through Civil Rules 1-7.1 and 8-15 respectively. After further revisions by the Standing Committee Style Subcommittee, these rules are ready for consideration by the Advisory Committee. The goal is to approve these drafts with a recommendation to the Standing Committee for publication. Publication, however, need not be this summer. Instead, additional styled rules will be accumulated for publication in a larger package. It may prove desirable to publish a total of three packages over the course of the project. The length of the comment period to be set for each package remains to be decided.

Rule 1. Earlier style drafts called for the "economical" determination of every action. The present draft reverts to the present rule, calling for "inexpensive" determination. The change back to the present rule was made for fear that "economical" may change the meaning — indeed, the reason for considering "economical" was the weary belief that few actions are determined inexpensively.

The committee decided that "and proceeding" should be added at the end, so the rule will call for the just, speedy, and inexpensive determination of "every action and proceeding." This addition will make the second sentence congruent with the first. The Style Subcommittee suggested that "and proceeding" should not be added because it "doubts whether speed and thrift are as relevant to proceedings as actions." Those doubts themselves seem to reflect a substantive concern. Present

Rule 1 calls for these good things in "all suits of a civil nature." That embraces every event that is governed by the Civil Rules. Rule 1 now extends to anything that would be characterized as a "proceeding" rather than an action. One example is a Rule 27 petition to perpetuate testimony before an action can be brought. It was argued that now there are proceedings that are not "suits of a civil nature," so the adoption of "and proceeding" broadens the rule. The proponent of this argument, however, conceded that it is a good thing to broaden the rule in this way, and that the good thing is within the scope of the Style Project. Other proponents of adding "and proceeding" adhered to the view that in fact Rule 1 now applies to all actions and proceedings and it would change its meaning to omit "and proceeding."

Style Rule 1 was approved, with the addition of "and proceeding."

Rule 2. Style Rule 2 was approved.

Rule 3. Style Rule 3 was approved.

Rule 4. It was agreed that throughout the rules, it is proper to substitute "minor" for "infant." As old understandings fade, there is an increasing risk that "infant" will be mistaken to mean a person of very young years, not the intended meaning of anyone not yet legally an adult.

Style Rule 4(c)(3) reflects a change urged by Subcommittee A. The second sentence now says that the court must direct service by a marshal or by someone specially appointed if the plaintiff is authorized to proceed under 28 U.S.C. § 1915 or § 1916. This expresses the intended meaning better than the original direction that an "appointment" must be made. The new Style Draft was accepted without change.

(Later discussion of Rule 12(a)(1)(A)(ii) led to adoption of a motion that Rule 4(d)(3) be amended to conform to an amendment of Style Rule 12: "until 60 days after the date when the request [for a waiver] was sent — or until 90 days after the request [for a waiver] was sent if the defendant was addressed outside any judicial district of the United States.")

Rule 4(e) is one illustration of a global question that remains under consideration by the Style Subcommittee. The rules refer in seemingly haphazard fashion to statutes, laws, federal, United States, Constitution and laws, Constitution or laws, and so on. For the time being, the style drafts carry forward the present language, although "United States" is substituted for federal. If further research makes it seem safe, a uniform expression will be adopted.

Rule 4 presents puzzling variations in the use of "shall" and "may" in describing the modes of service. Rule 4(e), for example, says that service "may be effected." So does Rule 4(f). Rule 4(g), on the other hand, says service "shall be effected." So do Rules 4(h), (i)(1), and (j); 4(i)(2) says "is effected." Professor Rowe's research suggests that the distinctions were deliberate, but that it is difficult to guess what distinctions were intended. The change to "may," "shall," and "is effected by," occurred about ten years ago. The central notion seems to be that the listed methods are the only valid methods of service. There is much to be said for adhering to "must" as the uniform command. But Professor Carrington, who was the Advisory Committee Reporter at the time, recalls clearly that the distinctions were deliberate. The underlying purpose of the distinctions, however, has been lost.

It was asked whether the best expression would be: "to serve an individual, a party must," and so on. That seems less jarring than to say that you must serve an individual — a plaintiff may

name multiple defendants, intending to serve some only if others cannot be served. This practice is so well established that the present language is not likely to be read to mean that all named defendants must be served, but clear expression seems important.

Professor Kimble suggested that any departure from the present words, whether they be may or must, would be substantive.

The Committee voted to adhere to the language of the present rule. Style Rule 4 will reflect "may" or "must" according to the present rule.

The Style Draft of Rule 4(e) refers to an individual "who has not waived service." The present rule refers to an individual "from whom a waiver has not been obtained and filed." The filing requirement is substantive and cannot be deleted from the Style Rule. The Committee voted to restore "filed." The Style Subcommittee may develop an expression more graceful than the present rule. One possible alternative is illustrated in the materials: " an individual — other than a minor, an incompetent person, or a person whose waiver of service has not been filed — may be served * * *." This might be further improved, for example by referring to "a person for whom a waiver of service has not been filed," dispelling any implication that the description is limited to a person who has waived service, but whose waiver has not been filed.

Other Style Rule 4 questions were discussed. It was decided that Style Rule 4(a)(1)(C) should not be expanded to include a requirement that the summons list an e-mail address — that would be a substantive addition. It also was decided that the rearrangement of provisions in Style 4(d)(1) does not create any implication that a plaintiff has a duty to seek a waiver of service. The reference in Style 4(i)(1)(B) to "a copy of each" is clearly limited by context to mean a copy of the summons and of the complaint. No change need be made.

Style Rule 4(i)(4), drawing from present Rule 4(i)(3), inadvertently refers to allowing a "plaintiff" a reasonable time to cure a failure to serve. A party other than a plaintiff may need to effect service under Rule 4(i). Style 4(i)(1), (2), and (3) all say "party." In each of three places in (i)(4), this should become "party": the court must allow a party a reasonable time if (A) the party has served either the Attorney General or the United States Attorney, or if (B) the party has served an officer or employee of the United States.

With these changes, Style Rule 4 was approved.

Rule 4.1. Again, it was noted that the references to a United States "statute" or "law" will be considered further as the Style Project proceeds. The Style Subcommittee was asked to consider whether the caption should be "serving other process," in line with the caption of Rule 5 and the captions for Rule 4 subdivisions.

Style Rule 4.1 was approved.

Rule 5. The Committee recommended a change in Style Rule 5(a)(1)(E), so it would read: "(i) a written notice, appearance, demand, or offer of judgment, or (ii) a similar paper."

It was observed that present Rule 5(a) provides for service "upon each of the parties." Style Rule 5(a) calls for service "on every party." Does "each" mean "every"? Rule 68(a), for example, directs service of an offer of judgment on "the adverse party." Is service required on every party by

Rule 5(a)? A committee member stated that in his practice experience, an offer of judgment is served on all parties. The Committee did not make any recommendation on this question.

Style Rule 5(c)(1)(B) says that when a court orders that designated pleadings not be served on other defendants, crossclaims and the like "will be treated as denied or avoided by all ~~other~~ parties who are not served * * *." Present Rule 5(c) refers to "other" parties. The Committee agreed that "other" parties should be restored unless the change is clearly justified by showing that there is no change in meaning and that the present meaning is better expressed by "who are not served."

Style Rule 5(d)(2)(A) says that a paper is filed by delivering it "to the clerk." The present rule refers to the "clerk of court." It was asked whether an unelaborated reference to "clerk" might be read to mean "law clerk." Professor Kimble noted that the Style Rules refer to "clerk" throughout. It was observed that the Appellate Rules uniformly refer to the circuit clerk. the Bankruptcy Rules refer to the bankruptcy clerk, and Bankruptcy Rule 1001 includes a definition. Further discussion suggested that in this particular instance, there may seem to be a change of meaning if we delete "of court." The Committee voted to restore "of court," but only in Style Rule 5(d)(2)(A). The Style Subcommittee suggested "court clerk." This was discussed as a question of style. "Clerk" can remain in the other rules, at least until they are considered individually.

Style Rule 5(d)(2)(B) says that a paper is filed by delivering it to a judge who agrees to accept it for filing. Present Rule 5(e) says that "the judge may permit the papers to be filed with the judge." It was asked whether the change is proper — does it change meaning, and in any event should it suffice to persuade any judge of a multi-judge court to accept a paper for filing when the case has been assigned to another judge? It was observed that the present rule was written before common adoption of individual assignments, and that some courts still do not have individual assignments. A committee member suggested that in practice it may be important to be able to file with the first judge who can be found. The judge's role, moreover, is one that does not interfere with the assigned judge's control of the case: all the judge does is note the filing date on the paper and promptly send the paper to the clerk. There is no risk that by accepting the paper for filing the filing judge is interfering with the assigned judge's authority to determine whether the filing occurred after a binding deadline or was otherwise ineffective. A motion to substitute "the" judge for "a" judge failed.

Rule 5 was approved.

Rule 6. Rule 6(b) is an early illustration of an issue that recurs throughout the Style Project. The present rule says that "the court for cause shown may at any time in its discretion" act in described ways. The Style Rule has restored "in its discretion" after an original omission, and continues to substitute "for good cause" for "for cause shown." The style consultants believe that it is better to rely on "may" to carry all the freight that the present rules express through "in its discretion," "for good cause," "on terms," "if justice so requires," and like terms. "May" suffices to express discretion, and all of the factors that influence an exercise of discretion to do the right thing. Present Rule 8(c), for example, says that the court may treat a mistaken designation as if it were correct "on terms, if justice so requires." Style Rule 8(c) says simply that the court may do so.

It was observed that "may" means that there is authority to do something. That does not always mean that the court can refuse to do it.

It was asked whether the variations in expression reflect differences of meaning in the present rules. The reply was that many of the present rules provisions were expressly bargained for in the rulemaking process. A further observation was that although the style proponents may be right in theory, these rule provisions have been crafted deliberately and should not all be changed lightly.

Looking specifically to Rule 6(b), it was noted that "for good cause" tells lawyers what they need show to persuade the judge to extend time. It is not enough simply to ask. The rule is much used. It should not be changed. The Style draft has it right.

Turning to Style Rule 6(b)(2), it was noted that present 6(b) says that the court "may not" extend the time limits set by specified rules. The Style draft says "must not." The committee voted to return to "may not," recognizing that this issue may be revisited on a global basis as the project continues.

With the change in Rule 6(b)(2), Style Rule 6 was approved.

Rule 7. Two Rule 7(a) questions were discussed.

First, present Rule 7(a) calls for an answer to a crossclaim "if the answer contains a cross-claim." Style Rule 7(a)(3) omits the limit that the answer contain a crossclaim. Deleting the limit seems to expand the meaning of the present rule, a step not to be undertaken in the Style Project even if it seems a good idea. A crossclaim is not itself a pleading, but under Rule 13(g) is only something that may be set out in a pleading. The problem is that a crossclaim may appear in a pleading other than an answer. If a defendant counterclaims against two plaintiffs, for example, either plaintiff may wish to crossclaim against the other in its reply to the counterclaim. More exotic examples may occur as well. A reply to a crossclaim is a good idea wherever it occurs.

Judge Thrash pointed to present Rule 12(a)(2), which states that "[a] party served with a pleading stating a cross-claim against that party shall serve an answer thereto * * *." This existing provision provides ample authority to restyle Rule 7(a) so that it conforms to the direct command to answer a crossclaim no matter what pleading sets it out. The Committee agreed that Rule 7(a) should call generally for an answer to a crossclaim. The Committee Note will explain that deletion of "if the answer contains a cross-claim" is appropriate to reconcile the two rules.

A proposal to further revise the structure of Rule 7(a) was referred to the Style Subcommittee for action in time for submission to the Standing Committee in June.

Style Rule 7(b) presents a thorny problem. Present Rule 7(b) requires that a motion be in writing, and provides that the writing requirement "is fulfilled if the motion is stated in a written notice of the hearing of the motion." Style Rule 7(b) omits any reference to a written notice that includes the motion.

One part of the difficulty is that most courts do not set motions for hearing. That might suggest that there is no need to carry forward a provision dealing with written notice of a hearing. But there are hearings on some motions. Rule 6(d) requires that a written motion and notice of hearing be served not later than 5 days before the hearing. Some efficiency can be gained by preparing and serving a single document with a single caption, statement, and notice of hearing. Several members noted that in many courts it is common to do this in one paper.

It was concluded that the Style Draft can stand. The Committee Note will state that the statement about combining the motion and notice of hearing in a single document was deleted as redundant. A single document can serve both purposes without need for an express reminder.

Rule 7(b) also illustrates a common question. Present Rule 7(b)(3) states that all motions shall be signed in accordance with Rule 11. Style Rule 7 omits this statement as redundant. Rule 11 applies to written motions by its own express terms. It was urged that the cross-reference should be restored. Many people think of Rule 11 as a "pleading" rule. It is useful to remind them that it applies to motions as well. A rejoinder was offered — present Rule 7(b)(3) is confusing, because it seems to imply that all motions must be in writing. Oral motions are proper in some circumstances, as Rule 7(b) expressly recognizes. The cross-reference "is both redundant and infelicitous."

The theme was repeated. Rule 11 is valuable. We should not assume that all lawyers will remember that Rule 11 applies to written motions as well as to pleadings. It is valuable to remind them.

The same cross-reference question is raised by Rules 8(b) and (e), each of which redundantly reminds the reader that Rule 11 applies to all pleadings. It may be urged that the cross-reference is valuable in each place. Lawyers tend to think of Rule 11 first and foremost as a rule designed to cabin over-eager plaintiffs. Motions, answers, and inconsistent pleadings may each deserve explicit reminders. Each cross-reference, moreover, may reflect specific "deals" that were made in amending each of the different rules. The deals of once-upon-a-time, however, may have faded from memory. There is no need to honor all old compromises after the passions that forged them have disappeared.

A particular difficulty was urged with respect to the Bankruptcy Rules. The Bankruptcy Rules have their own "Rule 11." Other rules, however, may incorporate the Civil Rules that cross-refer to Rule 11. These indirect cross-reference incorporations could become confusing in bankruptcy practice.

A motion to restore the cross-reference in present Rule 7(b)(3) failed. The explanation in the draft Committee Note included in the agenda materials provides adequate protection.

Style Rule 7 was approved.

Rule 7.1. Rule 7.1 raises a question of the need to maintain style consistency among the different sets of Rules. Rule 7.1(a) now requires a disclosure statement by a party "to an action or proceeding in a district court." None of these words is necessary. Rule 1 applies the Civil rules to all actions or proceedings in a district court. But the Criminal and Appellate Rules have parallel language. The question whether this redundancy should be carried forward was referred to the Style Subcommittee for disposition.

Style Rule 7.1 was approved.

Rule 8. Discussion of Rule 8 began with the distinction between "aver" and "allege." For the present, the Style Rules will adhere to the word in the present rule — when the present rule says "aver," the Style Rule will say "aver." And the use of "allege" will be carried forward when it appears in the present rule.

Style Rule 8(b)(5) offers a change from the present rule's "lacks knowledge or information sufficient to form a belief," to become "lacks sufficient knowledge or information to form a belief." It was suggested that the language of the present rule is deeply embedded in practice, and approaches "sacred phrase" status. The order of words may have meaning. The Committee voted to restore the language of the present rule.

It was noted that Subcommittee B considered a change in Rule 8(c). The draft suggested that "comparative negligence" be added to supplement the increasingly antiquated reference to contributory negligence. Comments on the draft suggested the conceptual superiority of referring to comparative responsibility. Any change was rejected for fear of substantive consequences.

Style Rule 8(c)(2) substantially simplifies the present rule. The present rule says that when a party mistakenly designates a counterclaim or defense, "the court on terms, if justice so requires, shall treat the pleading as if there had been an appropriate designation." The Style Rule says simply that the court "may" do so. The Committee, recognizing the global issues involved with the use of "may" to signify discretion and the exercise of discretion by imposing conditions, voted that the Style Subcommittee should redraft the Style rule to include something about "terms" and justice so requiring.

The Style Subcommittee also was asked to consider whether to delete "inconsistency" from the caption of Rule 8(d).

Style Rule 8 was approved, subject to the Style Subcommittee's reconsideration of 8(c)(2).

Rule 9. Style Rule 9(a)(2) provoked renewed discussion of the difference — if any — between an allegation and an averment. The present rule calls for a "specific negative averment." Some Committee members prefer "allegation," including those who have changed their minds on this issue as the Style Project continues. To them, "aver" seems antiquated. Others find a nuanced distinction. Some dictionaries give "aver" a stronger meaning. Garner's dictionary says that "aver" "has its place in solemn contexts — it should not be lightly used." Garner says that "[t]o allege is formally to state a matter of fact as being true or provable, without yet having proved it. The word once denoted stating under oath, but this meaning no longer applies. * * * Allege should not be used as a synonym of assert, maintain, declare, or claim. Allege has peculiarly accusatory connotations. One need not allege only the commission of crimes; but certainly the acts alleged must concern misfeasances or negligence." Some of the uses in the present rules seem questionable. Rule 23.1, for example, describes what the complaint is to allege. But it also requires verification, a level of solemnity that is better matched by aver. If we are to make distinctions at this level, we must be very careful. The only way to make sure that meanings are not changed is to carry forward, as the current Style drafts do, whichever word appears in the present rule. For the time being, the drafts will adhere to the present rule. But this question remains open to further consideration as the Style Project goes forward. "Specific negative averment" will remain in Rule 9(a)(2). But "and" will be changed to "that," or perhaps "which": "a party must do so by [a] specific negative averment ~~and~~ that must state any supporting facts * * *"; or "by [a] specific negative averment, ~~and~~ which must state * * *."

The question posed by Rule 9(b) is whether there should be any restyling, beyond changing "shall" to "must." The Style Draft as it stands now seems to do no harm. It was agreed that despite the intense scrutiny that regularly fixes on Rule 9(b), the Style Draft changes are acceptable.

Style Draft Rules 9(c), (d), and (e) all simplify the corresponding present rules. The present rules say "it is sufficient to" plead in the described way. The Style Draft says in each place that a party "may" plead in the described way. The change alters the meaning. The present rule says expressly that such pleading suffices. The Style Draft does not. The Committee voted that the sufficiency concept should be restored. The Style version should find a graceful way to say: "It suffices to aver generally," and so on.

Rule 9(h)(3) provided the occasion for a reminder that the Style Subcommittee continues to consider the question of cross-references within a single rule. The current Style draft of (3) cross-refers to all of subdivision (h) by saying: "within this subdivision." Alternatives include: "this subdivision (h)"; "subdivision (h)"; Rule 9(h)(1); and still others.

With these changes, Style Rule 9 was approved.

Rule 10. Style Rule 10(a) includes a change that was not before Subcommittee B: the pleading must have a caption with ~~stating~~ the court's name * * *." It was agreed that the change is a question of style, and some preferences were expressed for adhering to "with."

So too, it was agreed that the Style Rule 10(b) change from "To facilitate clarity" to "If it would promote clarity" is a matter of style within the discretion of the Style Subcommittee.

Present Rule 10(c) says: "A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." An earlier Style draft dropped any reference to writing or an instrument. Writing has been added back: "A~~n~~ written exhibit attached to a pleading is a part of the pleading for all purposes." Discussion of these changes began by asking whether the word "instrument" is broad enough to cover any written exhibit, or whether dropping "instrument" broadens the meaning of the rule. Is "instrument" used in a narrow sense to denote such documents as a contract or a deed, or does it cover any writing? What about a photograph or a drawing?

Turning to "written," it was suggested that it is a good idea to treat nonwritten exhibits as part of the pleading. A videotape of an allegedly defamatory telecast would be an example — the court should be entitled to view the tape and rule that the offending statements were not defamatory. But deleting "written" is a matter of style only if we are confident that Rule 10 now embraces an exhibit in any medium that can be "attached" to a pleading.

A motion to delete "written" from the Style rule failed.

It was noted that Rule 10(c) does not limit what can be attached as an exhibit. It only addresses the question whether the attachment can be treated as part of the pleading. The most obvious consequence is consideration on a Rule 12 motion without need to convert to summary-judgment procedure. A motion was made to restore two thoughts from present Rule 10(c): "A copy of any written instrument which is an exhibit * * *." It was suggested that "which is an exhibit" is not needed — "a copy of any written instrument attached to a pleading is a part of the pleading for all purposes" says it all. This motion carried, subject to final styling by the Style Subcommittee.

With these changes, Style Rule 10 was approved.

Rule 11. The present Style Draft of Rule 11(a) restores a present-rule word that had been deleted from earlier style drafts: "Unless a rule or statute specifically states otherwise * * *." The restoration

was welcomed. A change in Style Rule 11(b)(1) also was approved, deleting three words: "unnecessary delay or expense ~~in the litigation~~."

Rule 11(c) now provides that the court may impose a sanction "upon the attorneys, law firms, or parties that have violated * * * or are responsible for the violation." Style Rule 11(c) calls for a sanction "on the attorney, law firm, or party that violated the rule." The Guidelines call for drafting in the singular. But that makes it all the more important to restore "any," to make it clear that sanctions may be imposed on each of multiple violators. This is not style alone. A motion to restore "any" was adopted.

Present Rule 11(c)(1)(A) introduces the safe harbor added in 1993 by saying that a motion for sanctions "shall not be filed * * * unless." Style Rule 11(c)(2) says the motion "may be filed * * * only if." The Style Rule change was challenged. The emphasis provided by "shall not be filed unless" was important in 1993. Rule 11 is very closely read by the bar. We should be reluctant to change it. Rule 11 is so important that even the "flavor" of present drafting should be protected. A motion to restore the emphasis of "shall not be filed unless" was adopted.

With these changes, Style Rule 11 was approved.

Rule 12. Discussion of Rule 12 began by noting that Subcommittee B found many problems in Rule 12 that cannot be fixed within the limits of the Style Project. Rule 12(b), for example, says that if a responsive pleading is permitted, a motion asserting any of seven enumerated "defenses" must be made before pleading. But Rule 12(h) says that some of those same defenses may be raised later. This and other internal conflicts seem to present matters of substance. An effort will be made to redraft Rule 12 as a "Reform Agenda" item in time to meet or beat adoption of the Style Rules.

The Style Draft of Rule 12(a)(1)(A)(ii) was questioned for clarity and fidelity to the present rule. A motion was adopted to rewrite it: "within 60 days after the request [for a waiver] was sent, or within 90 days after the request [for a waiver] was sent if the defendant was addressed outside any judicial district of the United States." A parallel change should be made in Rule 4(d)(3).

The question was raised whether Style Rule 12(a)(3) should be modified to adhere more closely to the present language. The present language, adopted in 2000, refers to suit against a government employee "sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States." The Style Draft changes this to "acts or omissions occurring in connection with duties performed on behalf of the United States." It was pointed out that the draft language may imply actual performance in a way that the present language does not. This question was dispatched by observing that the analogous provision in Rule 4(i) has been changed by the Style Draft in the same way as Rule 12(a)(3), and no one has objected to the change in Rule 4(i) Rule 12(a)(3), indeed, was amended in 2000 only to parallel the simultaneous Rule 4(i) amendment. The Style Draft stands as it is.

Present Rule 12(e) provides for a motion for a more definite statement made "before interposing a responsive pleading." This timing element is missing from Style Rule 12(e). The question whether it should restored went in two directions. One was the observation that in some courts it is common practice to file both an answer and a motion for a more definite statement. The theory seems to be "this is my answer if I have properly unraveled this incomprehensible complaint, but if I have failed to understand I should have a more definite statement." The other direction suggested that the motion should be made before a responsive pleading, and that this practice so

inheres in the rule that the present statement is redundant. To file a responsive pleading is to show that the party can reasonably frame a responsive pleading. After brief further discussion the question was dropped without any motion to change the Style Draft.

Subcommittee B originally asked whether an earlier draft of Style Rule 12(h)(3) adequately emphasizes the court's obligation to raise the question of its own subject-matter jurisdiction. The revised Style Draft does nothing to weaken this long tradition, and can stand as it is.

With the change in rule 12(a)(1)(A)(ii), Style Rule 12 was approved.

Rule 13. Style Rule 13 was approved.

Rule 14. The Style Subcommittee was asked to consider whether a few more words may be deleted at the beginning of Style Rule 14(a)(1): ~~After the action is commenced,~~ A defending party may * * *."

A style protest was voiced. The second sentence of Rule 14(a)(1) begins with "But." That is jarring. We should avoid it when possible. The Committee did not recommend any change.

Present Rule 14(a) allows impleader more than 10 days after serving the original answer only on motion "upon notice to all parties." An earlier Style Draft carried forward the notice provision, but it has been deleted. It was asked whether this explicit reference to the notice requirement that Rule 6(d) attaches to all written motions should be deleted. Third-party practice is confusing and confused. The redundancy with Rule 6(d) has always been there, and it may serve a valuable function as a clear reminder. Perhaps there is no confusion now about the notice requirement, but deletion might lead to eventual confusion. This concern was met with the response that one purpose of the Style Project is to delete redundant cross-references. The Committee Notes will all say that there is no change in meaning. Although there will be an interval in which lawyers compare old rule language to new Style Rule language, courts will be alert to prevent changes of meaning. A motion to restore the notice provision failed.

As a matter of style, the Style Subcommittee was asked to consider dividing the lengthy final sentence of Style Rule 14(c)(2) into two sentences.

Style Rule 14 was approved.

Rule 15. It was observed that in many courts there is no meaning in the provision in Rule 15(a) that cuts off the right to amend once as a matter of course if the action is on the trial calendar. These courts do not have a trial calendar. This question was discussed by Subcommittee B, however, and it was decided that no change should be made. Any change would alter the meaning of Rule 15(a). Some courts still have a trial calendar.

It was noted that the final sentence of present Rule 15(d) provides for pleading in response to a supplemental pleading "if the court deems it advisable." Style Rule 15(d) changes "deems" to "considers." The two words feel different. "Deems" seems to imply a finding. "Considers" is a lesser word. No response was made to this observation.

The protest about beginning a sentence with "but" in Style Rule 14(a)(1) was renewed by protesting the decision to begin the last sentence of Style Rule 15(d) with "And." There was no reaction beyond the observation that this is modern style.

Style Rule 15 was approved.

Rules 1-15: With the revisions to be made in some of the rules, the Committee voted to submit Style Rules 1 through 15 to the Standing Committee in June for approval for publication together with such additional Style Rules to be submitted later as will make a convenient package for the first Style Rules publication.

Rule 5.1

28 U.S.C. § 2403 directs a court of the United States to certify to the Attorney General the fact that the constitutionality of an Act of Congress affecting the public interest has been drawn in question. Certification also must be made to a state attorney general when the constitutionality of a state statute affecting the public interest is drawn in question. Certification is not required, however, if "the United States, or any agency, officer or employee thereof" is a party, or the "State or any agency, officer, or employee thereof" is a party.

The § 2403 requirement is supported by the final three sentences of Civil Rule 24(c). The first two of these sentences repeat the command of § 2403. The last sentence directs a party challenging the constitutionality of legislation to call the court's attention to the court's "consequential duty."

Appellate Rule 44 implements § 2403 in terms that depart in several directions from present Civil Rule 24(c). During the publication period for the Appellate Rule 44 amendment that added Appellate Rule 44(b), expanding Rule 44 to deal with state statutes as well as federal, a United States District Judge commented that the Civil Rules should be amended to provide better notice of the § 2403 obligation. The apparent source of concern is that Rule 24(c) is part of the intervention rule, and is more likely to be consulted by a nonparty who wishes to join a pending action than by a party who is framing an action.

A draft Rule 5.1 has been prepared to locate the § 2403 obligation in a more visible place in the rules. The draft also addresses the question of establishing parallels with Appellate Rule 44 as part of the continuing quest to increase the concurrence of provisions that address the same issue in different sets of rules. The draft has been revised several times in consultation with Department of Justice staff.

The draft presented with the agenda materials expands to some extent the certification obligations imposed by § 2403. Although it duplicates Appellate Rule 44 in some respects, it also departs from Rule 44 in several respects. The Department of Justice believes that the departures are justified by the differences between district-court litigation and appellate litigation. It is most important to ensure notice to the Department at the trial-court stage so that it can exercise the statutory right to intervene and participate in building the record that presents the constitutional questions. Notice at the appeal stage is important primarily in cases that have not already come to the Department's attention.

The agenda draft has been sent to the Appellate Rules Committee, but they meet in mid-May and have not had an opportunity to respond to the draft.

Although it has been suggested that the Committee Note might describe the reasons for any deviations that are made from Appellate Rule 44, the draft Note does not do that. To the extent that different provisions may be recommended, it should suffice to make the case for differences in the Report to the Standing Committee.

Presentation of the Rule 5.1 draft was accomplished by noting the ways in which it departs from § 2403 and the ways in which it departs from Appellate Rule 44.

Both the Rule 5.1 draft and Appellate Rule 44 depart from § 2403 in at least three ways.

First, each applies to a party who questions the constitutionality of a statute. Section 2403 applies when the constitutionality of a statute is drawn in question. There may be a difference in tone and meaning. Constitutional questions frequently are raised in a conditional and subordinate way by arguing that a statute should be interpreted so as to avoid the need to confront constitutional questions that might be raised by alternative interpretations.

Second, § 2403 applies only to a statute "affecting the public interest." Both draft Rule 5.1 and Appellate Rule 44 delete this restriction, requiring notice when a challenge addresses any Act of Congress or state statute. This expansion of the statutory certification requirement flows from the belief that the Attorney General should be the first to determine whether an act affects the public interest. The court retains control at the stage of determining whether § 2403 establishes a right to intervene.

Third, § 2403 does not require notice to the Attorney general if a United States officer or employee is a party. Both Appellate Rule 44 and draft Rule 5.1 require notice when an officer or employee is a party, but is not sued in an official capacity. With respect to an Act of Congress, the United States Attorney General often will have notice under Civil Rule 4(i) of an action against a United States officer or employee in an individual capacity, but not always.

Draft Rule 5.1 departs from Appellate Rule 44 in six ways, one of them drawing from the provisions of Civil Rule 24(c).

First, draft Rule 5.1 provides greater detail than Rule 44 in addressing the notice that a party must file. The notice must state the question and identify the pleading or other paper that raises the question.

Second, draft Rule 5.1 goes beyond the Rule 44 requirement that the notice be filed with the court. It also requires that the notice be served on (or perhaps sent to) the Attorney General. Service would be accomplished in the manner provided by Civil rule 4(i)(1)(B), which calls for certified or registered mail. The draft does not substitute this requirement for the court's § 2403 to certify the fact of the challenge to the Attorney General, but adds to it. The Attorney General thus gets notice twice, once from the party who raises the question and once from the court. This dual-notice requirement was drafted because the Department of Justice wishes to make quite sure that notice comes to its attention in timely fashion.

Third, adhering to the statute, draft Rule 5.1 provides that the court certifies the question to the Attorney General. Appellate Rule 44 transfers the certification duty to the clerk. (It may be that on appeal it is easier to substitute the clerk for the court because Rule 44, in common with draft Rule 5.1, dispenses with the need to determine whether the challenged statute affects the public interest. The substitution may be complicated, however, by the need to determine whether a United States officer or employee who is a party has been made a party in an official capacity.)

Fourth, draft Rule 5.1 explicitly provides that a court that raises a question as to the constitutionality of a statute must certify that fact. Appellate Rule 44 is silent on this question, leaving the matter to interpretation of the § 2403 "is drawn in question" phrase.

Fifth, draft Rule 5.1 includes a specific provision for setting a time to intervene. Appellate Rule 44 has no similar provision.

Finally, draft Rule 5.1, adapting a provision in Civil Rule 24(c), provides that a party's failure to file the required notice, or a court's failure to make a required certification, "does not forfeit a constitutional right otherwise timely asserted." Appellate Rule 44 has no similar provision.

Discussion began by asking whether there is a difference between an "Act of Congress" and a statute, an issue that also was discussed by Subcommittee B in reviewing Style Rule 24(c). The Department of Justice believes that "Act of Congress," the statutory term, is broader than "statute." Even a private bill may affect the public interest. A Joint Resolution is not a statute, but it is signed by the President and has the force of law. The Department prefers to adhere to Act of Congress as the term used in Rule 24(c).

The Subcommittee B discussion was explored. Perhaps the least helpful term is "legislation," which is used in Rule 24(c) in an apparent effort to include both an Act of Congress and a state statute. "Legislation" is not a term used in official documents. It is not used in Title 1. "Legislation" also might refer to a bill that remains unenacted but within the ongoing legislative process.

Turning to the double notice requirement, it was noted that the Department prefers that a party be required to serve notice on the Attorney General, not merely to send notice. The Department has an internal mechanism for handling mail that includes return receipts — a return-receipt form of mail is the only added burden resulting from a "service" requirement. Ordinary mail may be lost in the maze, particularly if events recur in which mail must be screened for possible contaminating agents. The dual notice provision is justified. The court's duty to certify is set by § 2403. It is appropriate to impose an additional duty on the party. It should be remembered that defendants as well as plaintiffs may raise the constitutional challenge. Some local rules already impose some obligations on a party who raises a constitutional challenge.

It was observed that if the rule requires "service" on the United States Attorney General, it also should require service on a state attorney general.

Of the three drafts presented in the agenda materials, the Department of Justice prefers the first draft because the more compact second draft is written in a way that may cause confusion over the distinction between a statute and an Act of Congress — Rule 5.1(a) begins by addressing a challenge to an Act of Congress, but 5.1(a)(1) begins "if the statute is an Act of Congress." "[S]tatute" in this setting might be used to narrow the reference to Act of Congress. It was pointed

out, however, that this drafting issue could easily be addressed within the framework of the more compact draft.

The "official capacity" question was raised by asking about an action against a United States officer or employee in an individual capacity. Commonly the defendant seeks to have the United States assume the burden of defense, and Rule 4(i) requires service on the United States if the suit is in connection with the performance of duties on behalf of the United States. Why should notice be required in such actions? In response, it was noted that even when the Department of Justice has notice, it may decline to assume the defense. At times, unfortunately, an action against an individual employee may arise from a deliberate and clear violation of a plaintiff's constitutional rights. A constitutional question might be raised in such an action, and the Department should have notice of it.

Turning to a different issue, it was observed that § 2403 speaks of constitutionality "drawn in question." This language seems better than the draft Rule 5.1 reference to a party who questions constitutionality. "Drawn in question" refers more clearly to the conditional arguments often made in support of contending for a particular statutory interpretation. The argument will be that a different interpretation would raise a constitutional problem. "Drawn in question," further, can speak to the court's duty to certify a question when it is the court, not a party, that raises the question. The Department of Justice is aware of the shades of gray that are presented by the "drawn in question" language. There is always a risk that, confronted with a conditional argument addressed to statutory interpretation, a judge will adopt the challenged interpretation and hold the statute unconstitutional.

It was pointed out that it is easy to begin the rule in the active voice by addressing "a party that draws in question the constitutionality of" an Act of Congress or state statute. But if the rule is recast to address any action in which constitutionality "is drawn in question," it will be necessary to reframe the provisions that impose a notice duty on a party.

It was observed that many cases challenging a statute are filed by pro se parties. Many of them are dismissed without further ado. Drafting must take care not to interfere with the practice of threshold screening. And it was observed that many pro se litigants would love a rule that invites them to serve notice on the Attorney General. If the court dismisses the action at the beginning, there is little reason to burden the Attorney General with notice at all. By way of analogy, note that Rule 4 requires service by the marshal in in forma pauperis actions, but screening at the beginning protects against undue burdens. Screening also should remain useful in cases that present constitutional challenges to statutes. Some help might be found by inquiring into experience under similar state statutes — Pennsylvania, for example, has such a statute. In any event, the Department of Justice recognizes that the draft rule might expose it to notices from sophisticated pro se litigants, and is prepared to assume the burden of reviewing the notices to determine whether intervention is warranted.

The Committee Note should point out that the rule does not interfere with the court's authority to dismiss a constitutional challenge before notice or certification to the Attorney General. This formulation may help not only in cases that are dismissed at the very beginning, but also in cases that go forward to a conventional Rule 12 motion to dismiss, to strike, or for judgment on the pleadings. And it seems better than attempting to draft a provision that defers notice until the court has determined that the constitutional challenge has some potential merit. We do not want to impose such an obligation on the court, in part because it might complicate efficient pretrial procedure.

A separate question was asked: what should be done if the argument is raised in closing arguments? It was acknowledged that this is a difficult question that is not addressed by draft Rule 5.1, and that does not have a satisfactory answer under § 2403 itself. It may be important to direct notice to the Attorney General even if the question arises late in the litigation.

The "no forfeiture" provision provoked a question whether a court lacks authority to declare a statute unconstitutional if the § 2403 certification requirement has not been fulfilled. It was noted that the Department of Justice does encounter cases in which it finds out about the ruling only when the case is in the court of appeals. The Department has not seen the argument made that the judgment must be reversed solely for want of statutory certification. But it might argue for remand if there were a need to add to the record.

It was agreed that draft Rule 5.1 should not attempt to limit the court's § 2403 duty. The rules are properly addressed to parties more than to a court. But it should suffice to refer in the Note to the court's obligation when the question is raised by the court, not by a party. That provision in the draft can be deleted. The Department of Justice will act on certification of a question raised by the court with the same close attention as on certification of a question raised by a party. But there is no need to require service by the court — a notice sent by a court will not be overlooked.

It was asked whether an action must be stayed during the period set for intervention by the Attorney General. The draft rule does not address this point, and does not assume that the action should be stayed. Many pretrial proceedings may and should continue. As in the earlier discussion, one proper action may be to dismiss the constitutional challenge. The central concern is that the court should not act to hold an Act of Congress unconstitutional during the period set for intervention. If the action is dismissed, constitutionality is no longer drawn in question. Section 2403 establishes a right to intervene, not an obligation — the district court must be entitled to proceed with many matters before intervention.

Another observation was that the draft does not set a time limit for making the certification to the Attorney General. The Department of Justice does not believe that there should be a time limit. In the ordinary case there is plenty of time if a legitimate constitutional question is raised. There is time enough both for continuing district-court proceedings and for setting the time to intervene.

Another question addressed to the intervention draft asked whether it should say that the court "may set a time not less than 60 days" for intervention. Should the rule say "must"? It was tentatively decided that "must" is better. But account must be taken of the authority to dismiss a challenge not only before the court's certification but also soon after. Perhaps account also should be taken of the need for immediate action, at least on an interlocutory basis.

It was suggested that one way to begin Rule 5.1 would be: "Whenever the constitutionality of an Act of Congress is drawn in question the court must certify that fact to the United States Attorney General under 28 U.S.C. § 2403." If the rule continues to require notice by a party, this language might instead be used in subdivision (b).

The Committee voted to approve submission of Rule 5.1 to the Standing Committee with a recommendation for publication if the several revisions directed by the discussion can be satisfactorily implemented in time.

Rule 6(e)

Rule 6(e) provides that when a party is to act within a prescribed period after service, "3 days shall be added to the prescribed period" if service is made under Rule 5(b)(2)(B), (C), or (D). During comments on Appellate Rules amendments designed to integrate the Appellate Rules with the Civil Rule 6(a) provisions for counting time when the prescribed period is less than eleven days, the Appellate Rules Committee was asked to clarify the method of applying the 3 additional days. The Appellate Rules Committee referred the question to the Civil Rules Committee.

Several different methods of integrating the three-day addition with Rule 6(a) are possible. As an illustration, one of the times set by Civil Rule 15(a) for pleading in response to an amended pleading is "within 10 days after service of the amended pleading." The three days could be added to the 10 days, converting this into a 13-day period. The result would be to shorten the time allowed to plead, because intervening Saturdays, Sundays, and legal holidays are excluded from a 10-day period but not from a 13-day period. Or the 10-day period could be counted out to the end, and the added three days could be treated as an independent period for Rule 6(a) purposes, so that any intervening Saturdays, Sundays, or legal holidays are excluded. The result in some cases would be an extra-long period. Neither of these approaches seems sensible.

The two main choices appear to be to count the three days before the time to respond begins to run, or to count them after the time to respond has otherwise ended. There is an attractive argument that the three days should be counted before the time starts to run. The initial concern was that service by mail may take as much as 3 days to arrive. That concern has been extended to service by electronic means and other means described in Rules 5(b)(2)(B), (C), and (D). This approach results in less added time if service is made on a Wednesday, Thursday, or Friday because the intervening Saturday and Sunday are double counted.

The abstract argument for counting the three days at the beginning, however, fails to account for present practice. Informal surveys of practicing lawyers, including discussion at a meeting of the ABA Litigation Section leadership, shows that the overwhelming majority of practicing lawyers routinely add the 3 days after counting the initial period to a conclusion. This reaction represents a natural reading of the "3 days shall be added" language of Rule 6(e). The main reason to amend Rule 6(e) is to establish an authoritative, clear, and uniform answer that lawyers can rely upon. An amendment that conforms to the main course of current practice will be more effective than one that attempts to turn the tide.

The proposed Rule 6(e) amendment says "3 days are added after the prescribed period expires." The Committee voted to delete "expires" as redundant.

The draft Committee Note includes one paragraph explaining the amendment and a second paragraph that illustrates application of the amendment. Committee members thought the illustration very helpful, provided that it is accurate. District-court clerks will be consulted to ensure accuracy. If the illustration is accurate, it will be retained in the Note.

Discussion addressed the common reaction to this and like proposals that the time-counting rules are far too complicated. Lawyers need clear and simple rules that they can rely upon without worry and the risk of miscalculation. Why not eliminate all of the provisions for intervening "dies non" and simply adopt reasonable periods that are extended only if the final day falls on a Saturday, Sunday, or legal holiday? Beyond this common question others lurk. Any time period that runs

from service is difficult to administer because the court does not know when service occurs. Filing is a clearer and objective point. Electronic filing, moreover, is causing concern about "midnight filing." And what should be done about calculating a period that is set before, not after a prescribed event? Suppose a rule or order says that a party must act X days before trial, and the Xth day falls on a weekend? Must the act be taken on Friday (or earlier if Friday is a legal holiday), or may it be taken on the first day after that is not a Saturday, Sunday, or legal holiday?

These time-counting questions are not unique to the Civil Rules. It was noted that at some point it might be useful for the Standing Committee to create an ad hoc committee that draws from all the advisory committees to address these problems in a comprehensive way.

Rule 27(a)(2)

Rule 27(a)(2) provides that the notice of hearing on a petition to perpetuate testimony must be served on each person named in the petition as an expected adverse party "in the manner provided in Rule 4(d) for service of summons." Rule 4 was amended in 1993. Rule 4(d) no longer provides for service of summons, but instead governs waiver of service. The now superseded cross-reference must be corrected.

Correction is not as simple as might seem. The service provisions of former Rule 4(d) have been spread out among Rule 4(e), (g), (h), (i), and (j)(2). Some of the new subdivisions include modes of service that were not included in former Rule 4(d). None of them provided for service on a defendant outside the United States. A choice must be made whether to emulate as closely as possible the modes of service incorporated in former Rule 4(d), or instead to change the permitted modes. The need to make a choice forecloses disposition of this question in the Style Project.

The recommended decision is to incorporate all Rule 4 methods of service in Rule 27(a). The object is to get notice to as many expected parties as possible, and to get notice to them in a manner that is reliable and that signifies the importance of the event. As to a defendant in a foreign country, it is important to honor the national sensitivities that are reflected in the Rule 4 service provisions. Rule 27(a) provides sufficient protections both for the petitioner and for the expected adverse parties when service cannot be made with due diligence on an expected adverse party.

The committee decided that the cross-reference should be to all of Rule 4.

A recommendation to publish this change for comment was deferred so that the Style Project could finish its work on Rule 27(a)(2). Some advice was offered on the language that addresses appointment of an attorney to represent expected parties who cannot be served. Present Rule 27(a)(2) says the court shall appoint an attorney "who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent." Rather than change the first shall to must and the second to may, it was decided that "to" is better in each place: "to represent them, and, in case they are not otherwise represented, to cross-examine the deponent." Of course the Style Subcommittee and the Advisory Committee may settle on a structure that dictates a still different expression.

Rule 45(a)

Rule 45(a)(2), which governs a subpoena for attendance at a deposition, does not require that the subpoena state the method for recording the testimony. The deposition notice must state the

method for recording, so the deponent will know if the deponent is a party or is sufficiently friendly with a party. The deponent also has notice if another party designates another recording method, since Rule 30(b)(3) requires notice to the other parties and to the deponent. But in other circumstances the deponent may not be aware of the recording method until the time for the deposition. Advance notice may help the deponent to prepare mentally and emotionally. In addition, a deponent may have legitimate concerns about the recording method, leading to a disruptive last-minute request for a protective order.

The Discovery Subcommittee recommended that Rule 45(a)(2) be amended to state that a subpoena for attendance at a deposition "must state the method for recording the testimony."

The Committee recommended that the Rule 45(a)(2) amendment be published for comment. The Special Reporter, Reporter, and subcommittees will work to adapt all of Rule 45(a)(2) to Style Project conventions in time for presentation to the Standing Committee. The draft Committee Note may be shortened by the reporters and Discovery Subcommittee.

Supplemental Admiralty Rule G

Judge McKnight introduced the report of the Forfeiture Subcommittee. The Subcommittee has met twice by conference call to begin work on the current draft Admiralty Rule G that would govern civil asset forfeiture proceedings. There will be further conference calls, and perhaps at the end a face-to-face meeting. Research has been launched to address difficult issues. The impetus for this project comes from the Department of Justice, making it suitable to ask them to describe it.

Stefan Cassella described the evolution of the Rule G undertaking. A working group in the Department of Justice has developed this project. The purpose is to consolidate in one place all of the special procedures that apply to civil asset forfeiture. A similar project led to the adoption of Criminal Rule 32.2, which consolidates in one place all of the special procedures for criminal forfeiture.

The reason for placing forfeiture procedures in the supplemental rules for admiralty and maritime proceedings is that many forfeiture statutes provide that procedure is governed by these rules. "It is not an ideal fit." Once there were more admiralty proceedings than forfeiture proceedings. Now there are many forfeiture proceedings. Both admiralty practice and forfeiture practice will benefit from stripping forfeiture provisions out from the current admiralty rules and bringing them together in a single new rule. The terms "claim" and "claimant," for example have developed a distinctive meaning in admiralty practice, while they are used in forfeiture statutes in a different way. Separation will reduce the risks that different concepts will mistakenly be substituted for each other. The process of separating forfeiture practice from admiralty practice began with amendments that took effect in 2000, but more work remains.

A new rule will achieve better clarity. In addition, it will address topics not now addressed in the rules, such as expanded venue provisions, forfeiture of property located abroad, notice requirements, and other matters. A new rule can address matters that now are not addressed in any of the rules. And at times it may be feasible to fill in gaps in statutory language.

The several provisions of Rule G were then described.

Subdivision (1) states the application of Rule G. By incorporating the other admiralty rules

for matters not covered by Rule G, this subdivision incorporates the Rule A provision that the Civil Rules apply to the extent they are not inconsistent with the admiralty rules.

Subdivision (2) covers the complaint.

Subdivision (3) governs service of process, beginning with the arrest warrant. A judicial officer must make a probable cause determination if the property is not already in government possession. The distinctive statutory rules for initiating forfeiture of real property are incorporated.

Subdivision (4) governs notice — when it is to be published, and how. Special rules provide for publication as to property located in a foreign country. Publication on the Internet is provided. For the first time, there is a requirement that direct notice be served on any person "who, appearing to have an interest in the property, is a potential claimant."

Subdivision (5) covers responsive pleading — what does a claim have to say. The time for filing claim and answer are consistent with the Civil Asset Forfeiture Reform Act. This subdivision also carries forward the admiralty practice that requires that answers to interrogatories served with the complaint be served with the answer.

Subdivision (6) governs disposition of property, interlocutory sales, and like matters.

Subdivision (7) governs motion practice, including motions to suppress, standing issues, release for hardship, motions to dismiss, and excessive fines issues.

A question was asked about internet publication. It was noted that traditionally publication has been in newspapers, but that the statute does not specify the medium. More people have access to the internet than to any particular newspaper. The Department of Justice is considering the establishment of a web site that would list all property subject to forfeiture proceedings.

The requirement that a claimant file two separate documents, first a claim and then an answer, was addressed by noting that the statutes require both.

It was asked whether Rule G(8) expands the right to jury trial. It says that any party may request jury trial — does the government now have a right to jury trial? The Department of Justice believes that the government does have this right.

Discussion turned to a summary of the significant issues raised by draft Rule G. The issues noted were identified by drawing from two lengthy sets of comments submitted by the National Association of Criminal Defense Lawyers.

In order of Rule G subdivisions, the first issue that has provoked protest may be subject to resolution without much difficulty. Supplemental Rule E(2)(a) now requires that the complaint in an in rem action "state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading." Draft Rule G(2)(v) carries forward the particular pleading requirement, but omits the reference to a need to move for a more definite statement. The omission arose from a suggestion that the reference to a motion for a more definite statement is unnecessary, not from an attempt to change the meaning.

Draft Rule G(2)(c) carries forward the provision of Rule C(6)(c) that allows interrogatories to be served with the complaint. The Department of Justice believes that early discovery of issues that bear on standing to file a claim is important. Defense lawyers, on the other hand, fear that massive initial discovery requests may intimidate potential claimants, deterring them from filing a claim. Actual use of this procedure seems to vary from one district to another. It is possible that the Department's interests can be satisfied by providing a later time for serving interrogatories — one possible point would be after a claim is filed — or by limiting the nature of the issues that can be inquired into by interrogatories served before the time otherwise allowed by the Civil Rules. In part, these issues tie to the standing and related issues that begin with Draft Rule G(5).

G(3)(b)(ii)(A) and (C) provide that the warrant to seize property must be executed as soon as practicable unless the complaint is under seal or the action is stayed. Questions about this provision are really challenges to the propriety of sealing the complaint or staying proceedings after the complaint is filed. The Department of Justice believes sealing and stay orders are necessary at times to reconcile the needs of ongoing investigations with requirements for prompt filing. Limitations problems may require prompt filing. More exotic needs arise from the statute that allows all electronic funds to be treated as fungible for a period of one year, but that requires specific tracing of funds credited to an account more than one year before filing. But disclosure of the forfeiture proceeding may jeopardize an ongoing investigation or risk the very lives of undercover investigators. The challenge to this position is that filing and then sealing the complaint or staying the proceedings does not serve the purposes of the underlying statutes.

The Internet filing provision in Draft Rule G(4)(a)(v) also has drawn challenges. Internet filing as such is welcomed. But defense advocates also want print publication.

For the first time, Draft Rule G(4)(b)(i) provides for service of notice of the action and a complaint on a person who, appearing to have an interest in the property, is a potential claimant. G(4)(b)(ii) provides that service is to made "in any manner reasonably calculated to ensure that the notice is received, including first class mail, private carrier, or electronic mail." Although this is the first assurance of notice to be established by rules, adversaries argue that service should be made under Civil Rule 4.

Standing issues generate by far the greatest controversy. Draft Rule G(5)(a)(i) limits standing to contest the action to "a person who asserts an ownership in the property." This provision is avowedly designed to change present law. Several courts of appeals have ruled that claim standing is established by any interest that satisfies the minimal Article III injury-cause-redress tests. The Department of Justice is dissatisfied with these decisions. The reasons for dissatisfaction tie also to the motion-practice provisions in Draft Rule G(7)(b) and (d). The story begins with a change made in 2000 by the Civil Asset Forfeiture Reform Act. Until 2000, the government carried the initial burden by showing probable cause to forfeit the property. The claimant then had the burden of showing by a preponderance of the evidence that the property was not forfeitable or showing a defense. CAFRA now imposes the burden on the government to prove by a preponderance of the evidence that the property is forfeitable. If the government fails, it cannot retain the property unless it initiates a new forfeiture proceeding. The property must be returned to someone, and often the claimant will be the only person to receive it. The government believes that it should not be forced to the burden of proving forfeitability at the behest of someone who has no real interest in the property. The task of proving forfeitability may be difficult. The proof, moreover, may reveal information that jeopardizes continuing investigations or the identity of informants or undercover officers. In addition, the claim may be filed by a mere nominee for the purpose of concealing the

owner's identity. The government illustrates its concern by pointing to several cases. In one, a drug conspirator drove an automobile to a rendezvous with another conspirator and an undercover officer. The driver locked the car and handed the keys to the co-conspirator, who in turn handed them to the undercover officer. The Third Circuit assumed that the conspirator who acted to transmit the keys had standing because he had "possession" of the automobile by possessing the keys.

This concern with standing is expressed also in Draft Rules G(7)(b) and (d). G(7)(b) allows the government to move at any time before trial to strike a claim and answer for failure to establish an ownership interest in the property subject to forfeiture. The emphasis on "to establish" seems designed to require the claimant to offer sufficient evidence to meet a summary-judgment test. G(7)(d) allows a party with an ownership interest to move to dismiss the complaint "at any time after filing a claim and answer." This provision is designed to defeat the ordinary right to file a Rule 12(b) motion to dismiss before answering, and may be tied to the Draft Rule G(5)(b) provision that any objection to in rem jurisdiction or venue must be stated in the answer or will be waived.

These interlaced provisions are challenged on the basic ground that many interests other than "ownership" interests should support standing to claim. CAFRA establishes the "innocent owner" defense in 18 U.S.C. § 983(d)(6), and defines "owner" for this purpose to include one who has a leasehold, lien, mortgage, recorded security interest, or valid assignment. It also includes a bailee if the bailor is identified and the bailee shows a colorable legitimate interest in the property. This example is used to support the broader argument that any possessory interest should suffice. If property has been taken from a person's possession, or if a person has a right to possession, that should suffice to claim the property if the government cannot establish forfeitability.

Some objections also have been made to the Draft Rule G(7)(a) provision that a party with standing to contest the lawfulness of the seizure may move to suppress use of the property as evidence at the forfeiture trial. The theory is that suppression should be for all purposes, not merely trial use.

Draft Rule G(7)(e) addresses another new issue that has emerged from case law. It establishes a procedure for seeking mitigation of a forfeiture under the Excessive Fines Clause of the Eighth Amendment. The challenge to this provision rests on the assertion that the draft seeks to establish a procedure that Congress refused to adopt when it enacted CAFRA.

Following this summary it was noted again that the Forfeiture Subcommittee will plan further meetings by conference call or in person, and may seek more detailed discussion of Rule G at the October meeting. The Admiralty Rules do not come often before the Committee. When they are considered, the Department of Justice and the Maritime Law Association have provided important help. Former committee member Mark Kasanin and the Maritime Law Association believe that it is a good idea to separate forfeiture procedure from the other admiralty rules. This is important work. It also is controversial work and will be complicated. Some of the controversies are likely to be ironed out, but other areas are likely to remain controversial when the rule moves ahead to publication and comment.

Sealed Settlements

The subcommittee that is working on forfeiture also is working on the questions that arise when parties to an action seek to file a settlement agreement under seal. The Federal Judicial Center has agreed to study this practice.

Tim[othy?] Reagan provided an interim progress report on the FJC study. The study is focused on agreements that are filed with the court — confidential settlement agreements are common, but the study is not directed to those that are not filed with the court.

One phase of the study has been completed. Marie Leary has collected state statutes and local district rules. The state statutes tend to forbid sealed agreements with public agencies. Florida prohibits sealed agreements that conceal a public hazard. Sealing is often associated with good cause. Some rules require weighing interests, or implementation of the least restrictive alternative that accomplishes the desired protection. Some place time limits on sealing. Michigan prohibits sealing the order that directs sealing. The District of South Carolina prohibits filing settlements under seal. The Eastern District of Michigan says that a filed settlement agreement must be unsealed after two years, but the court staff find this difficult to implement because there is nothing in court records to designate which sealed materials are settlement agreements. Time limits on keeping sealed agreements are common, but seem to be motivated by storage concerns — return to the parties or destruction often are accepted alternatives to unsealing.

The study of the actual incidence of filed and sealed settlement agreements in federal courts is based on all cases terminated in 2001 and 2002. The study has been completed for seventeen districts.

The most common reason to file a settlement agreement is to facilitate enforcement. Filing may occur when the settlement is reached, but also occurs as an attachment to a motion to enforce a settlement. Occasionally a court transcript of a settlement conference is filed and sealed. Many cases involve minors and require court approval of the settlement.

It is common to seal the amount paid in settlement. At times trade secrets or other confidential information are protected.

Commonly the complaint is not sealed in the cases that accept sealed settlements for filing. Of 209 cases with sealed settlements, 3 (two of which were consolidated) sealed most or all of the record.

Public hazard may be involved in 10% to 15% of the cases with sealed settlements. Other people beyond the parties may be at risk.

The FJC study is not finished, but already has produced interesting results. Filed, sealed settlements seem to occur in a small proportion of federal cases.

An appendix to the interim report describes the cases on which information has been obtained to date. Some of them involve problems of the sort that give rise to concern about public hazards. But in most of these cases the file materials that are not under seal will reveal the nature of the perceived hazard. This is true of several of the product-defect cases described.

It was noted that public media are directing attention to sealed settlements. Concerns are expressed about dangerous products, bad doctors, and other risks. This subject deserves serious attention and work. The FJC work already is providing a solid basis for evaluating what federal courts are doing.

The state statutes and local district rules are in themselves good models to provoke consideration of a possible national rule. They address such topics as the standard to order sealing; the physical method of sealing; notice before deciding whether to seal; challenges by nonparties; the duration of the seal; and whether some kinds of agreements — such as those made with public entities — should never be subject to sealing.

It was noted that in Texas a settlement agreement involving a matter of public interest is always open. Anyone with standing can seek access. Indeed many of the state statutes that deal with public bodies seem to deal with all settlement agreements, not only those that are filed with a court.

A related confidentiality problem was described. Settlement agreements often require return of discovery materials and impose confidentiality obligations. The parties have used public processes to get the information, Rule 5 bars filing discovery materials before use in the action or court order, and the public interest is thwarted by destruction. The issue is not the need to reveal how much money the plaintiff got, but preserving the discovery information. This, however, is a different problem than the filed-and-sealed settlement agreement that is the sole focus of the current project.

In response, it was noted that a court may be asked to enforce an agreement to return or destroy discovery materials. The motion and all supporting materials are filed under seal.

It was noted that most settlement agreements are not filed. The parties simply stipulate to a dismissal with prejudice. If court review and approval of the settlement is required, the parties may file and seek to seal. There may be trade secrets involved. It is not clear that we need a rule.

The FJC study shows that it is common to find a court retaining jurisdiction for 60 days after the parties announce settlement. Then the settlement agreement is filed under seal as part of a motion to enforce the settlement.

The discussion concluded by noting that any approach to a rule dealing with sealed settlements must be sensitive to substantive issues. And there also may be questions of attorney conduct.

Discovery of Computer-Based Information

Professor Lynk delivered the report of the Discovery Subcommittee on discovery of computer-based information. At the October meeting the Subcommittee had thought that it might work toward draft rules for consideration at this meeting. The questions continue to evolve at a rapid pace, however, and it seems better to establish a clear rationale before going forward to the initial drafting phase.

A letter prepared by Professor Marcus was sent out to 250 persons and groups, inviting comments on e-discovery and rule language. Twelve responses were received. Because some of the responses were from organizations, it is clear that more than twelve people were involved. The responses were mixed. Some readers will be tempted to conclude that by and large it is defendants who think there is a problem in defining what should be produced, what depth of search is required, and so on while plaintiffs say that this topic is not suitable for rulemaking.

Further information was gathered at a meeting of the American Bar Association Litigation Section leadership.

Following an intensive October 2002 meeting, the Sedona Conference prepared a report and recommendations in March. Ken Withers of the Federal Judicial Center attended the meeting that was held to discuss the report, which may be amended in light of that debate.

The Federal Judicial Center has logged continuing education courses in electronic discovery. There are many and lengthy programs, with many sponsors. Since January 2001 there have been an average of more than two a week. The very emergence of this cottage industry suggests that there are problems that deserve attention.

The ABA 1999 Civil Discovery Standards address these problems. The need for Standards again suggests that there is a rules gap to be filled.

Local district rules also are emerging to address these questions. The emergence of local rules also suggests that the national rules are unclear or incomplete. Texas led the way in state-court rules.

The Discovery Subcommittee met in March by conference call. The meeting identified seven specific areas of research as the most promising topics to consider for draft rule provisions. Publication of proposed rules, if they progress to that stage, will attract and focus comment.

Professor Marcus described the seven areas to be studied, noting that the work is beginning without specific rules proposals in mind.

One group of proposals is for rules that tell the parties to discuss discovery of computer-based information at the beginning of an action. The Rule 26(f) conference is an obvious occasion. Rule 16(b) and Form 35 also might be amended. Simply directing discussion by the parties may be more useful than attempting to provide greater specificity.

A second group of proposals would amend Rule 26(a)(1) to require disclosures about each party's computer information systems. It may be desirable to require this form of disclosure before the Rule 26(f) conference in order to support intelligent discussion at the conference. Such early disclosure also may be useful to remind lawyers of the need to find out at the beginning what information resources a client has, and to help lawyers impress on clients the importance of drawing on those resources.

A third set of proposals address the definition of what is a document. There are some models to study. These issues tie to the question of heroic efforts — does deleted information count as a "document" if it is possible to retrieve it by special means? Are back-up tapes "documents"?

The form of production presents the fourth group of issues. Hard copy? The electronic version — and if so, in what form (and does software go with the production)? There are many databases of information that is constantly evolving, and that produce a "document" only in response to specific questions put at a specific moment. Often it is not feasible to produce the data base, but is feasible only to put the questions and deliver the response.

"Heroic efforts" frame a fifth and much-discussed group of issues. Most litigation does not justify a demand that every party do everything that is possible to retrieve information that is not

readily retrievable by means that track the ordinary course of business. It would be possible to begin with an assumption that no heroic effort is required, but to allow a judge to order it. The Texas rule looks to information reasonably available in the ordinary course of business. The ABA Standards treat this as a question of cost bearing, imposing special expenses on the requesting party.

Inadvertent privilege waiver presents a sixth issue, one that is not unique to discovery of computer-based information. The Committee last considered this question in October 1999, studying two different approaches for paper documents. This topic may deserve general study, remembering that 28 U.S.C. § 2074(b) requires affirmative action by Congress to give effect to a rule creating, abolishing, or modifying an evidentiary privilege.

The seventh topic identified for study is particularly complex. Many firms that expect to be asked for information in discovery want a "safe harbor" rule that tells them what information they must preserve. People that expect to ask for information want rules that assure that reasonable preservation measures will be taken. Creating a rule to address these concerns has never been attempted for paper documents. It will be difficult to attempt for computer-based information.

The Discovery Subcommittee has worked with these issues for more than three years. The time has come to attempt drafting.

Professor Lynk noted that the result is not prejudged by undertaking to draft possible rules. The drafting process itself will be very helpful in demonstrating what may be possible.

Brief discussion asked whether the "safe-harbor" project might attempt to define both what must be preserved and the time when the obligation to preserve arises. Many corporations have information policies. Whether it is feasible to offer useful guidance in court rules is unclear; record-retention policies are shaped by many concerns, including direct commands. The SEC, for example, has imposed explicit retention requirements for e-mail messages on some firms. It was noted that a court rule might attempt to create indirect incentives for record retention by creating consequences for information destruction. But great care should be taken in framing rules that address pre-filing activities.

The Discovery Subcommittee may have a meeting to review preliminary drafts before bringing them to the Committee. And at some point it may be useful to have an invitational conference. The Chicago conference on the Rule 23 proposals following publication in 2001 was helpful. An organized conference can be a valuable complement to the public comments and hearings.

Class-Action Subcommittee

Judge Rosenthal reported that the Class-Action Subcommittee is deliberately taking time before returning to the study of settlement classes. One reason for delay is to await emergence of the current Rule 23 amendments from Congress. Another is to see what comes of the pending minimal-diversity class-action bills. Information continues to be gathered on the impact of the Amchem and Ortiz decisions on the ability to certify settlement classes. Alternatives to the settlement-class proposal published in 1996 will be studied.

Professor Francis McGovern reported on the progress of attempts to find a legislative solution to asbestos litigation, with the thought that there may be some general lessons for settlement classes or some procedure akin to settlement classes.

Four legislative proposals are now converging into a single bill that may emerge in a week or two.

One bill is the long-pending "criteria" bill. This bill would alter state law, denying adjudication of no-symptom cases. It would affect aggregation.

A second bill would establish a defined contribution trust fund. The model is close to the Ortiz settlement. Those suffering the worst illnesses would be compensated first. If the funds available in one year are not adequate to compensate all claims, the lower-ranked claims will spill over to future years.

A third model adopts a distribution plan that sets a specific sum for each asbestos disease. The amount of contributions from businesses and insurers would be set to pay all claims.

A fourth model is "§ 524(g) without bankruptcy." Section 524(g) now permits bankruptcy relief. It requires a 75% vote in favor of a plan. Each asbestos victim is assigned one vote, weighed at $1. A future claims representative is appointed. The result usually is that tort claimants emerge owning 51% of the debtor. The debtor emerges free from any liability for asbestos injuries. (Experience with the Manville Trust helps to shape this. The trust kept getting new contributions, creating a "catch 22" situation in which the victims owned most of Manville and added contributions in effect came from the victims themselves.) This proposal would allow § 524(c) protection without bankruptcy. Judge Schwarzer made a similar proposal many years ago, calling it "product-line bankruptcy."

An asbestos study group of manufacturers, insurers, plaintiffs' lawyers, and the AFL-CIO is working toward a coalescence of these approaches. The current outline calls for $5 billion of annual contributions; defined benefits; and protection of the kind that § 524(g) gives to companies that have gone into bankruptcy. They contemplate an Article I court to oversee the trust fund; a claims administrator; payments from both manufacturers and insurers, perhaps balanced 50/50; and defined tiers of contribution. The system would entirely displace the tort system, achieving finality.

There is an optimistic feeling that the various interested groups may be able to agree. The insurers are anxious that insurance company payments be set in proportion to the reserves that have been set aside. The AFL-CIO likes the idea. There is some ongoing debate about the level of contributions — the manufacturers and insurers think the total should be $90 billion, while plaintiffs want $140 billion. (Differences at this level are likely to be worked out in a range from $100 to $110 billion if other issues are resolved.) The plaintiffs' bar is split, with the mesothelioma-cancer bar upset with caps. ATLA thinks the system makes sense. There is a 25% limit on attorney fees (though 25% of $100 billion or so adds up to a considerable sum).

Although the proponents are optimistic, the opponents think this approach can be blocked. There is not much time to act before the politics of the 2004 election cycle take over.

What might all of this suggest for Civil Rule 23 reform? The 75% approval requirement in § 524(g) is a lot like an opt-in class. Perhaps a similar class-action rule could be developed, allowing

class disposition only if most class members choose to opt in. The fen-phen settlement has survived Amchem-Ortiz; some claimants are outside the settlement, and the defendants seem to accept that. Massive though not universal support from plaintiffs may suffice to free us from Amchem-Ortiz. And the approach saves us the burdens of litigation.

There are "some obvious constitutional problems" to be confronted. Legislation rather than Enabling Act rules reform may be necessary. But it is important to find a vehicle to resolve mass-tort cases. It is very cumbersome to undertake settlements on a company-by-company, plaintiffs'-firm-by-plaintiffs'-firm approach.

It would be possible to adapt the opt-in approach by disaggregating into subclasses based on injury type. As compared to present § 524(g) practice, it would be possible to weight votes by severity of injury.

It was noted that the present system gives great power to the lawyers who represent unimpaired claimants — they have a lot of votes, and you have to give them a lot of money to get their votes. But this phenomenon may be qualified by the observation that "the aggregation is among the lawyers": The bulk of mesothelioma cases are held by lawyers who also have the bulk of the unimpaired cases. Account also should be taken of the proposition that there should not be an incentive to find more cases to have more votes.

This opt-in settlement-vehicle approach might well be limited to mature torts where there is a strong basis for assuming liability.

It was suggested that it would be difficult to create a rule that applies to cases other than personal-injury cases.

On a separate issue, the Federal Judicial Center reported briefly on the current stage of its study of the factors that influence plaintiffs and defendants to choose between state and federal courts. 2,100 survey instruments have been sent to lawyers in 1,000 cases. 569 responses are in hand, and a "dynamite" letter has been sent to encourage more responses. Data-gathering will close at the end of May. The ABA Litigation Section was helpful in testing the survey.

The Class-Action Subcommittee will continue its work.

Rule 50(b)

One Rule 50(b) proposal has held a place on the agenda for a few years. A new proposal has been advanced by the Committee on Federal Procedure of the Commercial and Federal Litigation Section of the New York State Bar Association. The new proposal addresses the requirement that a renewed motion for judgment as a matter of law after a jury verdict be supported by a motion made at the close of all the evidence. This requirement was built into Rule 50(b) in 1938 as part of the process of fictionalizing the Seventh Amendment requirements that at first seemed to prohibit judgment notwithstanding the verdict and then permitted judgment n.o.v. if a proper ritual were observed. It was carried forward, albeit in somewhat obscure language, in the 1991 amendments.

The current proposal is to amend Rule 50(b) to permit a post-verdict motion to be based on any pre-verdict motion for judgment as a matter of law that satisfies Rule 50(a).

After 65 years of fiction, it cannot be said that the Seventh Amendment requires this procedure unless some clear functional need can be found. In attempting to explain the persistence of the rule, courts regularly rely on the desire to be sure that the party opposing the motion has had clear notice of the asserted deficiency in the evidence. Clear notice may lead to the offer of sufficient evidence. Notice also affords a court the opportunity to seize the advantages that occasionally attend direction of a verdict on part or all of a case before submission to the jury. In addition, clear notice makes it easier to resist a verdict-winner's argument that rather than judgment notwithstanding the verdict there should be a new trial that affords an opportunity to supply sufficient evidence.

The argument for revising Rule 50(b) runs in two directions. First, the clear-notice function can be — and commonly is — served by means other than a motion at the close of all the evidence. Second, the present rule is frequently overlooked in the flurry of activity at the close of trial, creating a risk that judgment must be entered on an unsupported verdict.

These observations have prompted many appellate opinions to struggle with attempts to mollify the seemingly rigid close-of-all-the-evidence rule. The most common event is that a defendant moves for judgment as a matter of law at the close of the plaintiff's case and forgets to renew the motion at the close of all the evidence. Omission of the later motion is most likely to be forgiven if the trial court expressly took under submission the motion made at the close of the plaintiff's case and if the defendant offered very little evidence before the close. The language of the opinions is not always consistent, even within a single Circuit, and relief is not often granted from the close-of-the-evidence requirement.

Amendment of Rule 50(b) deserves careful study. The central question is whether the party opposing the post-verdict motion is sufficiently protected by a motion made before the close of all the evidence. Protection seems to be provided by any motion that satisfies Rule 50(a), which permits a motion for judgment as a matter of law "[i]f during a trial by jury a party has been fully heard on an issue." A motion that satisfies Rule 50(a) should provide ample notice of the asserted evidentiary failing, and a motion before the close of all the evidence provides a better opportunity to cure the failure. A post-verdict motion under Rule 50(b) can be supported only by grounds urged in support of the pre-verdict motion, avoiding the risk of unfair surprise.

Discussion began with the observation that lawyers are very concerned about the close-of-all-the-evidence requirement. Some tape reminders to the counsel table. There is so much going on at the close of trial that this is a real issue — the problem is not so much that some lawyers are unaware of the requirement as that knowledge does not always translate into a reflexive renewal of an earlier motion when there are many other urgent tasks to accomplish. There is a natural instinct not to repeat a motion that has already been made, particularly if the court has carried the motion forward or has suggested that the question should be decided after the verdict.

Another reason for neglecting the Rule 50(b) limit is that local state practice may be different. In Texas, for example, a post-verdict motion can be made without support in any pre-verdict motion.

One question that will need to be tended to arises when the decision whether to grant judgment as a matter of law is affected by evidence introduced after the Rule 50(a) motion. It is clear that if all of the evidence in the trial record supports the jury verdict, the verdict must stand even though judgment as a matter of law would have been appropriate at the time the Rule 50(a) motion was made. Such is the clearly established rule when an "erroneous" denial of summary judgment is followed by a trial that supplies jury-sufficient evidence. But it is more difficult to know

what to do if the Rule 50(a) motion should properly be denied when made, but should be granted on the basis of later evidence that must be believed by the jury even though unfavorable to the party opposing the motion. If the evidence was obviously unfavorable, there may be sufficient notice to alleviate any concern that a later motion would alert the party opposing the motion to the need to provide additional evidence. But that may not always be so.

Employment-discrimination cases often create Rule 50(b) issues because of the burden shifting that results from making a prima facie case, followed by the defendant's explanation of the employment action. The defendant's explanation often provides evidence unfavorable to the plaintiff, and at times it may be evidence of a quality that the jury must believe. The "pretext" argument becomes entangled with all of this.

The Rule 50(b) proposal will be carried forward for further consideration at the October meeting.

Indicative Rulings: Rule "62.1"

The Appellate Rules Committee referred to the Civil Rules Committee a proposal by Solicitor General Waxman to adopt a rule articulating the "indicative rulings" practice that has been adopted by most circuits.

The problem addressed by this proposal arises most frequently when an appeal is pending from a truly final judgment that is intended to leave no further occasion for district-court action. A party seeks to vacate the judgment by motion under Rule 60(b). Most circuits rule that because the judgment is pending in the court of appeals the district court lacks jurisdiction to grant the motion. But they allow two sorts of action by the district court. The district court may deny the motion, clearing the way for the appeal to proceed without complication. Or the district court may indicate that if the court of appeals is inclined to remand the action, the motion would be granted. The court of appeals then can decide whether to remand for further district-court proceedings.

Although this practice is well established in most circuits, three reasons were offered to support adoption of a new court rule. First, there is some variation among the circuits. Some courts will not allow a district court to deny a Rule 60(b) motion unless the case is remanded. There is no reason for disuniformity; a uniform national rule seems desirable. Second, many lawyers are not aware of the proper practice, which seems to be well-known only to veteran appellate lawyers and the courts of appeals. Third, the occasions for district-court motions have increased since the Supreme Court ruled that a court of appeals need not automatically vacate a district-court judgment that is mooted by a settlement pending appeal. Settlement pending appeal often is possible only if the district-court judgment is vacated. Settlement often is desirable. It is useful to have a clear procedure that directs the parties to move in the district court for a ruling that the district court will vacate the judgment if the case settles and is remanded from the court of appeals.

These questions arise most frequently under Rule 60(b), but it does not seem sufficient to react by amending Rule 60. Rule 60(a) now permits correction of a clerical error during the pendency of an appeal if the district court acts before the appeal is docketed, and also allows correction after the appeal is docketed "with leave of the appellate court." This model might be extended to Rule 60(b), or varied. But these questions also arise in other settings. One setting arises on § 1292(a)(1) appeals from interlocutory orders granting an injunction, whether a preliminary injunction or a permanent injunction issued in continuing proceedings. Civil Rule 62(c) allows the

district court to "suspend [or] modify" the injunction, but some courts of appeals have ruled that the district court cannot vacate the injunction. By its terms, Rule 60(b) applies to relief from a "final judgment." Still further complications may arise from judgments that are appealed under § 1291, but that are "final" only by the courtesy of such doctrines as the collateral-order rule. Collateral-order appeals from interlocutory orders denying official immunity are common. Rule 54(b) establishes open-ended authority to revise the district-court ruling, and there is no reason to invoke the much more limited provisions of Rule 60(b). The purpose of permitting appeal, indeed, is to spare the defendant the burdens of pretrial and trial proceedings; action by the district court pending appeal can serve that purpose. An independent rule thus seems desirable.

Discussion began with the observation that these questions do not arise frequently, but that they are a mess when they do arise. A clarifying and uniform rule would be useful. Many district judges do not recognize that their own circuit permits them to deny a motion pending appeal.

It was further noted that the court of appeals may prefer to retain jurisdiction to proceed with the appeal after the district court takes the indicated action. This course is particularly useful when the district court intends to amend the judgment without further extensive proceedings. It may be useful to add a provision for retained jurisdiction to the draft rule.

Drafting also must take care to ensure that a new rule is not misread to establish a new category of motion for relief from a judgment.

Draft Rule 62.1 will be carried forward for further consideration at the October meeting.

Next Meetings

The next regular meeting of the Advisory Committee was set for October 2-3 at a place to be determined.

Style Rules 26-37 and 45 are proceeding at a rate that should make it possible to schedule meetings of Subcommittees A and B toward the end of August or early September.

Respectfully submitted,

Edward H. Cooper
Reporter

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

SAMUEL A. ALITO, JR.
APPELLATE RULES

A. THOMAS SMALL
BANKRUPTCY RULES

DAVID F. LEVI
CIVIL RULES

EDWARD E. CARNES
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

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

FROM: **Honorable Jerry E. Smith, Chair**
Advisory Committee on Evidence Rules

DATE: **May 5, 2003**

RE: **Report of the Advisory Committee on Evidence Rules**

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on April 25, 2003, in Washington, D.C. At the meeting the Committee approved a proposed amendment to Evidence Rule 804(b)(3), with the unanimous recommendation that the Standing Committee approve the proposed amendment and forward it to the Judicial Conference. Part II of this Report summarizes the discussion of this proposed amendment. An attachment to this Report includes the text, Committee Note, statement of changes made after public comment, and summary of public comment for the proposed amendment to Rule 804(b)(3).

Part III of this Report provides a summary of the Committee's long-term projects. A complete discussion of these matters can be found in the draft minutes of the Spring 2003 meeting, attached to this Report.

II. Action Item

Recommendation To Forward the Proposed Amendment to Evidence Rule 804(b)(3) to the Judicial Conference

The Evidence Rules Committee has voted unanimously to propose an amendment to Rule 804(b)(3) in order to correct the potential unconstitutionality of that Rule in cases where declarations against penal interest are offered against a criminal defendant. The amendment is made necessary by Supreme Court decisions analyzing the relationship between the Confrontation Clause and hearsay admitted against an accused under a hearsay exception. Specifically, in *Lilly v. Virginia*, 527 U.S. 116 (1999), the Supreme Court declared that the hearsay exception for declarations against penal interest is not "firmly rooted" and therefore the Confrontation Clause is not satisfied simply because a hearsay statement fits within that exception. Furthermore, under *Lilly* and *Idaho v. Wright,* 497 U.S. 805 (1990), a statement offered under a hearsay exception that is not firmly-rooted will satisfy the Confrontation Clause only when it bears "particularized guarantees of trustworthiness." And the *Lilly* Court held that this standard of "particularized guarantees" would not be satisfied simply because the statement was disserving to the declarant's penal interest. To satisfy the Confrontation Clause, the government must show particularized guarantees of trustworthiness beyond the fact that the statement is disserving. Yet Rule 804(b)(3) as written requires only that the prosecution show that the statement is disserving to the declarant's penal interest. It does not impose any additional evidentiary requirement.

Thus, after *Lilly*, Rule 804(b)(3) as written is not consistent with constitutional standards. To the Committee's knowledge, no other categorical hearsay exception has the potential of being applied to admit evidence that would violate the accused's right to confrontation. Other categorical hearsay exceptions, such as those for dying declarations, excited utterances and business records, have been found firmly-rooted.

The Evidence Rules Committee has determined that codifying constitutional doctrine provides a protection for defendants against an inadvertent waiver of the reliability requirements imposed by the Confrontation Clause. A defense counsel might be under the impression that the hearsay exceptions as written comport with the Constitution. Indeed, this is a justifiable assumption for all the other categorical hearsay exceptions in the Federal Rules of Evidence, which have been found "firmly rooted"–the exception being Rule 804(b)(3). A minimally competent defense lawyer might object to a hearsay statement as inadmissible under Rule 804(b)(3), thinking that an additional, more specific objection on constitutional grounds would be unnecessary. If the hearsay exception and the Confrontation Clause are congruent, then the risk of inadvertent waiver of the constitutional reliability requirements would be eliminated. See, e.g., *United States v. Shukri,* 207 F.3d 412 (7th Cir. 2000) (court considers only admissibility under Rule 804(b)(3) because defense counsel never objected to the hearsay on constitutional grounds).

The language added to the amendment concerning "particularized guarantees of trustworthiness" is carefully chosen to track the language used by the Supreme Court in its

Confrontation Clause jurisprudence. The addition of this language would guarantee that the Rule would comport with the Constitution in criminal cases, without imposing on the government any evidentiary requirement that it is not already required to bear.

The Evidence Rules Committee carefully considered the public comment on the proposed amendment and held a public hearing on the amendment as part of its Spring 2003 meeting. While the comments received generally were favorable, the Committee agreed with two important suggestions for improvement to the proposed amendment:

1. The proposal released for public comment would have extended the corroborating circumstances requirement to declarations against penal interest offered in civil cases. The Committee has deleted this language in response to public comment indicating that it would make it unreasonably difficult to present some important evidence in certain civil cases, and reasoning that the extension was not supported by the original intent of Rule 804(b)(3).

2. The proposal released for public comment did not attempt to provide guidance on the difference between the two evidentiary standards set forth in the Rule, i.e., "corroborating circumstances" (applicable to statements against penal interest offered by the accused) and "particularized guarantees of trustworthiness" (applicable to statements against penal interest offered by the prosecution). The Committee has added a paragraph to the Committee Note that distinguishes the two standards, in response to public comment suggesting the need for more guidance to courts and litigants.

The proposed amendment to Rule 804(b)(3) is set forth as an attachment to this Report.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 804(b)(3), as modified following publication, be approved and forwarded to the Judicial Conference.

III. Information Items

A. Long-Term Project on Possible Changes to Evidence Rules

Two years ago the Evidence Rules Committee, as part of its long-range planning, directed its Reporter to review scholarship, caselaw, and other sources of evidence law to determine whether there are any evidence rules that might be in need of amendment. At its April 2002 meeting, the Committee reviewed a number of potential changes and directed the Reporter to prepare a report on a number of different rules, so the Committee could take an in-depth look at whether those rules require amendment. The Committee's decision to investigate those rules is not intended to indicate that the Committee has agreed at this time to propose any amendments. Rather, the Committee determined that with respect to those rules, a more extensive investigation and consideration are warranted.

At its October 2002 meeting, the Committee began to consider the Reporter's memoranda on some of the rules that have been found worthy of in-depth consideration. The Committee agreed that the problematic rules should be considered over the course of four Committee meetings and that if any Rules are found in need of amendment, the amendment proposals would be delayed in order to package them as a single set of amendments to the Evidence Rules. This would mean that the package of amendments, if any, would go to the Standing Committee at its June 2004 meeting, with a recommendation that the proposals (again, if any) be released for public comment.

The Committee continued its consideration of reports on a number of possibly problematic evidence rules at its Spring 2003 meeting. The goal of the Committee was not to vote definitively on whether to propose an amendment to any of those rules, but rather to determine whether to proceed further with the rules as part of a possible package of amendments. Thus, a "no" vote from the Committee meant rejection of any proposed amendment. A "yes" vote meant only that the Committee was interested in further inquiry into a possible amendment and might consider and approve possible language for an amendment at its Spring 2004 meeting.

In addition, the Committee considered and rejected a proposal by a member of the public to amend Evidence Rule 404(a)(1), as discussed below.

The Committee voted to reject the following proposals:

1. *Rule 106:* Commentators have suggested that Rule 106, the rule of completeness, should be expanded to cover oral as well as written statements. But the Committee determined that such a change would be unnecessarily disruptive to the order of proof at a trial. The Committee also investigated an apparent split of authority in the federal courts as to whether Rule 106 operates to

admit completing evidence that would otherwise be excluded as hearsay. After investigating this federal caselaw in detail, the Committee concluded that it was unnecessary to amend Rule 106 to specify whether the Rule is to operate as an independent hearsay exception. The costs of an amendment were found not justified, because the apparent conceptual disagreement among the courts has not made a difference in the results of any of the reported cases.

2. Rule 404(a)(1): The Committee received a request from a member of the public to propose an amendment to Rule 404(a)(1) "to explicitly authorize admission of character evidence to prove a trait of character when it is essential to a claim or defense." The Committee carefully considered the proposal and unanimously concluded that the proposed amendment did not meet the high threshold of necessity that the Committee imposes on amendments to the Evidence Rules. Rule 404(a) in its current form prohibits character evidence only when it is offered for a certain specific purpose: to prove "action in conformity" with the character trait. If the character evidence is offered to prove an element of a claim or defense, i.e., where character is "in issue", the evidence by definition is not being offered to prove conduct. Thus, character evidence offered to prove an element of a claim or defense is already admissible under the existing Rules. All federal courts have recognized this point and have uniformly admitted character evidence when character is "in issue."

3. Rule 803(6): At a previous meeting the Committee directed the consultant to the Committee, Professor Ken Broun, to prepare a report on the advisability of amending Evidence Rule 803(6) to codify the "business duty" requirement. The "business duty" requirement addresses a problem that arises when information recorded in a business record comes from outside the recording entity. If the person reporting from outside the entity has no "business duty" to report the information reliably, then there is a concern that the business record will contain a reliable recording of unreliable information.

After considering Professor Broun's report, the Committee concluded unanimously not to proceed with an amendment to Rule 803(6). Committee members agreed with Professor Broun that the courts have approached the question of "business duty" in a flexible and reasonable manner, with few if any conflicts in the caselaw. The Committee found it advisable to give this common law development an opportunity to continue without amendment of the Rule.

The Evidence Rules Committee voted to give further consideration to the following proposals:

1. *Rule 404(a)*: The Committee has agreed on tentative language for a possible amendment to Rule 404(a)(1) to clarify that character evidence is never admissible to prove conduct in a civil case. The text of Rule 404(a) seems to prohibit the circumstantial use of character evidence in a civil case, and yet two circuits have held that such evidence is admissible when a defendant is charged by the plaintiff with what amounts to criminal activity. The Committee will revisit this proposal at its meeting in Spring 2004.

2. *Rule 408:* The Committee is continuing to work on a possible amendment to Rule 408, the Rule that limits the admissibility of evidence of settlement and compromise. Currently there is substantial dispute in the courts over three important questions: a) whether evidence of a civil compromise is admissible in subsequent criminal litigation; b) whether statements made during settlement negotiations can be admitted to impeach a party for prior inconsistent statement; and c) whether an offer to settle can be admitted in favor of the party who made the offer. The Committee will give further consideration to possible language for a proposed amendment at its Fall 2003 meeting.

3. *Rule 410:* The Committee has agreed in principle that Evidence Rule 410—the rule that excludes most statements and offers made during guilty plea negotiations—should protect the statements and offers of prosecutors as well as defendants and defense counsel. Currently the Rule does not protect statements and offers of prosecutors from admissibility at trial. The Committee has determined that the policy of encouraging plea bargaining would be furthered by providing protection for the statements of all of the parties to a plea negotiation. The Committee will give further consideration to possible language for a proposed amendment at its Fall 2003 meeting.

4. *Rule 606(b):* Evidence Rule 606(b) generally excludes juror affidavits or testimony concerning jury deliberations. The rule is silent, however, on whether juror statements are admissible to prove that the verdict reported by the jury was different from that actually agreed upon by the jurors. Courts have generally allowed juror statements to prove errors in the reporting of the verdict, but there is dispute among the courts as to the scope of this court-created exception to the Rule.

At its Spring 2003 meeting the Committee discussed whether Rule 606(b) should be amended to account for errors in the reporting of the verdict, and if so, what the breadth of the exception should be. The Committee tentatively determined that an amendment to Rule 606(b) is justified because the courts have found an exception permitting proof of jury error even though no such exception is set forth in the Rule, and moreover because the courts are in dispute over the

breadth of that exception. Thus, an amendment would not only rectify a divergence between the text of the Rule and the case law (eliminating a trap for the unwary and the unpredictability that results from such divergence), but it would also eliminate a circuit split on an important question of evidence law.

The Committee also determined that if an amendment to Rule 606(b) is to be proposed, it should codify a narrow exception that would permit juror statements only to prove a clerical error in the reporting of the verdict. A broader exception that would permit proof of juror statements whenever the jury misunderstood or ignored the court's instruction was thought to have the potential of intruding into juror deliberations and upsetting the finality of verdicts in a large and undefined number of cases. In contrast, an exception permitting proof only if the verdict reported is different from that actually reached by the jury does not intrude on the privacy of jury deliberations, as the inquiry only concerns what the jury decided, not why it decided as it did.

The Committee tentatively decided to place a narrow amendment to Rule 606(b) on its list of a possible package of amendments that could be proposed in 2004. The Committee tentatively approved language providing that a juror may testify about whether "the verdict reported is the verdict that was decided upon by the jury." This language, and the advisability of an amendment to Rule 606(b), will be reconsidered by the Committee at its Spring 2004 meeting.

In addition, and as set forth in the Report to the Standing Committee in June 2002, the Committee has directed the Reporter to prepare memoranda on the following rules, to determine whether any changes to these rules are necessary:

Rule 607 (to consider whether the rule should be amended to prohibit a party from calling a witness solely to impeach that witness with otherwise inadmissible information).

Rule 609 (to consider whether to adopt the Uniform Rules definition of a conviction involving dishonesty or false statement).

Rule 613(b) (to consider whether to require a party to confront a witness with a prior inconsistent statement before it can be admitted for impeachment).

Rule 704(b) (to consider whether the rule should be amended to exclude only opinions of mental health experts).

Rule 706 (to consider certain stylistic suggestions and to determine whether to incorporate civil trial practice standards developed by the ABA).

Rule 801(d)(1)(B) (to consider whether the rule should be amended to provide that a prior consistent statement is admissible for its truth whenever it is admissible to rehabilitate the witness).

Rule 803(3) (to consider whether the rule should be amended to cover statements of the declarant's state of mind where offered to prove the conduct of someone other than the declarant).

Rule 803(5) (to consider whether the hearsay exception should cover records prepared by someone other than the party with personal knowledge of the event).

Rule 803(8) (to consider whether the language excluding law enforcement reports in criminal cases should be replaced by general language requiring that public reports are to be excluded if they are untrustworthy under the circumstances).

Rule 803(18) (to consider whether the "learned treatise" exception should be amended to provide for admissibility of "treatises" in electronic form).

Rule 806 (to consider whether the Rule should permit impeachment of hearsay declarants with prior bad acts that could be used for impeachment were the declarant to testify at trial).

Rule 901 (to consider whether the Rule must be amended to cover the admissibility of digital photographs and other evidence that can be altered electronically).

I wish to emphasize that in regard to any rules or other items as to which the Committee has indicated possible interest, this should by no means be read as an indication that the Committee ultimately will propose, or has a substantial likelihood of proposing, an amendment. The Committee merely wishes to be thorough in its consideration of any potential problems in the existing rules, but the Committee continues to be wary of recommending changes that are not considered absolutely necessary to the proper administration of justice.

B. Privileges

The Committee's Subcommittee on Privileges has been working on a long-term project to prepare a "survey" of the existing federal common law of privileges. The end-product is intended to be a descriptive, non-evaluative presentation of the existing federal law, and not a proposal for any amendment to the Evidence Rules. The survey is intended to help courts and lawyers in working

through the existing federal common law of privileges, and if completed it will be published as a work of the Consultant to the Committee and the Reporter.

C. "De Bene Esse" Depositions

At the request of the Civil Rules Committee, the Evidence Rules Committee considered a proposal by Judge Irenas to amend the Civil Rules to permit more general use of "de bene esse" depositions, i.e., depositions prepared as a substitute for trial testimony. The question for the Evidence Rules Committee was whether a rule supporting more general use of a "de bene esse" deposition would conflict with the Federal Rules of Evidence.

The Evidence Rules Committee determined that a rule permitting use of "de bene esse" depositions would create a conflict with the hearsay rule. The current exception that might apply–the Rule 804(b)(1) exception for prior testimony–is premised on the unavailability of the declarant, and with respect to "de bene esse" depositions, the deponent is often not unavailable for trial in the sense required by the Evidence Rules. Committee members also noted a possible conflict with the general preference for live testimony and the trial court's discretion under Evidence Rule 611(a) to control the mode and presentation of testimony. The Committee noted, however, that if the "de bene esse" deposition was given only after stipulation as to its admissibility, there would be no conflict with the Evidence Rules.

Committee members further expressed disapproval of the proposal on the merits. In their view, a rules-based distinction between discovery depositions and "de bene esse" depositions was unjustified. One problem would arise if a discovery deposition were taken and then the deponent becomes unavailable for trial under the terms of Evidence Rule 804(a). When the proponent moves to admit the deposition at trial, the opponent would have an argument that the proponent gave no "de bene esse" notice at the time the deposition was taken. This would change the existing law that discovery depositions are admissible when they comply with the terms of a hearsay exception. Committee members strongly expressed the opinion that no distinction should be made in the rules between discovery and "de bene esse" depositions.

Finally, Committee members discussed a related problem concerning the relationship between the Civil Rules and the Evidence Rules. Civil Rule 32 contains what amounts to a freestanding exception to the hearsay rule for depositions, creating a problematic overlap with the different (and sometimes more rigorous) exception for prior testimony in Evidence Rule 804(b)(1). The Committee determined that the placement of a hearsay exception in the Civil rather than the Evidence Rules could create confusion and a trap for the unwary.

The Committee resolved unanimously to report the following conclusions to the Civil Rules Committee: 1) Adoption of a rule permitting broad use of "de bene esse" depositions would create a conflict with the Evidence Rules, unless the rule were premised on stipulation among the parties;

2) On the merits, the Evidence Rules Committee is opposed to any attempt to distinguish "de bene esse" depositions from discovery depositions: and 3) The Evidence Rules Committee would be happy to work with the Civil Rules Committee in addressing the problem created by the existence of a freestanding hearsay exception in Civil Rule 32.

IV. Minutes of the October 2003 Meeting

The Reporter's draft of the minutes of the Committee's October 2003 meeting is attached to this report. These minutes have not yet been approved by the Committee.

Attachments:

Proposed amendment to Evidence Rule 804(b)(3)
Draft minutes of October 2003 Evidence Rules Committee meeting

PROPOSED AMENDMENT TO THE FEDERAL RULES OF EVIDENCE

Rule 804. Hearsay Exceptions; Declarant Unavailable*

* * * * *

(b) Hearsay exceptions. – The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * * * *

(3) Statement against interest. – A statement ~~which~~ that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. But

---

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

in a criminal case a ~~A~~ statement tending to expose the declarant to criminal liability ~~and offered to exculpate the accused~~ is ~~not~~ admissible ~~unless~~ under this subdivision in the following circumstances only:

(A) if offered to exculpate an accused, it is supported by corroborating circumstances that clearly indicate ~~the~~ its trustworthiness, or ~~of the statement~~

(B) if offered to inculpate an accused, it is supported by particularized guarantees of trustworthiness.

* * * * *

COMMITTEE NOTE

The Rule has been amended to confirm the requirement that the prosecution must provide a showing of "particularized guarantees of trustworthiness" when a declaration against penal interest is offered against an accused in a criminal case. This standard is intended to assure that the exception meets constitutional

requirements, and to guard against the inadvertent waiver of constitutional protections. *See Lilly v. Virginia,* 527 U.S. 116, 134-138 (1999) (holding that the hearsay exception for declarations against penal interest is not "firmly-rooted"and requiring a finding that hearsay admitted under a non-firmly-rooted exception must bear "particularized guarantees of trustworthiness" to be admissible under the Confrontation Clause).

The amendment distinguishes "corroborating circumstances that clearly indicate" trustworthiness (the standard applicable to statements offered by the accused) from "particularized guarantees of trustworthiness" (the standard applicable to statements offered by the government). The reason for this differentiation lies in the guarantees of the Confrontation Clause that are applicable to statements against penal interest offered against the accused. The "particularized guarantees" requirement cannot be met by a showing that independent corroborating evidence indicates that the declarant's statement might be true. This is because under current Supreme Court Confrontation Clause jurisprudence, the hearsay exception for declarations against penal interest is not considered a "firmly rooted" exception (*see Lilly v. Virginia, supra*) and a hearsay statement admitted under an exception that is not "firmly rooted" must "possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Idaho v. Wright,* 497 U.S. 805, 822 (1990). In contrast, "corroborating circumstances" can be found, at least in part, by a reference to independent corroborating evidence that indicates the statement is true.

The "particularized guarantees" requirement assumes that the court has already found that the hearsay statement is genuinely

disserving of the declarant's penal interest. *See Williamson v. United States*, 512 U.S. 594, 603 (1994) (statement must be "squarely self-inculpatory" to be admissible under Rule 804(b)(3)). "Particularized guarantees" therefore must be independent from the fact that the statement tends to subject the declarant to criminal liability. The "against penal interest" factor should not be double-counted as a particularized guarantee. *See Lilly v. Virginia, supra,* 527 U.S. at 138 (the fact that the hearsay statement may have been disserving to the declarant's interest does not establish particularized guarantees of trustworthiness because it "merely restates the fact that portions of his statements were technically against penal interest").

The amendment does not affect the existing requirement that the accused provide corroborating circumstances for exculpatory statements. The case law identifies some factors that may be useful to consider in determining whether corroborating circumstances clearly indicate the trustworthiness of the statement. Those factors include (*see, e.g., United States v. Hall,* 165 F.3d 1095 (7th Cir. 1999)):

> (1) the timing and circumstances under which the statement was made;
>
> (2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie;
>
> (3) whether the declarant repeated the statement and did so consistently, even under different circumstances;
>
> (4) the party or parties to whom the statement was made;

(5) the relationship between the declarant and the opponent of the evidence; and

(6) the nature and strength of independent evidence relevant to the conduct in question.

Other factors may be pertinent under the circumstances. The credibility of the witness who relates the statement in court is not, however, a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the credibility of the witness would usurp the jury's role in assessing the credibility of testifying witnesses.

Changes Made After Publication and Comments. The proposed amendment as issued for public comment would have extended the corroborating circumstances requirement to statements against penal interest offered in civil cases. The Committee withdrew this language in response to public comment, thus retaining the existing rule that corroborating circumstances are not required for declarations against interest offered in civil cases.

A paragraph was added to the Committee Note to clarify the distinction between "corroborating circumstances" (the standard applicable to statements against penal interest offered by the accused) and "particularized guarantees of trustworthiness" (the standard applicable to statements against penal interest offered against the accused).

SUMMARY OF PUBLIC COMMENTS

Robert E. Leake, Jr., Esq. (02-EV-001) would apply the "particularized guarantees of trustworthiness" requirement to "exculpatory as well as incriminating matter."

G. Daniel Carney, Esq. (02-EV-002) approves of the proposed amendment.

Jack E. Horsley, Esq. (02-EV-003) endorses the proposed change to Rule 804(b)(3).

The General Accounting Office (02-EV-004) has no comments to offer with respect to the proposed amendment.

The Commercial and Federal Litigation Section of the New York State Bar Association (02-EV-005) supports the proposed changes to Rule 804(b)(3) and advocates further analysis of other possible changes to the Rule. The Section notes that the text of the Rule is "misleading" in two respects. First, "in civil cases recent federal cases have held that an out-of-court statement against penal interest must be supported by corroborating circumstances to be admissible" – even though that requirement is not imposed by the text of the Rule. Second, where such statements are offered in a criminal case to inculpate the accused, the Confrontation Clause requires a showing of "particularized guarantees of trustworthiness" – a requirement that does not exist in the current text of the Rule. The Section notes that the proposed amendment would incorporate these two "judicial glosses" into the text of the Rule. The section supports the proposed amendment "as a useful codification of current law." But it urges the Advisory Committee to address two further questions: 1) whether the standard of "particularized guarantees of trustworthiness" should be applied to statements against penal interest offered in civil cases; and 2) whether the "particularized guarantees of trustworthiness" requirement should be applied to declarations against penal interest offered by an accused.

Professor Richard Friedman (02-EV-006), appreciates and applauds "at least much of the impetus" behind the proposed amendment. But he fears that the proposed amendment may cause confusion and that it "foregoes the opportunity to make more significant improvements in the operation of Rule 804(b)(3)." He advocates the elimination of the corroborating circumstances requirement as applied to hearsay statements offered by an accused. Professor Friedman also opposes an extension of the corroborating circumstances requirement to statement against penal interest offered in civil cases. He concludes that the Rule should provide that a statement made to law enforcement personnel "shall not be admissible against the accused." He also suggests that the proposed amendment should be changed to add language that would reject the Supreme Court's analysis in *Williamson v. United States,* 512 U.S. 594 (1994), by providing that a non-adverse

statement that is part of a broader inculpatory statement would be admissible if "it appears likely that the declarant would make the statement in question only if believing it to be true." Finally, Professor Friedman suggests that the text of the Rule include language (currently in the proposed Committee Note) providing that the credibility of the in-court witness is irrelevant to the reliability of the hearsay statement.

David Romine, Esq. (02-EV-007), opposes the extension of the corroborating circumstances requirement to civil cases. He contends that the extra evidentiary requirement will have a deleterious effect on the prosecution of civil antitrust cases. He states that the "relatively easy ways in which the corroborating circumstance requirement is satisfied by defendants in criminal cases will usually not be available to antitrust plaintiffs." Mr. Romine concludes that the "Committee should not endorse a revision that will have the perverse effect of making it harder to introduce such evidence in a private antitrust case than to exculpate the accused in a criminal case."

The Federal Magistrate Judges Association (02-EV-008) supports the proposed amendment to Rule 804(b)(3), as an appropriate revision in light of the Supreme Court's decision in *Lilly v. Virginia,* 527 U.S. 116 (1999).

Professor Roger Kirst (02-EV-009) opposes the amendment on the ground that it is "not possible to anticipate the evolving contours of confrontation doctrine for the hearsay exception in this Rule." He recommends that if the Rule is to be amended on other topics, "a caution about the right to confrontation should be included only in an Advisory Committee Note without attempting to define what the Sixth Amendment requires."

The Committee on the Federal Rules of Evidence of the American College of Trial Lawyers (02-EV-010) agrees with the proposed amendment "insofar as it articulates the constitutional requirement that a declaration against penal interest, offered to inculpate a defendant in a criminal case, be supported by particularized guarantees of trustworthiness." The Committee states that "[i]ncorporating the 'particularized guarantees' language into the rule does not change the law; it simply carries on the mission of the Rules of Evidence of codifying court-made evidentiary law and making it more accessible." However, the Committee disagrees with the proposal "insofar as it would import into the law of civil evidence the 'corroborating circumstances' requirement that traditionally has been thought to apply only to declarations against penal interest offered in criminal cases." Extension of the corroborating circumstances requirement to civil cases would, in the Committee's view, "move a difficult aspect of the criminal procedural law into the civil procedural law, without any compelling reason to do so."

Professor Clifford Fishman (02-EV-011), complains that "the proposal's language provides no explanation as to why different standards are imposed in the first place and offers no guidance as to what the different standards mean." Professor Fishman suggests that the text of the Rule be expanded to clarify that "corroborating circumstances" requires the court to consider the nature or strength of independent evidence that tends to corroborate the hearsay statement, while "particularized guarantees of trustworthiness" prohibits consideration of corroborating evidence.

The Federal Bar Association (02-EV-012), "supports the substance of the proposed amendment" but "recommends a change in format to provide additional clarity." The Association's proposal would place statements against penal interest offered by the prosecution into a separate subdivision. The Association "also agrees with the Committee's recommendation that the specific factors to be considered in assessing whether a proffered statement meets the applicable requirement be left to the Committee Note and to case law rather than being specified in the text of the Rule."

The Committee on Federal Courts of the California State Bar (02-EV-013), supports the proposed amendment to Rule 804(b)(3).

The National Association of Criminal Defense Lawyers (02-EV-014), opposes the amendment and argues that "'corroborating circumstances' should be required, and not merely 'particularized guarantees of trustworthiness', before the prosecution is allowed to obtain admission of hearsay statements on the basis of their having been made against the declarant's penal interest."

Advisory Committee on Evidence Rules

Draft Minutes of the Meeting of April 25th, 2003

Washington, D.C.

The Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 25th, 2003 at the Thurgood Marshall Federal Judiciary Building in Washington, D.C..

The following members of the Committee were present:

Hon. Jerry E. Smith, Chair
Hon. Ronald L. Buckwalter
Hon. Robert L. Hinkle
David S. Maring, Esq.
Patricia Lee Refo, Esq.
Thomas W. Hillier, Esq.
Christopher A. Wray, Esq.

Also present were:

Hon. Milton I. Shadur, former Chair of the Evidence Rules Committee
Hon. Thomas W. Thrash, Jr., Liaison from the Standing Committee on Rules of Practice and Procedure
Hon. Christopher M. Klein, Liaison from the Bankruptcy Rules Committee
Hon. Lee H. Rosenthal, representing the Civil Rules Committee
Hon. David G. Trager, Liaison from the Criminal Rules Committee
Professor Daniel R. Coquillette, Reporter to the Standing Committee on Rules of Practice and Procedure
Peter G. McCabe, Esq., Secretary, Standing Committee on Rules of Practice and Procedure
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James Ishida, Esq., Rules Committee Support Office
Jennifer Marsh, Esq., Federal Judicial Center
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Roger Pauley, Esq., former member of the Evidence Rules Committee

Witnesses at the public hearing were:

Professor Richard Friedman
David Romine, Esq.

Public Hearing on the Proposed Amendment to Evidence Rule 804(b)(3)

The Committee began its meeting by hearing from two witnesses on the proposed amendment to Evidence Rule 804(b)(3), the hearsay exception for declarations against interest. Only two witnesses requested to be heard on the amendment, and for purposes of economy, the Committee decided to combine its Spring meeting with a public hearing on the amendment.

The first witness, Professor Richard Friedman, applauded the impetus behind the proposed amendment to Rule 804(b)(3), but suggested several ways in which he thought the amendment should be improved. Professor Friedman made the following suggestions, among others: 1) The corroborating circumstances requirement, applicable to statements against penal interest offered by the accused, should be deleted; 2) The particularized guarantees of trustworthiness requirement, applicable under the amendment to statements offered by the prosecution (and codifying current Supreme Court cases on the right to confrontation) should be scrapped in favor of a rule that precludes all statements made to law enforcement officers; 3) The amendment should specify that the trustworthiness of the in-court witness who relates the hearsay statement is irrelevant to the reliability of the hearsay itself; and 4) The amendment should contain language that overrules the Supreme Court's decision in *Williamson v. United States*. As will be seen below, the Committee considered but ultimately rejected each of Professor Friedman's suggestions, most of which called for costly and unnecessary changes in settled law.

The second witness, David Romine, Esq., urged the Committee to delete the proposed amendment's extension of the corroborating circumstances requirement to civil cases. This suggestion was echoed by several public comments received by the Committee. As will be seen below, the Committee, after consideration, agreed with the suggestion of Mr. Romine and others.

Opening Business of the Committee Meeting

Judge Smith extended a welcome to those who were attending the Evidence Rules Committee for the first time: Judge Thrash, the new liaison from the Standing Committee, and Judge Rosenthal, representing the Civil Rules Committee. He also welcomed Judge Shadur, the former Chair of the Committee, who was unable to attend the Fall 2002 meeting in Seattle. Judge Smith asked for approval of the draft minutes of the October 2002 Committee meeting. The minutes were approved unanimously. Judge Smith then gave a short report on the January 2003 Standing Committee meeting. The Evidence Rules Committee presented no action items at that meeting.

Committee Consideration of the Proposed Amendment to Rule 804(b)(3)

The Committee began discussion on the public comment and public testimony concerning the proposed amendment to Evidence Rule 804(b)(3). The proposal released for public comment would make two basic changes to the Rule: 1) It would require a party proffering a declaration against penal interest in a civil case to show that the statement carries "corroborating circumstances" that clearly indicate the trustworthiness of the statement (extending to civil cases the evidentiary requirement that is currently applicable to statements offered by the accused); and 2) It would codify a constitutional standard imposed by the Supreme Court on declarations against penal interest offered by the prosecution, i.e., that the statement carry "particularized guarantees of trustworthiness."

The Committee first considered the substantial public commentary that was critical of the proposed extension of the corroborating circumstances requirement to civil cases. Some Committee members noted that there is a justification for distinguishing between civil and criminal cases insofar as the corroborating circumstances requirement is concerned. The corroborating circumstances requirement in criminal cases resulted from a considered decision by Congress. Congress was concerned that a criminal defendant could engineer a hearsay statement from an associate; that statement might admit responsibility for the crime and so would be technically "against penal interest" but under the circumstances the associate might not in fact be subject to a real risk of prosecution. Consequently, the corroborating circumstances requirement was added to alleviate concern over the potential unreliability of statements that were merely against the declarant's penal interest. That corroborating circumstances requirement in criminal cases has been applied in hundreds of cases over 30 years. In contrast, the extension of the corroborating circumstances requirement to civil cases would not adhere to the original intent of the Rule. To the contrary, the original intent of the Rule was to provide a clear distinction between criminal cases, in which the accused might generate an unreliable exculpatory statement, from civil cases, in which no such threat was perceived.

Committee members noted that the Advisory Committee, in its first proposal to amend Rule 804(b)(3), reasoned that extending the corroborating circumstances requirement to civil cases would provide for unitary treatment for all declarations against penal interest, no matter the case, no matter by whom offered. But the unitary treatment rationale no longer supports the extension of the corroborating circumstances requirement to civil cases. This is because the revised proposed amendment that was issued for a new round of public comment does not provide for unitary treatment of all declarations against penal interest. It provides different admissibility requirements for statements offered by the prosecution and those offered by the accused. Committee members also noted that the only civil case with any discussion of the corroborating circumstances requirement–the *Fishman* case, relied upon in the Committee Note–justifies extension of the corroborating circumstances requirement to civil cases solely on the ground that unitary treatment would be desirable. Thus, the only case providing a considered holding on the matter relies on a rationale that is undermined by the current proposed amendment. Committee members believed that, under these

circumstances, the costs of an amendment (in upsetting settled precedent and in making it more difficult to bring some civil cases) outweighed whatever benefits the amendment would provide.

A motion was made and seconded to delete the proposed extension of the corroborating circumstances requirement to civil cases. That motion was passed by a unanimous vote.

The Committee next discussed the proposed amendment's codification of the particularized guarantees of trustworthiness requirement for statements against penal interest offered by the prosecution. The reason for including this language in the proposal issued for public comment was to codify the protections imposed by the Confrontation Clause. The Supreme Court has held that the hearsay exception for declarations against penal interest is not a "firmly-rooted" hearsay exception, meaning that a statement fitting within the exception does not automatically satisfy the defendant's right to confrontation. The Court has further held that for a hearsay statement offered under a non-firmly rooted exception to satisfy the Confrontation Clause, the prosecution must show that the statement carries "particularized guarantees of trustworthiness" that are inherent in the circumstances under which the statement is made. Thus, the current state of affairs is that a declaration against penal interest offered by the prosecution may satisfy Rule 804(b)(3), and yet violate the Confrontation Clause. The Evidence Rules Committee found it unacceptable that a rule of evidence could be unconstitutional in its application.

The Reporter suggested, based on the public comment, that there were three alternatives for the Committee to consider to address the potential unconstitutionality of the current Rule 804(b)(3). The most elaborate solution would be to define the terms "corroborating circumstances" (applicable to statements offered by the accused) and "particularized guarantees of trustworthiness" (applicable to statements offered by the prosecution) in the text of the Rule. The most flexible would be to simply state that a statement offered by the prosecution would not be admissible if it would violate the accused's right to confront adverse witnesses. A compromise approach would be the one chosen in the version issued for public comment: providing some specificity by codifying the term "particularized guarantees of trustworthiness" while avoiding an elaborate textual distinction between "corroborating circumstances" and "particularized guarantees."

The Department of Justice representative commented that the Department had a strong preference for the alternative chosen by the Committee in the proposal issued for public comment. That proposal was a good compromise in that it provided more guidance than a simple reference to the Constitution would provide, and yet avoided the pitfalls of a lengthy description of applicable standards in the text of the Rule.

The liaison from Criminal Rules suggested that as a trial judge, he would prefer having more explication in the Rule. The distinction between "corroborating circumstances" and "particularized guarantees" is that the former standard permits (and in some courts requires) a showing of independent corroborating evidence indicating that the hearsay statement is true, while the latter standard *prohibits* any reference to corroborating evidence. This distinction is not evident in the

nature of the terms used, and so it could be helpful to provide such a distinction in the text. Other Committee members noted, however, the peril of adding such language to the Rule, including the danger of freezing common law development, and the danger of misdescription and over- and under-inclusiveness. They noted that any distinction between the two standards could be clarified in the Committee Note. The Reporter offered to write a paragraph to add to the Committee Note clarifying the distinction between the two standards, and that the Committee could review this language later in the meeting.

One Committee member suggested that general constitutional language would have the virtue of flexibility if the Supreme Court ever decided to change its approach to the Confrontation Clause. But after discussion, Committee members generally agreed that the chances of such a change were remote, especially if the particularized guarantees language were added to the text of Rule 804(b)(3). Moreover, the application of a particularized guarantees requirement was considered correct on the merits, as it added an important guarantee of reliability to statements that are often unreliable.

The Committee then reviewed a paragraph prepared by the Reporter that could be added to the Committee Note to explain the distinction between corroborating circumstances and particularized guarantees of trustworthiness. All Committee members agreed that it accurately and concisely set forth the distinction between the two standards.

The liaison from the Standing Committee observed that while most parts of the proposed Committee Note provided helpful guidance concerning the intent of the amendment, the last passage of the Note, describing the existing case law applying the corroborating circumstances requirement, might be more in the nature of explaining current law than in explaining or justifying the amendment. After discussion about the proper role of Committee Notes, it was determined that the questioned passage did more than explain current law. It was also important for drawing the distinction between corroborating circumstances and particularized guarantees, and as such was an important explication of the intent of the amendment.

A motion was made and seconded to approve the proposed amendment to Rule 804(b)(3) and refer it to the Standing Committee, with two changes from the version issued for public comment: 1) deletion of the corroborating circumstances requirement as applied to civil cases; and 2) addition of a paragraph to the Committee Note that would explain the difference between "corroborating circumstances" and "particularized guarantees of trustworthiness." This motion was approved unanimously.

The following is the text of the proposed amendment and Committee Note that will be referred to the Standing Committee with the recommendation that it be approved and forwarded to the Judicial Conference:

(3) Statement against interest. – A statement ~~which~~ that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. But in a criminal case a ~~A~~ statement tending to expose the declarant to criminal liability ~~and offered in a criminal case to exculpate the accused~~ is ~~not~~ admissible ~~unless~~ under this subdivision in the following circumstances only:

(A) if offered to exculpate an accused, it is supported by corroborating circumstances that clearly indicate ~~the~~ its trustworthiness ~~of the statement~~.; or
(B) if offered to inculpate an accused, it is supported by particularized guarantees of trustworthiness.

* * *

COMMITTEE NOTE

The Rule has been amended to confirm the requirement that the prosecution provide a showing of "particularized guarantees of trustworthiness" when a declaration against penal interest is offered against an accused in a criminal case. This standard is intended to assure that the exception meets constitutional requirements, and to guard against the inadvertent waiver of constitutional protections. *See Lilly v. Virginia,* 527 U.S. 116, 134-138 (1999) (holding that the hearsay exception for declarations against penal interest is not "firmly-rooted"and requiring a finding that hearsay admitted under a non-firmly-rooted exception must bear "particularized guarantees of trustworthiness" to be admissible under the Confrontation Clause).

The amendment distinguishes "corroborating circumstances that clearly indicate" trustworthiness (the standard applicable to statements offered by the accused) from "particularized guarantees of trustworthiness" (the standard applicable to statements offered by the government). The reason for this differentiation lies in the guarantees of the Confrontation Clause that are applicable to statements against penal interest offered against the accused. The "particularized guarantees" requirement cannot be met by a showing that independent corroborating evidence indicates that the declarant's statement might be true. This is because under current Supreme Court Confrontation Clause jurisprudence, the hearsay exception for declarations against penal interest is not considered a "firmly rooted" exception (*see Lilly v. Virginia, supra*) and a hearsay statement admitted under an exception

that is not "firmly rooted" must "possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Idaho v. Wright,* 497 U.S. 805, 822 (1990). In contrast, "corroborating circumstances" can be found, at least in part, by a reference to independent corroborating evidence that indicates the statement is true.

The "particularized guarantees" requirement assumes that the court has already found that the hearsay statement is genuinely disserving of the declarant's penal interest. *See Williamson v. United States*, 512 U.S. 594, 603 (1994) (statement must be "squarely self-inculpatory" to be admissible under Rule 804(b)(3)). "Particularized guarantees" therefore must be independent from the fact that the statement tends to subject the declarant to criminal liability. The "against penal interest" factor should not be double-counted as a particularized guarantee. *See Lilly v. Virginia, supra,* 527 U.S. at 138 (fact that statement may have been disserving to the declarant's interest does not establish particularized guarantees of trustworthiness because it "merely restates the fact that portions of his statements were technically against penal interest").

The amendment does not affect the existing requirement that the accused provide corroborating circumstances for exculpatory statements. The case law identifies some factors that may be useful to consider in determining whether corroborating circumstances clearly indicate the trustworthiness of the statement. Those factors include (*see, e.g., United States v. Hall,* 165 F.3d 1095 (7th Cir. 1999)):

(1) the timing and circumstances under which the statement was made;

(2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie;

(3) whether the declarant repeated the statement and did so consistently, even under different circumstances;

(4) the party or parties to whom the statement was made;

(5) the relationship between the declarant and the opponent of the evidence; and

(6) the nature and strength of independent evidence relevant to the conduct in question.

Other factors may be pertinent under the circumstances. The credibility of the witness who relates the statement in court is not, however, a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the credibility of the witness would usurp the jury's role in assessing the credibility of testifying witnesses.

Long-Range Planning — Consideration of Possible Amendments to Certain Evidence Rules

At its April 2001 meeting, the Committee directed the Reporter to review scholarship, caselaw, and other bodies of evidence law to determine whether there are any evidence rules that might be in need of amendment as part of the Committee's long-range planning. At the April 2002 meeting, the Committee reviewed a number of potential changes and directed the Reporter to prepare a report on a number of different rules, so that the Committee could take an in-depth look at whether those rules require amendment. The Committee's decision to investigate those rules further was not intended to indicate that the Committee had actually agreed to propose any amendments. Rather, the Committee determined that with respect to those rules, a more extensive investigation and consideration was warranted.

At the October 2002 meeting, the Committee began to consider the Reporter's memoranda on some of the rules that have been found worthy of in-depth consideration. The Committee agreed that the problematic rules should be considered over the course of four Committee meetings, and that if any rules are found in need of amendment, the amendment proposals would be delayed in order to package them as a single set of amendments to the Evidence Rules. This would mean that the package of amendments, if any, would go to the Standing Committee at its June 2004 meeting, with a recommendation that the proposals (again, if any) be released for public comment.

With that timeline in mind, the Committee considered reports on several possibly problematic Evidence Rules at its April 2003 meeting. The goal of the Committee was not to vote definitively on whether to propose an amendment to any of those rules, but, rather, to determine whether to proceed further with the rules as part of a possible package of amendments. Thus, a "no" vote from the Committee would mean that no action would be taken to propose an amendment. A "yes" vote would mean only that the Committee was interested in further inquiry into a possible amendment and would either tentatively approve or consider possible language for an amendment at a later date.

1. Rule 106

The Reporter's memorandum on Rule 106, the rule of completeness, indicated that courts and commentators are in dispute over two important questions about the scope of the rule. One question is whether the rule operates as an independent rule of admissibility—admitting completing evidence even if it would otherwise be excluded as hearsay or under some other rule of exclusion. This is called a "trumping" function. The other major question is whether the rule should permit completing evidence of oral statements and actions as well as the written statements currently covered by the rule. The Reporter prepared model drafts that would cover these points. At its Fall 2002 meeting, the Committee considered this memorandum and noted that while the courts appeared

to be in dispute over the existence of a trumping function, this dispute does not seem to make a real difference in the cases. The Committee also unanimously rejected the suggestion that Rule 106 should be amended to cover oral statements, on the ground that such a change could lead to disruption and uncertainty at trial. The change could lead to attempts of an opponent to disrupt the proponent's order of proof by contending that the proponent's witness testified to a misleading portion of an oral statement; disputes will often arise about what the oral statement actually was. There often will have to be a sidebar hearing to determine who said what.

In light of the discussion at the Fall 2002 meeting, the Reporter prepared a memorandum on Rule 106 that analyzed whether the apparent split in authority over the trumping function had actually led to a difference in the cases or resulted in a problem in practice. The Reporter concluded that few if any of the cases would be affected by the addition or rejection of a trumping function in Rule 106. The cases rejecting a trumping function would come out the same because the proffered evidence would still have been excluded under the circumstances, most commonly because the proffered statements were not needed to correct any misimpression. And the cases adopting a trumping function could all have been decided on other grounds, most commonly because the proponent "opened the door" to completing evidence, or because the "fairness" language of Rule 106 mandated the result.

After discussion, the Committee determined that the costs of amending Rule 106 to include a trumping function were far outweighed by the risks that a change in language would be misinterpreted, and concluded that any problems under the current rule were being well-handled by the courts.

A motion was made to terminate consideration of any amendment to Rule 106. That motion was approved unanimously.

2. Rule 404(a)

At its Fall 2002 meeting, the Committee tentatively agreed on language that would amend Evidence Rule 404(a) to prohibit the circumstantial use of character evidence in civil cases. The Committee determined that an amendment might be appropriate because the circuits are split over whether character evidence can be offered to prove conduct in a civil case. Such a circuit split can cause disruption and disuniform results in the federal courts. Moreover, the question of the admissibility of character evidence to prove conduct arises frequently in civil rights cases, so an amendment to the Rule would have a helpful impact on a fairly large number of cases. The Committee also concluded that as a policy matter, character evidence should not be admitted to prove conduct in a civil case. The circumstantial use of character evidence is fraught with peril in *any* case, because it could lead to a trial of personality and could cause the jury to decide the case on improper grounds. But the risks of character evidence historically have been considered worth

the costs where a criminal defendant seeks to show his good character or the pertinent bad character of the victim. This so-called "rule of mercy" is thought necessary to provide a counterweight to the resources of the government, and is a recognition of the possibility that the accused, whose liberty is at stake, may have little to defend with other than his good name. None of these considerations is operative in civil litigation. In civil cases, the substantial problems raised by character evidence were considered by the Committee to outweigh the dubious benefit that character evidence might provide.

After the Fall 2002 meeting, the Committee received a request from a member of the public to propose an amendment to Rule 404(a)(1) "to explicitly authorize admission of character evidence to prove a trait of character when it is essential to a claim or defense." The Reporter prepared a memorandum on this proposal and the Committee considered the proposal in detail. Committee members concluded that such an amendment was unnecessary and was likely to do more harm than good. The amendment was considered unnecessary because the Rule as it exists does not prohibit the admission of character evidence when offered to prove an element of a claim or defense. Rather, Rule 404(a) prohibits character evidence only when offered for a specific purpose: to prove "action in conformity" with the character trait. If the character evidence is offered to prove an element of a claim or defense, i.e., where character is "in issue", the evidence by definition is not being offered to prove conduct. All federal courts have recognized this point and have uniformly admitted character evidence when character is "in issue." Moreover, the amendment may do more harm than good–it may create a negative inference that the law is to change, when in fact the amendment would make no change in the law. Finally, Committee members noted that there are difficulties in determining when character is "in issue", e.g., in defamation cases, entrapment cases, self-defense cases, and any attempt to describe when character is "in issue" and when it is not might be fraught with peril.

Several of the Judges at the meeting argued that an amendment was unnecessary because neither litigants or judges are confused or are having problems with the current law. They noted that it was only common sense that if a character trait had to be proven in a case because the substantive law so demanded it, then one mode of obvious and admissible proof would be character evidence.

A suggestion was made that the distinction between character "in issue" and character evidence offered to prove conduct might be made in a Committee Note should the Committee decide to proceed with an amendment to Rule 404(a)(1) that would prohibit the use of character evidence to prove conduct in civil cases. The response from most Committee members was that such an addition was not necessary because the rule is on the one hand self-evident (character evidence is obviously admissible when the substantive law demands proof of character) and on the other hand the question of when a trait of character is "in issue" is a subtle one that may be difficult to describe.

A motion was made to reject the proposed amendment that would specify that character evidence is admissible when offered to prove an element of a claim or defense. That motion was approved unanimously.

Judge Smith then asked whether any member of the Committee wanted to revisit or to question the amendment to Rule 404(a) that was tentatively approved at the Fall 2002 meeting, i.e., the amendment that would prohibit the use of character evidence to prove conduct in civil cases. No Committee member expressed any concerns about that proposal. The Committee resolved to consider the proposed amendment as part of a possible package of amendments at the Spring 2004 Committee meeting.

3. Rule 408

The Reporter's memorandum on Rule 408, prepared for the Fall 2002 meeting, noted that the courts are divided on three important questions concerning the scope of the Rule:

1) Some courts hold that evidence of compromise is admissible against the settling party in subsequent criminal litigation, relying on a policy argument that the interest in admitting relevant evidence in a criminal case outweighs the interest in encouraging settlement. Other courts hold that compromise evidence is excluded in subsequent criminal litigation when offered as an admission of guilt, noting that there is nothing in the language of Rule 408 that would permit the use of evidence of civil compromise to prove criminal liability.

2) Some courts hold that statements in compromise can be admitted to impeach by way of contradiction or prior inconsistent statement. Other courts disagree, noting that the only use for impeachment specified in the Rule is impeachment for bias, and noting further that if statements in compromise could be admitted for contradiction or prior inconsistent statement, this would chill settlement negotiations, in violation of the policy behind the Rule.

3) Some courts hold that offers in compromise can be admitted in favor of the party who made the offer; these courts reason that the policy of the rule, to encourage settlements, is not at stake where the party who makes the statement or offer is the one who wants to admit it at trial. Other courts hold that settlement statements and offers are never admissible to prove the validity or the amount of the claim, regardless of who offers the evidence. These courts reason that the text of the Rule does not provide an exception based on identity of the proffering party, and that admitting compromise evidence would raise the risk that lawyers would have to testify about the settlement negotiations, thus risking disqualification.

At the Fall 2002 meeting, the Committee tentatively agreed to consider (as part of a possible package of amendments) an amendment that would limit the impeachment exception to use for bias, and that would exclude compromise evidence even if offered by the party who made an offer of settlement. As to the use of compromise evidence in criminal cases, the Justice Department representative noted at that time that the Department had not yet come to a conclusion on whether, as a matter of policy, such evidence should be admissible in criminal cases. For the Spring 2003

meeting, the Reporter prepared two models, one that would admit compromise evidence in criminal cases and one that would exclude it, with both models containing an impeachment exception limited to bias and a preclusion of compromise evidence even where offered by the party who made the settlement offer.

The models prepared by the Reporter attempted to restructure the existing Rule. As it stands, Rule 408 is structured in four sentences. The first sentence states that an offer or acceptance in compromise "is not admissible to prove liability for or invalidity of the claim or its amount." The second sentence provides the same preclusion for statements made in compromise negotiations–an awkward construction because a separate sentence is used to apply the same rule of exclusion applied in the first sentence. The third sentence says that the rule "does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations." The rationale of this sentence, added by Congress, is to prevent parties from immunizing pre-existing documents from discovery simply by bringing them to the negotiating table. The addition of this sentence at this point in the Rule, however, creates a structural problem because the fourth sentence of the rule contains a list of permissible purposes for compromise evidence, including proof of bias. As such, the third sentence provides a kind of break in the flow of the Rule. Moreover, the fourth sentence is arguably completely unnecessary, because none of the permissible purposes involves using compromise evidence to prove the validity or amount of the claim. Since the only impermissible purpose for this evidence is when it is offered to prove the validity or amount of a claim, it is unnecessary to add a sentence specifying certain (though apparently not all) permissible purposes for the evidence.

The models prepared by the Reporter restructured the Rule by providing that settlement offers and acceptances and statements offered in compromise are inadmissible unless permitted by a specific exception in a new subdivision (b) of the Rule. Thus, the models deleted the reference to the validity or amount of the claim. It was these models that were reviewed by the Committee at its Spring 2003 meeting.

On the question of admissibility of compromise evidence in criminal cases, the Department of Justice representative stated that the Department had concluded that compromise evidence should be admissible in a subsequent criminal case. The Department noted that it is often the case that through settlement of civil proceedings, a defendant is put on notice of the wrongfulness of his conduct. The Department's major concern was that if Rule 408 were amended to exclude evidence of a civil compromise in a subsequent criminal case, the government would lose evidence that would be critical to prove that the defendant knew that his conduct was illegal or wrongful.

Most Committee members stated in response that policy arguments weigh strongly in favor of excluding evidence of a civil compromise in a later criminal case. If such evidence is admissible in a criminal case, it significantly diminishes the incentive to settle civil litigation. Moreover, excluding compromise evidence in criminal cases would not result in the loss of evidence in such cases—without a rule protecting compromise evidence, there is likely to be no settlement that could ever be admitted in a criminal case. In other words, the only evidence "lost" is that generated by the

rule protecting compromise evidence.

One Committee member expressed concern over the Reporter's restructuring of the Rule. The deletion of the language explicating the impermissible purpose for compromise evidence–when offered to prove the validity or amount of the claim–might create unintended consequences. For example, in insurance litigation, a claim against the insurer for bad faith is often premised on unreasonable statements and offers in settlement negotiations. Under the current Rule, this evidence is admissible against the insurer because it is not offered to prove the validity or amount of the claim against the insurer. Under the restructured rule, this evidence would be excluded unless a specific exception were added covering claims against insurers for bad faith. Similarly, some fraud claims are premised on fraudulent statements made in settlement negotiations. Under the current rule, these statements are admissible because they are not offered to prove the validity or amount of the underlying claim. Under the restructured rule, this evidence would be excluded unless a specific exception were provided.

Committee members and the Reporter considered this comment on the attempted restructuring to be well-taken. The Committee resolved that the "validity or amount" language of the current Rule would have to be retained. The alternative would be to think up every situation in which compromise evidence ought to be admissible and then include each situation as a specific exception. But this solution is perilous as it is all too likely that some important exception will be missed. Accordingly, the Committee resolved to return to the original structure of the Rule, with any proposed amendment working within that structure to provide for an impeachment exception limited to bias and to provide that compromise evidence is excluded when offered to prove the validity or amount of a claim even if it is offered by the party who made the settlement offer.

Committee members noted that there was another virtue in retaining the language specifying validity or amount of the claim as the only impermissible purpose for compromise evidence. Retaining this language will solve the DOJ concern about the use of compromise evidence in criminal cases to prove notice. If the evidence of a civil compromise is offered to prove notice, then it is not offered to prove the validity or amount of a claim. See, e.g., *United States v. Austin,* 54 F.3d 394 (7th Cir. 1995) (no error to admit evidence of the defendant's settlement with the FTC, because it was offered to prove that the defendant was on notice that subsequent similar conduct was wrongful). Thus, the question of whether Rule 408 should apply in criminal cases is properly limited to cases where the government is using the evidence not to prove notice but rather to prove that the defendant had admitted guilt.

The Committee asked the DOJ representative if the Department might wish to reconsider its position on the use of compromise evidence in subsequent criminal litigation if the original structure of Rule 408 is retained. In other words, if notice cases fall out of the equation, does the balance of interests, in the Department's view, justify exclusion or admission of civil compromise evidence as proof of defendant's guilt? The DOJ representative promised to bring the reformulated question back to the Department for further discussion.

The Committee resolved to give further consideration to an amendment to Rule 408 at the next meeting. The Committee asked the Reporter to consider two further questions in working on a new model for a proposed amendment: 1) Are there problems in the courts in determining when a matter is "in dispute" so as to trigger the protections of Rule 408? 2) What is the meaning of the sentence providing that the Rule does not require exclusion of evidence "otherwise discoverable" merely because it is presented in the course of compromise negotiations? Is there any way to sharpen that language to make it more understandable?

4. Rule 410

In the course of investigating a possible amendment to Rule 408 at its Fall 2002 meeting, the Committee reviewed the case law holding that Rule 408 protects against admission of statements made by the government during plea negotiations in a *criminal* case. Rule 410 applies to plea negotiations, but it does not by its terms protect statements and offers made by the government: It provides that statements and offers in plea negotiations are not admissible "against the defendant." The inapplicability of Rule 410 to government statements and offers in plea negotiations has led some courts to hold that such evidence is excluded under Rule 408. The Committee noted, however, that Rule 408, by its terms, does not apply to negotiations in criminal cases—Rule 408 refers to efforts to compromise a "claim," as distinct from criminal charges.

As a policy matter, the Committee determined at its Fall 2002 meeting that government statements and offers in plea negotiations should be excluded from a criminal trial, in the same way that a defendant's statements are excluded. A mutual rule of exclusion would encourage a free flow of discussion that is necessary to efficient guilty plea negotiations; there is no good reason to protect only the statements of a defendant in a guilty plea negotiation. The Committee also determined, however, that if an amendment is required to protect government statements and offers in guilty plea negotiations, that amendment should be placed in Rule 410, not Rule 408, which, by its terms, covers statements and offers of compromise made in the course of attempting to settle a *civil* claim. Rule 410, which governs efforts to settle criminal charges, is the appropriate place for any amendment that would exclude statements and offers in guilty plea negotiations.

The Committee directed the Reporter to prepare a draft of an amendment to Rule 410 that would exclude statements and offers made by the government during guilty plea negotiations. That draft was reviewed and considered at the Spring 2003 meeting.

While the Committee adhered unanimously to the position that statements made by prosecutors in guilty plea negotiations should be protected, some concerns were expressed about the consequences of an amendment to Rule 410. If the Rule were amended simply to provide that offers and statements in guilty plea negotiations were not admissible "against the government," this might provide too broad an exclusion. It would exclude, for example, statements made *by the defendant* during plea negotiations that could be offered against the government, for example, to prove that the defendant had made a prior consistent statement, or to prove that the defendant believed in his own innocence, or was not trying to obstruct an investigation. Thus, the Committee resolved that any change to Rule 410 should specify that the government's protection would be limited to statements and offers *made by prosecutors* during guilty plea negotiations.

The Committee also considered two other possible problems with Rule 410 that might be clarified if an amendment were to be proposed on other grounds. Those questions are: 1) whether the Rule's protection should cover guilty pleas that are either rejected by the court or vacated on review–currently the Rule specifically covers only guilty pleas that are "withdrawn"; 2) whether the Rule should specify that its protections are inapplicable if the defendant breaches the plea agreement.

As to the applicability of the Rule to rejected and vacated pleas, the Committee was generally agreed that the question has not arisen often enough in the courts to justify an amendment on its own. However, if the Rule is to be amended on other grounds, the Committee agreed that it would be useful to clarify that the protections of the Rule are applicable to rejected and vacated pleas as well as to withdrawn pleas. Committee members noted that as a policy matter, there was no basis for distinguishing a withdrawn plea from a plea that is rejected or vacated. In any of these cases, the policy of protecting plea negotiations warrants protection from these subsequent unforeseen developments–otherwise negotiations are likely to be chilled by uncertainty.

As to treatment of pleas that have been breached, the Committee was in general agreement that any attempt to clarify the Rule would be likely to cause more problems than it solved. For one thing, it would be difficult to write a rule that would determine with any clarity whether an agreement was breached or not. Should the exception be limited to material breaches, for example? What kind of breach would be "material" ? Committee members resolved that the question of admissibility of plea negotiations after an asserted breach could be handled by agreement between the parties and by a reviewing court.

The Committee also considered a recent Second Circuit case holding that the protections of Rule 410 do not apply to statements made in plea negotiations with a foreign government. The Committee considered whether an amendment to Rule 410 to protect prosecution statements might

also usefully include language providing that negotiations with foreign prosecutors are (or are not) protected. The Committee resolved that the question of the extraterritorial effect of Rule 410 had not been vetted sufficiently in the courts to justify an amendment at this point.

Finally, the Committee agreed that the question of whether the protections of Rule 410 can be waived should be addressed in the Committee Note and not in the Rule. The Supreme Court has decided that the defendant can agree to the use of statements made in plea negotiations to impeach him should he testify at trial, but courts are still working out whether the power to waive the protections of Rule 410 extends to other situations. Thus, it would be counterproductive to codify a waiver rule in the text. But it would be important to acknowledge the waiver rule in the Committee Note, to prevent speculation that any amendment was rejecting Supreme Court precedent on the subject.

The Committee resolved to give further consideration to an amendment to Rule 410 that would protect statements by the prosecutor during guilty plea negotiations. The Reporter was directed to prepare a revised draft of a model amendment to Rule 410 that would protect prosecution statements when offered against the government by the defendant who was the other party in the negotiations. The revised model would also specify that the protections of the Rule would apply to rejected and vacated pleas. Finally, as a stylistic matter, the final paragraph of the existing Rule should be restylized so that it does not begin with "However".

5. Rule 606(b)

Evidence Rule 606(b) generally excludes juror affidavits or testimony concerning jury deliberations. The policies behind the Rule are to protect the privacy of jury deliberations and to preserve the finality of jury verdicts. The stated exceptions to the Rule are where the juror statements are offered "on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." The rule is silent on whether juror statements are admissible to prove that the verdict reported by the jury was different from that actually agreed upon by the jurors. Courts have generally allowed juror statements to prove errors in the reporting of the verdict, but there is dispute among the courts as to the scope of this court-created exception to the Rule.

At its April 2002 meeting, the Committee directed the Reporter to prepare a report on a possible amendment to Rule 606(b) that would clarify whether and to what extent juror testimony can be admitted to prove some disparity between the verdict reported and the verdict intended by the jurors. The Reporter's memorandum addressed two problems under the current Rule: 1. All courts have found an exception to the Rule, allowing juror testimony on clerical errors in the reporting of the verdict, even though there is no language permitting such an exception in the text of the Rule; and 2. The courts are in dispute about the breadth of that exception–some courts allow juror proof whenever the verdict has an effect that is different from the result that the jury intended to reach,

while other courts follow a narrower exception permitting juror proof only where the verdict reported is different from that which the jury actually reached because of some clerical error. The former exception is broader because it would permit juror proof whenever the jury misunderstood (or ignored) the court's instructions. For example, if the judge told the jury to report a damage award without reducing it by the plaintiff's proportion of fault, and the jury disregarded that instruction, the verdict reported would be a result different from what the jury actually intended, thus fitting the broader exception. But it would not be different from the verdict actually reached, and so juror proof would not be permitted under the narrow exception for clerical errors.

The Committee discussed whether Rule 606(b) should be amended to account for errors in the reporting of the verdict, and if so, what the breadth of the exception should be. The Committee was unanimous in its belief that an amendment to Rule 606(b) is warranted. Not only would an amendment rectify a divergence between the text of the Rule and the case law (thus eliminating a trap for the unwary and the unpredictability that results from such divergence), but it would also eliminate a circuit split on an important question of Evidence law.

The Committee was also unanimous in its belief that if an amendment to Rule 606(b) is to be proposed, it should codify the narrower exception of clerical error. An exception that would permit proof of juror statements whenever the jury misunderstood or ignored the court's instruction was thought to have the potential of intruding into juror deliberations, and upsetting the finality of verdicts, in a large and undefined number of cases. As such, the broad exception is in tension with the policies of the Rule. In contrast, an exception permitting proof only if the verdict reported is different from that actually reached by the jury does not intrude on the privacy of jury deliberations, as the inquiry only concerns what the jury decided, not why it decided as it did.

The Committee tentatively decided to place a narrow amendment to Rule 606(b) on its list of a possible package of amendments that could be proposed in 2004. The Committee tentatively approved language providing that a juror may testify about whether "the verdict reported is the verdict that was decided upon by the jury." This language, and the advisability of an amendment to Rule 606(b), will be reconsidered by the Committee at its Spring 2004 meeting.

5. Rule 803(6)

At the Committee's request, Professor Broun, the consultant to the Committee, prepared a memorandum on whether Evidence Rule 803(6) should be amended to add a "business duty" requirement to the Rule. The "business duty" requirement addresses a problem that arises when information recorded in a business record comes from outside the recording entity. If the person reporting from outside the entity has no "business duty" to report the information reliably, then there is a concern that the business record will be a reliable recording of unreliable information.

Professor Broun's report noted that Rule 803(6) does not explicitly contain a "business duty" requirement in the text of the Rule. The federal courts that have considered the question, however, have found a business duty requirement inherent in the Rule. That requirement can be satisfied when the reporting party has a business duty, or where the statement from the reporting party is independently admissible under a hearsay exception, thus satisfying the requirements of Rule 805, covering multiple levels of hearsay. Professor Broun also noted that some courts have relaxed the business duty requirement when the underlying data has been verified. Some other courts have abrogated the requirement where there are other adequate guarantees of trustworthiness. Professor Broun concluded that although there are some differences in the federal courts in dealing with the issue, for the most part a consistent pattern has emerged. Ordinarily, there will be a required business duty to report, but that duty may be supplanted by a clear motive to verify or other circumstances that bring the communication within the policy behind the business records exception.

After discussion, the Committee resolved unanimously to terminate consideration of any amendment to Rule 803(6). Committee members agreed with Professor Broun that the courts have approached the question of "business duty" in a flexible and reasonable manner. The Committee found it advisable to give this common law development an opportunity to continue without amendment of the rule.

A motion was made and seconded to terminate consideration of any amendment to Rule 803(6). That motion was approved by unanimous vote.

Privileges

At its Fall 2002 meeting, the Evidence Rules Committee decided that it would not propose any amendments to the Evidence Rules on matters of privilege. The Committee determined, however, that it could – under the auspices of its Reporter and consultant on privileges, Professor Broun – perform a valuable service to the bench and bar by giving guidance on what the federal common law of privilege currently provides. This could be accomplished by a publication outside the rulemaking process, such as has been previously done with respect to outdated Advisory Committee Notes and caselaw divergence from the Federal Rules of Evidence. Thus, the Committee agreed to continue with the privileges project and determined that the goal of the project would be to provide, in the form of a draft rule and commentary, a "survey" of the existing federal common law of privilege. This essentially would be a descriptive, non-evaluative presentation of the existing federal law, not a "best principles" attempt to write how the rules of privilege "ought" to look. Rather, the survey would be intended to help courts and lawyers determine what the federal law of privilege actually is. The Committee determined that the survey will be structured as follows:

1. An introduction setting forth the purpose and plan of the project.

2. The project would be divided into sections, one for each privilege as well as a general section for a discussion of principles such as choice of law and invocation and waiver of a privilege.

3. The first section for each rule would be a draft "survey" rule that would set out the existing federal law of the particular privilege. Where there is a significant split of authority in the federal courts, the rule would include alternative clauses or provisions.

4. The second section for each rule would be a commentary on existing federal law. This section would provide case law support for each aspect of the survey rule and an explanation of the alternatives, as well as a description of any aberrational caselaw. This commentary section is intended to be detailed but not encyclopedic. It would include representative cases on key points rather than every case, and important law review articles on the privilege, but not every article.

5. The third section would be a discussion of reasonably anticipated choices that the federal courts, or Congress if it elected to codify privileges, might take into consideration. For example, it would include the possibility of different approaches to the attorney-client privilege in the corporate context and the possibility of a general physician-patient privilege. This section, like the project itself, will be descriptive rather than evaluative.

At the Spring 2003 meeting, Professor Broun presented, for the Committee's information, a draft of the first two sections of the survey on the psychotherapist-patient privilege. It was agreed that Professor Broun would finish the third section of the survey on that privilege and move on to the attorney-client privilege. Judge Shadur asked for clarification on whether the survey, when completed, would be published as the work of the Committee as a whole. Committee members agreed that as with the previous reports outside the rulemaking process, the survey would not be considered Committee work product, but rather would be attributed to Professor Broun and the Reporter, working under the auspices of the Committee.

Other Business

1. "De Bene Esse" Depositions

Judge Levi, Chair of the Civil Rules Committee, asked the Evidence Rules Committee to consider the consequences of a proposal to amend the Civil Rules to permit more general use of "de bene esse" depositions, i.e., depositions prepared as a substitute for trial testimony. "De bene esse"

depositions are distinguished as a practical matter from discovery depositions because they are taken for the express purpose of substituting for trial testimony. Currently, however, there is nothing in the Civil Rules or in the Evidence Rules that distinguishes between discovery and "de bene esse" depositions. The question for the Evidence Rules Committee was whether a rule supporting more general use of a "de bene esse" deposition would conflict with the Federal Rules of Evidence.

The Reporter's memorandum to the Committee indicated that a rule permitting use of "de bene esse" depositions would create a conflict with the hearsay rule. The current exception that might apply–the Rule 804(b)(1) exception for prior testimony–is premised on the unavailability of the declarant, and with respect to "de bene esse" depositions, the deponent is often not unavailable for trial in the sense required by the Evidence Rules. The Reporter noted, however, that there was some ambiguity about the proposed rule change, in that it could be read as permitting use of "de bene esse" depositions only after stipulation among the parties. If the "de bene esse" deposition was given only after stipulation as to its admissibility, there would be no conflict with the Evidence Rules.

Committee members agreed that a rule permitting broad use of "de bene esse" depositions–at least in the absence of a stipulation–would create a conflict with the hearsay rule and also a possible conflict with the general preference for live testimony and the trial court's discretion under Evidence Rule 611(a) to control the mode and presentation of testimony. Committee members further expressed disapproval of the proposal on the merits. In their view, a rules-based distinction between discovery depositions and "de bene esse" depositions was unjustified. One problem would arise if a discovery deposition were taken and then the deponent becomes unavailable for trial under the terms of Evidence Rule 804(a). When the proponent moves to admit the deposition at trial, the opponent would have an argument that the proponent gave no "de bene esse" notice at the time the deposition was taken. This would change the existing law that discovery depositions are admissible when they comply with the terms of a hearsay exception. Committee members strongly expressed the opinion that no distinction should be made in the rules between discovery and "de bene esse" depositions.

Finally, Committee members discussed a related problem concerning the relationship between the Civil Rules and the Evidence Rules. Civil Rule 32 contains what amounts to a freestanding exception to the hearsay rule for depositions. There has always been an uneasy relationship between depositions admitted under Civil Rule 32 and depositions admitted under Evidence Rule 804(b)(1). The unavailability requirement applicable to depositions admitted under Rule 804(b)(1) is different from, and generally more stringent than, the requirements under Civil Rule 32. The most obvious difference is that to be unavailable on grounds of absence under Rule 804, the deponent must be beyond the subpoena power. In contrast, under Rule 32, the deponent need only be more than 100 miles from the place of trial. Committee members found no compelling reason for an exception that is so similar to Rule 804(b)(1) and yet based on subtly different admissibility requirements. Moreover, the placement of such an exception in a completely separate set of rules can only be deemed a source of confusion and a trap for the unwary

The Committee resolved unanimously to report the following conclusions to the Civil Rules Committee: 1) Adoption of a rule permitting broad use of "de bene esse" depositions would create a conflict with the Evidence Rules, unless the rule were premised on stipulation; 2) On the merits, the Evidence Rules Committee is opposed to any attempt to distinguish "de bene esse" depositions from discovery depositions: and 3) The Evidence Rules Committee would be happy to work with the Civil Rules Committee in addressing the problem created by the existence of a freestanding hearsay exception in Civil Rule 32.

2. Proposal on Preserving Exhibits

The Administrative Office referred to the Evidence Rules Committee a proposal from Judge Roll for a rule that would require district courts to preserve trial exhibits pending appeal. The Reporter prepared a memorandum on the subject, concluding that a rule governing preservation of exhibits during appeal was (assuming it was necessary) better placed in local rules or in the Appellate Rules rather than in the Evidence Rules. The Committee agreed with the Reporter's conclusion, and was informed by John Rabiej that the proposal was being taken up by the Appellate Rules Committee. The Reporter noted that the Appellate Rules Committee should be advised that any rule concerning preservation of exhibits should be limited to documentary exhibits only. District courts should not be expected to preserve physical evidence or dangerous substances pending appeal. The Reporter noted that many local rules distinguish between documentary exhibits and physical evidence, providing for court retention for the former pending appeal, but not for the latter.

3. Pending Legislation

The Reporter apprised the Committee of two bills pending in Congress that would have an impact on the Federal Rules of Evidence. One bill would enact a parent-child privilege as a new Rule 502 of the Federal Rules of Evidence. The other bill would make changes to Federal Rule 414 and 415, by providing for more liberal rules of admissibility in cases involving child molestation.

Neither of these bills is in danger of imminent enactment. The Committee determined that it would be prepared to provide comment on these bills if and when necessary. Committee members noted that the Committee was already on record as opposing any amendment that would add only a single codified privilege to the Federal Rules of Evidence, as this would result in a patchwork approach to the privileges.

4. Tribute to Judge Shadur

On behalf of the Committee, the Chair expressed profound gratitude to Judge Shadur for his stellar service as a member and subsequently Chair of the Evidence Rules Committee. Judge Shadur was a moving force behind the important amendments to Evidence Rules 701, 702 and 702 that were enacted in 2000. His boundless intellect and dedication were critical to the work of the Committee. Judge Smith presented Judge Shadur with a certificate signed by the Chief Justice acknowledging Judge Shadur's service on the Evidence Rules Committee. Judge Shadur expressed his thanks and noted that service on the Committee was a valuable experience for trial judges, giving them a unique opportunity to consider in depth the meaning and application of the Evidence Rules.

Next Meeting

The next meeting of the Committee is tentatively scheduled for November 13, 2003, at a place to be determined.

The meeting was adjourned at 3:00 p.m., April 25.

Respectfully submitted,

Daniel J. Capra
Reed Professor of Law
Reporter

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

SAMUEL A. ALITO, JR.
APPELLATE RULES

A. THOMAS SMALL
BANKRUPTCY RULES

DAVID F. LEVI
CIVIL RULES

EDWARD E. CARNES
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

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

FROM: **Honorable A. Thomas Small, Chair**
Advisory Committee on Bankruptcy Rules

DATE: **May 27, 2003**

RE: **Report of the Advisory Committee on Bankruptcy Rules**

I. Introduction

The Advisory Committee on Bankruptcy Rules met on April 3-4, 2003, in Longboat Key, Florida. The Advisory Committee considered public comments regarding a proposed amendment to Bankruptcy Rule 9014 that was published in August 2002. The Advisory Committee received only four comments on the proposed amendment to the Rule. Since no person who submitted a written comment requested to appear at the public hearing scheduled for January 4, 2002, the hearing was canceled. The Advisory Committee also considered technical amendments to Bankruptcy Rules 1011 and 2002(g) as well as a new Official Form for the submission of a debtor's social security number as required by amendments to Bankruptcy Rules 1007 and 2002 that will become effective on December 1, 2003. Finally, the Advisory Committee considered amendments to Bankruptcy Rules 1007, 3004, 3005, 4008, 7004, and 9006.

The Advisory Committee considered the written comments on the proposed amendment to Bankruptcy Rule 9014, and approved the proposal and will present it to the Standing Committee at its June 2003 meeting for final approval and transmission to the Judicial Conference. The amendment to Bankruptcy Rule 9014 is set out in Part II A of this Report.

The amendments to Bankruptcy Rules 1011 and 2002(g) are technical and are submitted to the Standing Committee without prior publication and comment. The amendment to Rule 1011 simply conforms a cross reference in that rule to reflect a recent amendment to another Bankruptcy Rule. The amendment to Rule 2002(g) changes the address for mailing notices to the Internal Revenue Service because of a change in the structure of the Service. A new Official Form 21 is proposed to implement the restrictions on the publication of a debtor's social security number. The amendments to Bankruptcy Rules 1011 and 2002(g) and Official Form 21 are set out in Part II B of this Report.

The Advisory Committee also approved a preliminary draft of proposed amendments to Bankruptcy Rules 1007, 3004, 3005, 4008, 7004, and 9006 and will present those amendments to the Standing Committee at its June 2003 meeting with a request that the proposals be published for comment. The Standing Committee in January 2003 approved for publication an amendment to Rule 4008. The Style Consultant to the Standing Committee and the Style Subcommittee of the Advisory Committee have made stylistic changes to that rule, and this revised version in set out along with the other proposed amendments in Part II C of this Report.

II Action Items

A. Proposed Amendments to Bankruptcy Rule 9014 Submitted for Final Approval by the Standing Committee and Submission to the Judicial Conference.

1. *Public Comment.*

The preliminary draft of the proposed amendment to Bankruptcy Rule 9014 was published for comment in August 2002. A public hearing on the preliminary draft was scheduled for January 24, 2003. There were no requests to appear at the hearing. There were four comments on the proposal, and they are summarized below. The Advisory Committee reviewed these comments and approved the amendment to the rule as published.

2. *Synopsis of Proposed Amendment*

Rule 9014 is amended to limit the applicability of the mandatory disclosure provisions of Rule 26 of the Federal Rules of Civil Procedure made applicable in contested matters in bankruptcy cases by Bankruptcy Rule 7026. Contested matters typically are resolved more quickly than the time that would elapse under the normal application of the mandatory disclosure provisions of Fed. R. Civ. P. 26. Those disclosure requirements continue to apply in adversary proceedings, and the court can order that they apply in a particular contested matter.

3. *Text of Proposed Amendment to Rule 9014*

Rule 9014. CONTESTED MATTERS

* * * * * * * *

(c) APPLICATION OF PART VII RULES. Except as otherwise provided in this rule, and unless ~~Unless~~ the court directs otherwise, the following rules shall apply: 7009, 7017, 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7064, 7069, and 7071. The following subdivisions of Fed. R. Civ. P. 26, as incorporated by Rule 7026, shall not apply in a contested matter unless the court directs otherwise: 26(a)(1) (mandatory disclosure), 26(a)(2) (disclosures regarding expert testimony) and 26(a)(3) (additional pre-trial disclosure), and 26(f) (mandatory meeting before scheduling conference/discovery plan). An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. The court shall give the parties notice of any order issued under this paragraph to afford them a reasonable opportunity to comply with the procedures prescribed by the order.

COMMITTEE NOTE

The rule is amended to provide that the mandatory disclosure requirements of Fed. R. Civ. P. 26, as incorporated by Rule 7026, do not apply in contested matters. The typically short time between the commencement and resolution of most contested matters makes the mandatory disclosure provisions of Rule 26 ineffective. Nevertheless, the court may by local rule or by order in a particular case provide that these provisions of the rule apply in a contested matter.

Public Comment on Proposed Amendments to Rule 9014:

1. Gary L. Kepplinger, Deputy General Counsel, United States General Accounting Office, submitted a letter indicating that his office had no comments on the proposal.

2. Thomas J. Yerbich, Court Rules Attorney for the District of Alaska, supports the proposed amendment to Rule 9014 and also suggested that the rule include a specific reference to the court's authority to issue a local rule governing mandatory discovery matters.

3. Professor Anthony Michael Sabino, Associate Professor at St. John's University School of Business, supports the proposed amendment to Rule 9014 and suggested an addition to the Committee Note to reiterate that the court has the power to require the application of all or some of Civil Rule 26 in appropriate circumstances.

4. Kent F. Hofmeister, Esq., President, Federal Bar Association, stated that the Federal Bar Association supports the amendment to Rule 9014.

Changes Made After Publication. No changes since publication.

B. *Rules and Official Form Amendments Proposed Without Public Comment.*

The Advisory Committee considered technical amendments to Bankruptcy Rules 1011 and 2002(g). The Advisory Committee approved the amendments to the rules and submits that the nature of these amendments is such that there is no need for publication and comment on the proposed amendments. The Advisory Committee recommends that the Standing Committee approve the amendments for submission to the Judicial Conference.

The Advisory Committee also considered a new Official Form 21. This form implements

the amendment to Rule 1007(f) that becomes effective on December 1, 2003, in the absence of Congressional action. The form provides the mechanism for the debtor to submit a social security number to the court so that creditors and other parties in interest can identify the debtor while maintaining the debtor's privacy. The Advisory Committee recommends that the Standing Committee approve the Official Form for submission to the Judicial Conference with an effective date of December 1, 2003.

1. *Synopsis of Proposed Rules Amendments and New Official Form:*

(a) Rule 1011 is amended to delete a cross reference to Rule 1004(b). The cross reference should be to Rule 1004 because that rule was amended recently such that the rule no longer includes any subdivisions.

(b) Rule 2002(g) is amended to reflect the restructuring of the Internal Revenue Service. The Service no longer includes a District Director, so the rule is amended to provide that notices should be mailed to the address set out by the Service in the register maintained by the clerk of the Bankruptcy Court.

(c) Official Form 21 is a new form that a debtor must submit to the court setting out the debtor's social security number. The Form implements the recently approved amendments to Bankruptcy Rule 1007 adopted to further the Judicial Conference's privacy protection policy.

2. *Text of Proposed Amendments to Rules 1011, 2002, and Proposed New Official Form 21:*

RULE 1011. RESPONSIVE PLEADING OR MOTION IN INVOLUNTARY AND ANCILLARY CASES

(a) WHO MAY CONTEST PETITION. The debtor named in an involuntary petition or a party in interest to a petition commencing a case ancillary to a foreign proceeding may contest the petition. In the case of a petition against a partnership under Rule 1004 ~~(b)~~, a nonpetitioning general partner, or a person who is alleged to be a general partner but denies the allegation, may contest the petition.

* * * * *

COMMITTEE NOTE

The amendment to Rule 1004 that became effective on December 1, 2002, deleted former subdivision (a) of that rule leaving only the provisions relating to involuntary petitions against partnerships. The rule no longer includes subdivisions. Therefore, this technical amendment changes the reference to Rule 1004(b) to Rule 1004.

Rule 2002. NOTICES TO CREDITORS, EQUITY SECURITY HOLDERS, UNITED STATES, AND UNITED STATES TRUSTEE

* * * * * *

(j) NOTICES TO THE UNITED STATES. Copies of notices required to be mailed to all creditors shall be mailed (1) in a chapter 11 reorganization case, to the Securities and Exchange Commission at any place the Commission designates, if the Commission has filed either a notice of appearance or a written request to receive notice; (2) in a commodity broker case, to the Commodity Futures Trading Commission at Washington, D.C.; (3) in a chapter 11 case, to the ~~District Director of~~ Internal Revenue Service at its address set out in the register maintained under Rule 5003(e) for the district in which the case is pending; (4) if the papers in the case disclose a debt to the United States other than for taxes, to the United States attorney for the district in which the case is pending and to the department, agency, or instrumentality of the

United States through which the debtor became indebted; or (5) if the filed papers disclose a stock interest of the United States, to the Secretary of the Treasury at Washington, D.C.

* * * * * *

COMMITTEE NOTE

The rule is amended to reflect that the structure of the Internal Revenue Service no longer includes a District Director. Thus, rather than sending notice to the District Director, the rule now requires that the notices be sent to the location designated by the Service and set out in the register of addresses maintained by the clerk under Rule 5003(e). The other change is stylistic.

The Advisory Committee also approved a new Official Form 21. This Form implements a recent amendment to Bankruptcy Rule 1007(f) which requires a debtor to submit a statement under penalty of perjury setting out the debtor's social security number. This rule amendment becomes effective on December 1, 2003, and the Advisory Committee recommends that the Standing Committee recommend that the Judicial Conference approve the Official Form to be effective on December 1, 2003.

OFFICIAL FORM NO. 21 IS SET OUT SEPARATELY

Form B 21 Official Form 21
(12/03)

FORM 21. STATEMENT OF SOCIAL SECURITY NUMBER

[*Caption as in Form 16A.*]

STATEMENT OF SOCIAL SECURITY NUMBER(S)

1.Name of Debtor (enter Last, First, Middle):_____
(Check the appropriate box and, if applicable, provide the required information.)

/ /Debtor has a Social Security Number and it is: _ _ _-_ _-_ _ _ _
(If more than one, state all.)
/ /Debtor does not have a Social Security Number.

2.Name of Joint Debtor (enter Last, First, Middle):_____
(Check the appropriate box and, if applicable, provide the required information.)

/ /Joint Debtor has a Social Security Number and it is: _ _ _-_ _-_ _ _ _
(If more than one, state all.)
/ /Joint Debtor does not have a Social Security Number.

I declare under penalty of perjury that the foregoing is true and correct.

X _____
Signature of Debtor Date

X _____
Signature of Joint Debtor Date

**Joint debtors must provide information for both spouses.*
Penalty for making a false statement: Fine of up to $250,000 or up to 5 years imprisonment or both. 18 U.S.C. §§ 152 and 3571.

COMMITTEE NOTE

The form implements Rule 1007(f), which requires a debtor to submit a statement under penalty of perjury setting out the debtor's Social Security number. The form is necessary because Rule 1005 provides that the caption of the petition includes only the final four digits of the debtor's Social Security number. The statement provides the information necessary for the clerk to include the debtor's full Social Security number on the notice of the meeting of creditors, as required under Rule 2002(a)(1). Creditors in a case, along with the trustee and United States trustee or bankruptcy administrator, will receive the full Social Security number on their copy of the notice of the meeting of creditors. The copy of that notice which goes into the court file will show only the last four digits of the number.

C. Preliminary Draft of Proposed Amendments to Rules 1007, 3004, 3005, 4008, 7004, and 9006

1. *Synopsis of Proposed Amendments:*

(a) Rule 1007 is amended to require the debtor in a voluntary case to submit with the petition a list of entities to which notices will be sent in the case. The listed parties are identified as the entities listed or to be listed on Schedules D through H of the Official Forms.

(b) Rule 3004 is amended to conform the rule to § 501(c) of the Bankruptcy Code. The amendment clarifies that the debtor or trustee may not file a proof of claim until after the time for filing a proof by a particular creditor has expired.

(c) Rule 3005 is amended to delete any reference to a creditor filing a proof of claim that supersedes a claim filed on behalf of the creditor by a codebtor. The amendment thus conforms the rule to § 501(b) of the Bankruptcy Code.

(d) Rule 4008 is amended to establish a deadline for filing a reaffirmation agreement with the court. The amendment deletes the former version of the rule that governed the timing of the reaffirmation agreement and discharge hearing. These restrictions on the court's docket are unduly burdensome and the amendment with the discretion to set and hold these hearings at appropriate times in the circumstances presented in the case.

(e) Rule 7004 is amended to authorize the clerk specifically to sign, seal, and issue a summons electronically. The amendment does not address the service requirements for a summons which are set out in other provisions of Rule 7004.

(f) Rule 9006 is amended to clarify that the three day period is added to the end of the time period for taking action when service is accomplished through certain specified means. This amendment in intended to conform as closely as possible to the amendment being proposed by the Advisory Committee on Civil Rules.

2. *Text of Proposed Amendments to Rules 1007, 3004, 2005, 4008, 7004, and 9006:*

RULE 1007. LISTS, SCHEDULES AND STATEMENTS, TIME LIMITS

(a) LIST OF CREDITORS AND EQUITY SECURITY HOLDERS

(a) List of Creditors and Equity Security Holders

(1) In a voluntary case, ~~the debtor shall file with the petition a list containing the name and address of each creditor unless the petition is accompanied by a schedule of liabilities~~ the debtor shall file with the petition a list containing the name and address of each person included or to be included on Schedules D, E, F, G, and H as prescribed by the Official Forms.

(2) In an involuntary case, the debtor shall file within 15 days after entry of the order for relief, a list containing the name and address of each ~~creditor unless a schedule of liabilities has been filed~~ person included or to be included on Schedules D, E, F, G, and H as prescribed by the Official Forms.

* * * * *

(c) In a voluntary case, the ~~The~~ schedules and statements, other than the statement of intention, shall be filed with the petition in a voluntary case, or ~~if the petition is accompanied by a list of all~~

~~the debtor's creditors and their addresses,~~ within 15 days thereafter, except as provided in subdivisions (d), (e), and (h) of this rule. In an involuntary case the list in subdivision (a)(2), and the schedules and statements, other that the statement of intention, shall be filed by the debtor within 15 days after the entry of the order for relief. ~~Schedules~~ Lists, schedules, and statements filed prior to the conversion of a case to another chapter shall be deemed filed in the converted case unless the court directs otherwise. Any extension of time for the filing of the schedules and statements may be granted only on motion for cause shown and on notice to the United States trustee and to any committee elected under § 705 or appointed under § 1102 of the Code, trustee, examiner, or other party as the court may direct. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

* * * * *

(g) The general partners of a debtor partnership shall prepare and file the list required under subdivision (a), the schedules of assets and liabilities, schedule of current income and expenditures, schedule of executory contracts an unexpired leases, and statement of financial affairs of the partnership. The court may order any general partner to file a statement of personal assets and

liabilities within such time as the court may fix.

COMMITTEE NOTE

Notice to creditors and other parties in interest is essential to the operation of the bankruptcy system. Sending notice requires a convenient listing of the names and addresses of the entities to whom notice must be sent, and virtually all of the bankruptcy courts have adopted a local rule requiring the submission of a list of these entities with the petition and in a particular format. These lists are commonly called the "mailing matrix".

Given the universal adoption of these local rules, the need for such lists in all cases is apparent. Consequently, the rule is amended to require the debtor to submit such a list at the commencement of the case. This list may be amended when necessary. See Rule 1009(a).

The content of the list is described by reference to Schedules D through H of the Official Forms rather than by reference to creditors or persons holding claims. The cross reference to the Schedules as the source of the names for inclusion in the list ensures that persons such as codebtors or nondebtor parties to executory contracts and unexpired leases will receive appropriate notices in the case.

While this rule renders unnecessary, in part, local rules on the subject, this rule does not direct any particular format or form for the list to take. Local rules still may govern those particulars of the list.

Subdivision (c) is amended to reflect that subdivision (a)(1) no longer requires the debtor to file a schedule of liabilities with the petition in lieu of a list of creditors. The filing of the list is mandatory, and subdivision (b) of the rule requires the filing of schedules. Thus, subdivision (c) no longer needs to account for the possibility that the debtor can delay filing a schedule of liabilities when the petition is accompanied by a list of creditors. Subdivision (c) simply addresses the situation in which the debtor does not file schedules or statements with the petition, and the procedure for seeking an extension of time for filing.

Other changes are stylistic.

RULE 3004. FILING OF CLAIMS BY DEBTOR OR TRUSTEE.

If a creditor ~~fails to file~~ does not timely file a proof of claim Rule 3002(c) or 3003(c), ~~on or before the meeting of creditors called pursuant to § 341(a) of the Code,~~ the debtor or trustee may ~~do so in the name of the creditor,~~ file a proof of the claim within 30 days ~~of~~ after the expiration of the time for filing claims prescribed by Rule 3002(c) or 3003(c), whichever is applicable. The clerk shall forthwith ~~mail~~ give notice of the filing to the creditor, the debtor and the trustee. ~~A proof of claim filed by a creditor shall supersede the proof filed by the debtor or trustee.~~

COMMITTEE NOTE

The rule is amended to conform to § 501(c) of the Code. Under that provision, the debtor or trustee may file proof of a claim if the creditor fails to do so in a timely fashion. The rule previously authorized the debtor and the trustee to file a claim as early as the day after the first date set for the meeting of creditors under § 341(a). Under the amended rule, the debtor and trustee must wait until the creditor's opportunity to file a claim has expired. Providing the debtor and the trustee with the opportunity to file a claim ensures that the claim will participate in any distribution in the case. This is particularly important for claims that are nondischargeable.

Since the debtor and trustee cannot file a proof of claim until after the creditor's time to file has expired, the rule no longer permits the creditor to file a proof of claim that will supersede the claim filed by the debtor or trustee. The rule leaves to the courts the issue of whether to permit subsequent amendment of such proof of claim.

Other changes are stylistic.

RULE 3005. FILING OF CLAIM, ACCEPTANCE, OR REJECTION BY GUARANTOR, SURETY, INDORSER, OR OTHER CODEBTOR

(a) FILING OF CLAIM. If a creditor does not timely file ~~has not filed~~ a proof of claim under ~~pursuant to~~ Rule 3002 or 3003(c), any entity that is or may be liable with the debtor to that creditor, or who has secured that creditor, may, within 30 days after the expiration of the time for filing claims prescribed by Rule 3002(c) or 3003(c) whichever is applicable, ~~execute and~~ file a proof of the ~~such~~ claim ~~in the name of the creditor, if known, or if unknown, in the entity's own name~~. No distribution shall be made on the claim except on satisfactory proof that the original debt will be diminished by the amount of distribution. ~~A proof of claim filed by a creditor pursuant to Rule 3002 or 3003(c) shall supersede the proof of claim filed pursuant to the first sentence of this subdivision.~~

* * * * * *

COMMITTEE NOTE

The rule is amended to delete the last sentence of subdivision (a). The sentence is unnecessary because if a creditor has filed a timely claim under Rule 3002 or 3003(c), the codebtor cannot file a proof of such claim. The codebtor, consistent with § 501(b) of the Code, may file a proof of such claim only after the creditor's time to file has expired. Therefore, the rule no longer permits the creditor to file a superseding claim. The rule leaves to the courts the issue of whether to permit subsequent amendment of the proof of claim.

The amendment conforms the rule to § 501(b) by deleting language providing that the codebtor files proof of the claim in the name of the creditor.

Other amendments are stylistic.

RULE 4008. ~~DISCHARGE AND REAFFIRMATION HEARING~~ FILING OF REAFFIRMATION AGREEMENT

A reaffirmation agreement shall be filed not later than 30 days after the entry of an order granting a discharge or confirming a plan in a chapter 11 reorganization case of an individual debtor. The court, for cause, may extend the time, and leave shall be freely given when justice so requires. ~~Not more than 30 days following the entry of an order granting or denying a discharge, or confirming a plan in a chapter 11 reorganization case concerning an individual debtor and on not less than 10 days notice to the debtor and the trustee, the court may hold a hearing as provided in § 524(d) of the Code. A motion made by the debtor for approval of a reaffirmation agreement shall be filed before or at the hearing.~~

COMMITTEE NOTE

The rule is amended to establish a deadline for filing reaffirmation agreements. The Code sets out a number of prerequisites to the enforceability of reaffirmation agreements. Among those requirements are that the agreements be entered into prior to the discharge and that they be filed with the court. Since the parties must make their agreement prior to the entry of the discharge, they will have at least 30 days to file the agreement with the court. Requiring the filing of reaffirmation agreements by a certain deadline also serves to inform the court of the need to hold

a hearing under § 524(d) whenever the agreement is not accompanied by an appropriate declaration or affidavit from counsel for the debtor.

The rule allows any party to the agreement to file it with the court. Thus, whichever party has a greater incentive to enforce the agreement usually will file it. In the event that the parties fail to timely file the reaffirmation agreement, the rule grants the court broad discretion to permit a late filing.

The rule also is amended by deleting the provisions formerly in the rule regarding the timing of the reaffirmation and discharge hearing. Instead, the rule leaves discretion to the courts to set the hearing at a time appropriate for the particular circumstances presented in the case and consistent with the scheduling needs of the parties.

RULE 7004. PROCESS; SERVICE OF SUMMONS; COMPLAINT

(a) SUMMONS; SERVICE; PROOF OF SERVICE

(1) Except as provided in Rule 7004(a)(2), Rule 4(a), (b), (c)(1), (d)(1), (e)-(j), (*l*), and (m) F.R.Civ.P. applies in adversary proceedings. Personal service under ~~pursuant to~~ Rule 4(e)-(j) F.R.Civ.P. may be made by any person at least 18 years of age who is not a party, and the summons may be delivered by the clerk to any such person.

(2) The clerk may sign, seal, and issue a summons electronically by putting an "s/"before the clerk's name and including the court's seal on the summons.

COMMITTEE NOTE

This amendment specifically authorizes the clerk to issue a summons electronically. In some bankruptcy cases the trustee or debtor in possession may commence hundreds of adversary proceedings simultaneously, and permitting the electronic signing and sealing of the summonses for those proceedings increases the efficiency of the clerk's office without any negative impact on any party. The rule only authorizes electronic issuance of the summons. It does not address the service requirements for the summons. Those requirements are set out elsewhere in Rule 7004, and nothing in Rule 7004(a)(2) should be construed as authorizing electronic service of a summons.

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 ~~service of a notice or other paper and the notice or paper other than process is served~~ and that service is by mail or under Rule 5 (b)(2)(C) or (D) F. R. Civ. P., three days ~~shall be~~ are added ~~to~~ after the prescribed period expires.

COMMITTEE NOTE

Rule 9006(f) is amended, consistent with a corresponding amendment to Rule 6 (e) of the F.R. Civ. P, to clarify the method of counting the number of days to respond after service either by mail or under Civil Rule 5(b)(2)(C) or (D). Three days are added after the prescribed period expires. If the prescribed period is less than 8 days, intervening Saturdays, Sundays, and legal holidays are excluded from the calculation under Rule 9006(a). Some illustrations may be helpful.

Assuming that there are no legal holidays and that a response is due in seven days, if a paper is filed on a Monday, the seven day response period commences on Tuesday and concludes on Wednesday of the next week. Adding three days to the end of the period would take one to Saturday. The response day would be the following Monday, two weeks after the filing of the initial paper. If the paper is filed on a Tuesday, the seven day response period would end on the following Thursday, and the response time would also be the following Monday. If the paper is mailed on a Wednesday, the seven day period would expire nine days later on a Friday. The response would again be due on the following Monday. If the paper is mailed on a Thursday, however, the seven day period ends on Monday, eleven days after the mailing of the service because of the exclusion of the two intervening Saturdays and Sundays. The response is due three days later on the following Thursday. If the paper is mailed on a Friday, the seven day period would conclude on a Tuesday, and the response is due three days later on a Friday.

No other change in the system of counting time is intended.

Other changes are stylistic.

III. Information Items

(1) *Proposed Bankruptcy Legislation*

Congress continues to consider extensive reform of the Bankruptcy Code. A bill, H.R. 975, passed in the House of Representatives on March 19, 2003, and is pending in the Senate. Prospects for its passage are unclear at this time, although the Bill has been placed on the Senate Calendar.

The Advisory Committee has taken steps to prepare appropriate amendments to the Bankruptcy Rules and Official Forms in the event that the reform legislation is enacted. Professors Jacoby and Markell continue to assist the Advisory Committee as consultants on both the consumer and business aspects of bankruptcy reform. Since the effective date of the legislation is 180 days after enactment, for most provisions, the Advisory Committee is actively preparing and considering amendments and additions to the Bankruptcy Rules and Official Forms.

(2) *Draft Minutes*

Draft minutes of the April 2003 meeting of the Advisory Committee are attached.

ATTACHMENT

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of April 3-4, 2003
Longboat Key, Florida

Draft Minutes

The following members attended the meeting:

Bankruptcy Judge A. Thomas Small, Chairman
District Judge Robert W. Gettleman
District Judge Ernest C. Torres
District Judge Thomas S. Zilly
District Judge Laura Taylor Swain
District Judge Irene M. Keeley
Bankruptcy Judge James D. Walker, Jr.
Bankruptcy Judge Christopher M. Klein
Bankruptcy Judge Mark McFeeley
Professor Mary Jo Wiggins
Professor Alan N. Resnick
Eric L. Frank, Esquire
Howard L. Adelman, Esquire
K. John Shaffer, Esquire
J. Christopher Kohn, Esquire

Professor Jeffrey W. Morris, Reporter, attended the meeting. District Judge Norman C. Roettger, Jr., a member of the Committee, was unable to attend.

Circuit Judge Anthony J. Scirica, chair of the Committee on Rules of Practice and Procedure (Standing Committee); District Judge Thomas W. Thrash, Jr., liaison to the Standing Committee; and Peter G. McCabe, secretary to the Standing Committee, attended. District Judge Bernice Bouie Donald, a former member of the Committee, attended. Bankruptcy Judge Jack B. Schmetterer, a member of the Committee on Federal-State Jurisdiction (Federal-State Committee); District Judge Lee H. Rosenthal, a member of the Advisory Committee on Civil Rules (Civil Rules Committee); David M. Bernick, a member of the Standing Committee; and Professor S. Elizabeth Gibson, University of North Carolina Law School, attended. Bankruptcy Judge Dennis Montali, liaison to the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee), and Lawrence A. Friedman, Director, Executive Office for United States Trustees (EOUST), were unable to attend.

The following additional persons attended all or part of the meeting: Martha L. Davis, Principal Deputy Director, EOUST; James J. Waldron, Clerk, United States Bankruptcy Court for the District of New Jersey; John K. Rabiej, Chief, Rules Committee Support Office,

Administrative Office of the United States Courts (Administrative Office); Patricia S. Ketchum and James H. Wannamaker, Bankruptcy Judges Division, Administrative Office; and Robert Niemic, Research Division, Federal Judicial Center (FJC).

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 Matters

The Chairman welcomed all the members, liaisons, advisers, and guests to the meeting. The Chairman recognized the contributions of Bankruptcy Judge Donald E. Cordova, a former member of the Committee, who died on February 16, 2003. The Chairman presented a certificate of appreciation to Judge Donald in recognition of her service as a member of the Committee. The Chairman presented a certificate of recognition to Ms. Ketchum in recognition of her outstanding work as principal support staff for the Committee under five different chairmen.

The Committee approved the minutes of the October 2002 meeting.

The Chairman reported on the January 2003 meeting of the Bankruptcy Administration Committee. The Bankruptcy Administration Committee adopted a revised mass torts report, which examines the mass torts recommendations of the National Bankruptcy Review Commission. The report, which was revised to incorporate comments from the Civil Rules Committee and the Federal-State Committee, includes an observation that bankruptcy is only one aspect of any solution to the problem of mass torts in the federal and state courts. The report also notes that the Review Commission recommendations raise constitutional issues that may not be resolved without guidance by the United States Supreme Court.

The Chairman stated that it was the view of the Bankruptcy Administration Committee that the continuing development and support of the Case Management/Electronic Case Files System (CM/ECF) is necessary to ensure future compatibility with court enhancements and advances in technology. To accomplish this, the Bankruptcy Administration Committee established a Subcommittee on Automation to assist the Committee in working with the Committee on Information Technology to define requirements for additional functionality.

The Chairman briefed the Committee on the January 2003 meeting of the Standing Committee. The Chairman reported that Mr. Bernick had expressed reservations about the impact of the proposed amendments to Rules 3004 and 3005 in mass torts cases. In order that the Committee could reconsider the proposed amendments after discussing mass torts, the Chairman withdrew the proposal from the Standing Committee. The Standing Committee approved the Committee's recommendation to publish a proposed amendment to Rule 4008 for

public comment.

The Chairman reported that the Supreme Court approved amendments Bankruptcy Rules 1005, 1007, 2002, 2003, 2009, 2016, 7007.1 on March 27, 2003. The amendments were transmitted to Congress and will take effect on December 1, 2003, unless Congress enacts legislation to reject, modify, or defer the amendments.

Discussion of Mass Torts

The Chairman said that the Standing Committee had devoted the final day of its January meeting to a general discussion of mass torts, and he thought that the Committee should start thinking about mass tort issues. As part of the discussion, he invited Mr. Bernick, a member of the Standing Committee, who has been a litigator in many mass tort cases, Professor Gibson of the University of North Carolina Law School, who has written extensively on the subject, and Judge Rosenthal, the chair of the Civil Rules Subcommittee on Class Actions, to discuss mass tort issues. In addition, Judge Schmetterer, a member of the Federal/State Committee; and Professor Resnick, a member of the Committee and the author of a recent law review article on resolving enterprise-threatening mass torts liability in bankruptcy, spoke briefly and participated in the discussion.

Professor Gibson said bankruptcy is an attractive alternative for companies facing thousands or millions of tort claims because: a bankruptcy case permits the consolidation of the litigation in a single forum with nationwide jurisdiction; the Bankruptcy Code's definition of claims is broad enough to include future claims; and the debtor can obtain a broad, comprehensive discharge of its liabilities. In addition, bankruptcy offers the protection of the automatic stay, which may be expanded to third parties in some circumstance; the bankruptcy court has exclusive jurisdiction over the debtor's property; and, unlike a civil class action, in a bankruptcy case, claimants do not have the opportunity to opt out of the proceeding. Professor Gibson outlined issues that may arise during the course of a mass torts bankruptcy. She said the inclusion of future claimants raises due process issues such as what kind of notice to give, the sufficiency of the appointment of a future claims representative, and whether a separate future claims representative is needed for each category of claimants.

Mr. Bernick said there is no clear litigation path for mass tort cases, inside or outside of bankruptcy. Outside of bankruptcy, no one court is in charge, and there is no single legal standard on which to determine liability and factual issues. Defendant conduct may be a common element, but its impact is plaintiff-specific. Mr. Bernick said it is very difficult for the courts to value a large number of individual claims, many of which are mediocre and a few of which are very valuable. Bankruptcy is appealing because it offers centralization before a single judge, tools to define liability and damages, the flexibility of section 105 of the Code, and the bankruptcy discharge. He said making the reorganization process work is arduous, however, because there is no clear litigation path and myriad issues must be wrestled to the ground. He

analyzed centralization, litigation, and closure issues in several major mass torts cases and concluded that, although asbestos cases are instructive, non-asbestos cases offer a better model for reforming the process.

Judge Rosenthal said her subcommittee was charged with ameliorating problems in class action cases and muting the corrosive effects of the process, which include overlapping, competing and duplicative class action suits in state and federal courts, lengthy delays, high litigation costs, and conflicts in rules and procedure, including the timing of class certification, the selection of class counsel, and determining which case will be tried first. After extensive study and discussion, the subcommittee concluded that rulemaking under the Rules Enabling Act could not solve the problem. Along with the Federal/State Committee, however, the Civil Rules Committee recommended the concept of minimal diversity for certain large, multi-state class actions in the federal courts with appropriate safeguards. In addition, the Supreme Court has forwarded to Congress proposed amendments to Civil Rule 23 concerning the conduct of class actions. If the amendments become effective December 1, 2003, as expected, they would apply in adversary proceedings in bankruptcy cases.

Professor Resnick said the 18-month limit on a chapter 11 debtor's exclusivity period in the pending Bankruptcy Reform Act, which has passed the House of Representatives, would change the dynamics of cases. He stated that what the Committee can do is limited by the nature of procedural rules and the absence of a supersession clause in section 2075 of title 28. Judge Schmetterer discussed the importance of the minimal diversity recommendation and of further analysis of the reform proposals made by the National Bankruptcy Review Commission and others.

After further discussion, the Advisory Committee concluded that additional mass tort-related amendments to the Bankruptcy Rules probably will have to be preceded by legislative action. The Chairman thanked Mr. Bernick, Judge Rosenthal, and Professor Gibson for their clear presentations of the difficult issues.

Action Items

Proposed Amendments to Rules 3004 and 3005. At its meeting in Hyannis, the Committee approved proposed amendments to Rules 3004 and 3005 to bring those rules in compliance with section 501(c) of the Bankruptcy Code. At the Standing Committee's January meeting, the Chairman withdrew the proposed amendments for further consideration after Mr. Bernick expressed reservations about the proposal's impact in mass tort cases. Mr. Bernick described a case in which he was involved where the chapter 11 debtor filed a proof of claim on behalf mass tort claimants so that their claims could be brought before the court and adjudicated. Setting a bar date for filing claims in such a case may be very costly because of the difficulty in providing notice to thousands or millions of potential creditors of their need to file.

Mr. Bernick's comments and the proposed amendments were considered by an ad hoc Rule 3004/3005 Subcommittee of the Advisory Committee, which recommended going forward with the original proposal because of the apparent conflict with section 501(c). At the Committee meeting, a member of the committee asked whether a chapter 11 debtor could avoid the need to file a claim on behalf of the creditor by amending its schedules. Mr. Bernick responded that the claims are unliquidated. He said the debtor wants to file a claim on behalf of the creditors in order get a trial on the merits on scientific issues and to determine the value of the claim.

The ad hoc subcommittee also considered whether timeliness under section 501, could be construed to mean within a time for the court to efficiently resolve matters essential to the case. The subcommittee concluded that it is likely the term would be interpreted to mean within the time permitted by the rules. Professor Resnick said the phrase "timely filed" is used several places in the Bankruptcy Code and Rules and that there is danger in saying that "timely filed" refers to something other than the bar date. The Committee discussed whether the bankruptcy judge could set a bar date for a small number of creditors as a means of moving the case forward, such as a bar date for claims based on currently filed lawsuits, or utilize sections 105 and 502(c) of the Code to estimate claims, even if unfiled, so long as due process is satisfied.

The Reporter said the Committee Note attempted to leave to the discretion of the court the extent of a creditor's ability to amend a claim filed on its behalf by the debtor or the trustee. The Chairman said that the Committee had addressed the question raised at the Standing Committee and that if other questions remain, the Committee could address them along with any comments after publication of the proposed rules. **A motion to forward the proposed amendments to the Standing Committee and request their publication for comment passed without dissent.**

Proposed Amendment to Rule 9014. The Reporter stated that the Committee has received four comments as a result of the publication of the proposed amendment to Rule 9014. The proposed amendment would make the mandatory disclosure and meeting requirements of Civil Rule 26 inapplicable to contested matters unless the court directs otherwise. One of the comments suggested that the Committee Note be revised to make explicit the court's discretion to reinstate the excepted subdivisions of Civil Rule 26 in whole or in part. The Reporter recommended inserting the phrase "some or all" in the final sentence of the Committee Note.

The Committee discussed whether such an insertion is needed in either the proposed amendment or the Committee Note and whether the insertion would create a negative inference in other rules. Mr. Frank suggested not making the insertion in order to avoid any negative inference. **A motion to approve the proposed amendment and the Committee Note without revision and recommend their adoption passed without dissent.**

Proposed Amendment to Rule 2002(g). The Bankruptcy Noticing Working Group had previously requested that the Committee consider an amendment to Rule 2002(g) to create a

process to permit creditors to receive notices electronically on a national or regional basis. The Noticing Working Group also has requested that the Committee consider amending Rule 2002(g) to permit creditors to register in a single place the address or addresses they wish to be used in all cases and in all districts throughout the bankruptcy system. The Working Group noted that technological advances permit the Bankruptcy Noticing Center (BNC) to correct misaddressed notices, batch multiple notices to a single creditor, and enhance the desirability of creditor participation in the Electronic Bankruptcy Noticing program by sending a creditor's notices to a single address designated by the creditor, all at a substantial savings to the judiciary. The Technology Subcommittee discussed the propriety of such an amendment to Rule 2002(g) and concluded that the issue should be considered by the Committee.

The Committee discussed concerns that the debtor might submit a creditor name which the name-matching software would match with the wrong creditor and, as a result, the BNC would send a notice intended for creditor A to creditor B. The problem could be avoided by sending two copies of the notice, one to the address supplied by the debtor and one to the national or regional address supplied by the creditor. Committee members noted that the double notice solution could be accomplished by contract without amending the rule and that sending double notices would not increase efficiency in the noticing process. Professor Resnick and Mr. Shaffer suggested that creditors could be charged extra for the added value of receiving duplicate notices at a single address.

Mr. Waldron suggested that a creditor file its request for a single, national address with the court, rather than with the BNC, which is operated by a government contractor. Judge Swain said the proposed amendment would force the debtor to review each certificate of service to determine if the notice went to the right party. The Chairman characterized the task as a heavy burden. The Committee discussed the differences between the proposed amendment and the register of mailing addresses for governmental units maintained by the clerk pursuant to Rule 5003(c). Although the Technology Subcommittee proposed a safe harbor similar to that in Rule 5003(c), the two rules would function differently and the discussion indicated that it might be difficult to provide a "safe harbor" for debtors whose notices are misdirected.

Judge Zilly stated that the origin of the proposed amendment was the creditor's desire to have a single, national address which would alleviate the problem with notices going to the wrong person at a creditor's local address. The Committee discussed whether the creditor should bear the risk for mistakes, since it requested the convenience of a single address, or whether the BNC should bear the cost. The Committee also discussed whether the proposed amendment would govern lease rejections and other notices given directly by the debtor, overriding the notice address stated in the lease or contract.

Several Committee members expressed interest in questioning representatives of the BNC and the Noticing Group about the operation of the BNC and the proposed national address system. **Mr. Frank's motion to table consideration of the proposed amendment until the next meeting passed without dissent.** On May 19, the Technology Subcommittee will meet

with representatives of the BNC, the Noticing Group, and the Bankruptcy Court Administration Division at the Administrative Office to discuss the proposal.

Proposed Official Form 21 on Which an Individual Debtor is to Submit the Debtor's Full Social Security number to the Court. The proposed privacy-related amendments to Rules 1007 and 2002, which are scheduled to take effect on December 1, 2003, will require that an individual debtor submit to the court the debtor's complete Social Security number for use on the § 341 Notice to Creditors and by any case trustee, the United States trustee or bankruptcy administrator, or the court. The proposed new subdivision (f) of Rule 1007 also provides for a debtor who does not have a Social Security number to so state.

Judge Walker presented the proposed form and Committee Note as revised by the Subcommittee on Forms. The subcommittee recommended deleting the phrase *("If more than one, state all.")* both times it was used in the draft form, deleting the last sentence of the first paragraph of the Committee Note, and deleting the entire second paragraph of the draft Note as it appeared in the agenda book for the meeting. Judge Walker stated that the Subcommittee had anguished over whether to include the Individual Taxpayer Identification Number (ITIN), a nine-digit number which is used by certain aliens and others who cannot obtain a Social Security number. The subcommittee concluded that consideration of including the ITIN should be deferred to a future meeting.

Judge McFeeley asked why the subcommittee didn't want to know if the debtor has more than one Social Security number. Judge Walker said the courts' software systems don't permit capturing more than one Social Security number or including more than one number on the meeting of creditors notice. Ms. Davis said the United States trustees want to know if the debtor has multiple Social Security numbers. Judge Torres said the form should err on the side of including multiple numbers, even if multiple numbers can't be put into the system with current technology. Mr. Frank said the form is to implement the privacy policy and give notice to creditors, not to require the debtor to disclose crimes such as using multiple Social Security numbers.

Judge Klein stated the current petition form asks for the debtor's Social Security number or tax ID number and adds "(if more than 1, state all)." Because the purpose of the new form is to transfer this answer block from the petition to a form that's not part of the public file, he said that, at a minimum, the new form should include the same information. The Reporter stated that collecting multiple numbers may not be all that useful if the court's computer system sends out only one number, and creditors may get a different number from the one under which they extended credit.

Judge Swain stated that the petition form facially gives the debtor an opportunity to submit multiple Social Security numbers and that the new form should not lose that. Including only one number might prevent the debtor from discharging debt obtained under other numbers. She stated that even if only one Social Security number is included on the notice, creditors and

the trustee now can review petitions with more than one Social Security number. She said the new form should not cut off the debtor's opportunity to submit information.

Judge Walker suggested retaining the phrase "(if more than one, state all)" from the current petition form and asking the programers to revise the software which generates the section 341 notice. **A motion to approve the form as drafted, including the phrase, carried without dissent.** Although further changes are anticipated in the form in the future (possibly including the ITIN), the consensus of the Committee was that the proposed form is important enough that it should be an Official Bankruptcy Form, rather than the less formal Director's Procedural Form.

A committee member asked how an unscheduled creditor could get the debtor's Social Security number. The Reporter answered that, if the creditor extended credit under the debtor's Social Security number, the creditor can input that number in the court computer system to confirm the debtor's identity. Mr. Shaffer questioned the deletion of a statement in an earlier draft of the Committee Note that the court would make the debtor's Social Security number available to law enforcement. The Reporter stated that law enforcement agencies do not get the section 341 notice but that the United States trustee's use of the full number is not limited. **The Committee approved the Committee Note as revised by the Forms Subcommittee after deleting the word "Only" at the start of the next to last sentence.** The proposed form and Committee Note will be transmitted to the Standing Committee with a recommendation for their adoption.

Proposed Amendment to Rule 7004. The Committee briefly considered the electronic issuance of a summons under Rule 7004 at its meeting in Hyannis and referred the matter to the Technology Subcommittee. Judge Zilly discussed the three reasons for the electronic issuance identified by the subcommittee. First, the plaintiff can file the complaint electronically. Second, in many bankruptcy cases, the debtor or the trustee may file dozens or even hundreds of adversary proceedings at the same time. Finally, many attorneys are located a great distance from the court, and the issuance of a summons electronically is both more convenient and more efficient for that attorney. The Committee has informed the Civil Rules Committee that it is considering amending Rule 7004 to specifically authorize the electronic issuance of a summons. The Civil Rules Committee may have helpful suggestions on the matter and the bankruptcy amendment possibly may form the basis of a future amendment to the Civil Rules.

Professor Resnick suggested changing the reference to "subdivision (a)(2)" in the first line of the proposed amendment to a reference to "Rule 7004(a)(2)" and that the Committee Note refer to "Rule 7004(a)(2)" rather than to "subpart (a)(2) of the rule." The Committee discussed whether it is appropriate for the first sentence Committee Note to state there is some doubt that the clerk can issue a summons electronically under Civil Rule 4(a) and (b). At Judge Klein's suggestion, the Committee agreed to revise the sentence to state "This amendment specifically authorizes the clerk to issue a summons electronically."

Judge Klein stated that the civil rule refers to signing, sealing, and issuing a summons while the proposed amendment only refers to signing and sealing it but the Committee Note refers to issuing the summons electronically. The Reporter stated that the proposed amendment only referred to signing and sealing the summons electronically because these actions can be demonstrated physically. He said signing and sealing the summons is issuance. It was suggested that line 8 of the proposed amendment be revised to state "The clerk may sign, seal, and issue a summons electronically . . ."

A motion to approve the proposed amendment and Committee Note with Professor Resnick's suggested changes in Line 2 of the proposed amendment and in the Committee Note, the suggested change in line 8 of the proposed amendment, and Judge Klein's suggested change in the first sentence of the Committee Note carried without dissent. The proposed amendment and Committee Note will be transmitted to the Stranding Committee with a request for their publication for comment.

Proposed Amendment to Rule 8001. At its meeting in Hyannis, the Committee considered whether to pursue an amendment to Rule 8001 to expedite the dismissal of appeals when an appellant has failed to complete the designation of the record in the matter in a timely fashion. The Committee referred the matter to the Subcommittee on Privacy and Public Access. During a teleconference, the subcommittee discussed the bankruptcy appeals process in those courts in which the members have had any experience, and no one indicated any problems with delays in these matters. Mr. Waldron stated that he had discussed the matter with several bankruptcy clerks and that, although the courts use a number of different procedures to bring unperfected appeals to the attention of the district court or the bankruptcy appellate panel, this does not appear to be a problem.

The Reporter discussed Appellate Rule 3, which requires that the clerk of the district court promptly send a copy of the notice of appeal to the clerk of the court of appeals. This would be more difficult in bankruptcy appeals because the appeal could go either to the district court or to the Bankruptcy Appellate Panel (BAP). Judge Klein stated that the bankruptcy courts in the 9th Circuit handle the matter by immediately sending a copy of the notice to the BAP unless the appellant has opted to take the appeal to the district court. If the appellee subsequently opts out of the BAP, the BAP sends the notice of appeal to the district court. This enables the BAP or the district court to monitor the status of the appeal. Judge McFeeley indicated the 10th Circuit BAP follows the same procedure, sending the notice of appeal to the district court if the appellee opts out of the BAP

Judge Klein stated that there are a number of provisions in the rules governing bankruptcy appeals which deserve study and that the Committee should not go forward with a proposal to amend just a single rule. Judge Small suggested that the Committee accept the Subcommittee's recommendation that it not pursue the matter. **The Committee agreed by consensus.**

Proposed Amendment to Rule 1007 and Schedule G. At its meeting in Hyannis, the

Committee discussed the proper treatment of the parties listed on Schedule G — Executory Contracts and Unexpired Leases. The current schedule contains a note reminding the person completing the schedule that "[a] party listed on this schedule will not receive notice of the filing of this case unless the party is also scheduled in the appropriate schedule of creditors." The cautionary note may be misleading because it could be read to suggest that parties to executory contracts and unexpired leases may not be creditors. Therefore, the note may mislead debtors into concluding that they do not need to notify these parties of the case.

Judge Walker stated that all parties to the case should be notified but that there is no consistency in the treatment of parties to executory contracts and unexpired leases. He said that the proposed amendment requires a list containing the names and addresses of the persons included or to be included on Schedules D, E, F, and G, instead of a list of creditors. For the first time in the national rules, the Committee Note refers to a "mailing matrix," a phrase frequently used in local rules and in bankruptcy practice.

Professor Resnick suggested deleting the phrase "unless the court orders otherwise" in line 7 because it would limit the requirement to prepare and file the list rather than limiting notice to the parties listed. The Reporter and Mr. Adelman stated that the provision was intended for cases such as those in which the debtor is a manufacturer, software company, or franchiser with thousands of executory contracts. Judge Klein suggested providing that, unless the court orders otherwise, the parties listed on Schedule G shall be included on the list filed with the petition. Professor Resnick said the provision would encourage "boilerplate" motions for such relief and suggested that the matter be left to the court's power under 11 U.S.C. § 105.

The Committee agreed to delete the phrase "unless the court orders otherwise" in line 7, correct the spelling of "name" in line 12, correct the reference to "subdivision (a)(2)" in line 22, and the reference to "subsection (a)" in line 37. At Professor Wiggins' suggestion, the Committee agreed to revise the last sentence of the Committee Note to read: " This list may be amended when necessary. See Rule 1009(a)." At Professor Resnick's suggestion, the Committee agreed to delete the last sentence of the third paragraph of the Committee Note and the second sentence of the fifth paragraph. **Judge Walker's motion to approve the proposed amendments to Rule 1007 and Schedule G, as revised at the meeting, carried without dissent.** The proposed amendment and Committee Note will be transmitted to the Stranding Committee with a request for their publication for comment.

Proposed Amendments to the Uniform Numbering System for Local Bankruptcy Court Rules. Acting on the recommendation of the Standing Committee, the Judicial Conference directed the courts to "adopt a numbering system for local rules of court that corresponds with the relevant Federal Rules of Practice and Procedure." In furtherance of that policy, the Committee developed and distributed to the courts a numbering system for local bankruptcy rules that corresponds to the numbering system in the Bankruptcy Rules. Ms. Ketchum stated that the use of the uniform numbers and the posting of local rules on court websites has made practicing bankruptcy law in multiple districts easier.

The uniform numbers have not been updated since the system was issued seven years ago. Ms. Ketchum stated that, as a result of changes in the national rules and the adoption of local rules for electronic filing, there is interest in revising the uniform numbering system. **Professor Resnick's motion to approve the changes proposed by Ms. Ketchum carried without dissent.** The Chairman suggested that the revision is a great opportunity to remind the courts about the uniform numbering system. **Ms. Ketchum said she would prepare a memorandum for distribution to the courts.**

Proposed Technical Amendments to Rules 1011 and 2002(j). The proposed technical amendment to Rule 1011 corrects a cross reference to Rule 1004. The Reporter stated that the proposed amendment does not require publication because it is purely technical and makes no substantive or procedural change in the rules or the bankruptcy process. **The amendment was approved by consensus.** The proposed technical amendment to Rule 2002(j) deletes the reference to District Director of Internal Revenue and provides for service on the agency at the address set out in the Rule 5003(g) register. The Committee approved the amendment and recommended its adoption without publication at the Tucson meeting. Rather than transmit proposed amendments piecemeal, the Committee delayed sending the technical amendment to Rule 2002(j) to the Standing Committee. **The technical amendments to Rule 1011 and Rule 2002(j) will be transmitted to the Standing Committee along with a recommendation that they be approved without publication.**

Proposed Development of National Chapter 13 Plan. The Forms Subcommittee considered a model chapter 13 plan form developed at a workshop during the 2002 meeting of the National Association of Chapter 13 Trustees and submitted by Judge Keith M. Lundin. One Committee member stated that everybody favors a standard form for chapter 13 plans but "they want to use their standard form, not yours." Several committee members expressed concern that a number of standard forms for chapter 13 plans are used across the country and that the Committee could spend a lot of time considering whether to adopt a standard form and, if so, which one. Professor Resnick described the work done several years ago by the Committee's former Chapter 13 Subcommittee. He said the subcommittee found that chapter 13 is working fine even though there are different practices in every district. **The Committee agreed not to pursue the matter.**

Information Items

CM/ECF Working Group Subcommittee on Claims. Judge McFeeley and Mr. Wannamaker reported on the work of the Claims Subcommittee of the Bankruptcy CM/ECF Working Group. Judge McFeeley said the subcommittee is considering recommending establishment of a national filing center for proofs of claim and streamlining the transfer of claims by large, institutional creditors. Mr. Wannamaker said the claims group also is considering how to make it easier for small creditors to file claims, possibly using a electronic form in the "fillable PDF" format. Judge McFeeley said the CM/ECF claims group has

scheduled a meeting in Washington in May and that the group currently has no recommendation for rules changes.

Implementation of the CM/ECF system. Ms. Ketchum reported that the implementation of the CM/ECF system has been a mixed blessing for the courts. The system has changed how filings get to the court and has given the attorneys, court staff, and judges better access to documents in the case, but it has made it more difficult for bankruptcy judges to sign orders. She said that creative ways to solve the problem are being developed as the courts become more familiar with the CM/ECF system.

Mr. Waldron said his court has been live on the CM/ECF system for a year. He said the biggest complaints are the volume of email to attorneys on Notices of Electronic Filing and the fact that the court continues to scan a large volume of paper. Mr. Waldron stated that he would like a rules amendment permitting electronic service of the motion initiating a contested matter. Ms. Ketchum said many attorneys err on the side of caution when they file and serve motions because they are unsure whether it will be a contested matter under Rule 9014, which requires service in the manner required for a summons and complaint under Rule 7004. **The Chairman asked Mr. Waldron to prepare a proposal for the next meeting.**

The E-Government Act of 2002. The Reporter stated that the Committee's approval of the proposed privacy amendments to the Bankruptcy Rules and Forms limiting the disclosure of a debtor's Social Security number to the last four digits had proved serendipitous with the enactment of the E-Government Act in December. The act provides that, if the rules require the redaction of certain categories of information to protect privacy and security concerns, a party who wishes to file an otherwise proper document containing such information, may file an unredacted document under seal as well as the redacted electronic version. Ms. Ketchum said there is concern that the provision will be burdensome for the courts.

Memorandum on Proposed Amendment to Rule 9036. The Administrative Office's Bankruptcy Noticing Working Group has previously requested that Rule 9036 be amended to eliminate the requirement that the sender of an electronic notice receive an electronic confirmation that the transmission has been received. A memorandum in support of amending Rule 9036 was distributed to the Committee.

Ms. Ketchum stated that the Bankruptcy Noticing Center is trying to expand the use of Electronic Bankruptcy Noticing over the Internet, which would reduce the Judiciary's printing and postage costs, speed the delivery of notices to the parties, and facilitate the use of automated processing by recipients. Many Internet service providers (ISPs), however, only offer negative receipts, not the affirmative receipts required by Rule 9036. In addition, doubts have been expressed about the reliability of transmitting the text of bankruptcy notices as large e-mail attachments. Ms. Ketchum said the BNC has experimented with sending e-mails with hyperlinks to the text of bankruptcy notices, which has worked in almost every instance. She said the Committee may wish to consider whether it is satisfied with a system which gives creditors a

message that they have a notice rather than the notice itself.

Mr. Waldron stated that the system only retains the links to the notice text for a limited time, possibly as short as two weeks. He said the BNC also is exploring the possibility of establishing its own ISP which would provide the electronic confirmations currently required by Rule 9036. **The chairman requested that the Technology Subcommittee meet in Washington, D.C., with the representatives of the Working Group and the BNC and that the Committee consider the matter at its September meeting.**

Study of Mandatory Disclosure under Civil Rule 26. Mr. Niemic reported that the FJC has encountered problems in its attempt to get information electronically for a study of whether mandatory disclosure is needed in some types of adversary proceedings under Rule 7026 and Civil Rule 26. He said the FJC will continue to investigate the matter but that a more costly review of the dockets in a sample of adversary proceedings may be necessary.

Administrative Matters

The Committee's next scheduled meeting will be at Skamania Lodge in Stevenson, WA, on September 18-19, 2003. The Committee discussed several East Coast locations as possible sites of the spring 2004 meeting. The Committee discussed several dates in March or early April as possibilities.

Respectfully submitted,

James H. Wannamaker, III

LEONIDAS RALPH MECHAM
Director

CLARENCE A LEE, JR
Associate Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

PETER G McCABE
Assistant Director

Office of Judges Programs

May 8, 2003

MEMORANDUM TO THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Subject: Update on Electronic Case Filing

From: Nancy G. Miller, Associate Project Director, CM/ECF (Office of Judges Programs)

Update on Use of Electronic Filing

As of early May 2003, electronic filing was being used in about a dozen federal district courts, the Court of Federal Claims, and more than forty bankruptcy courts. More than 30,000 attorneys have filed documents electronically. Use of electronic filing in criminal cases is still not common, although several courts have been permitting it for several months. A list of courts currently operational on CM/ECF, and of courts in the process of implementing CM/ECF, is attached.

Model Local Rules on Electronic Filing

The Committee on Court Administration and Case Management is discussing revisions to the model local rules for electronic case filing at its June 3-4, 2003 meeting. (A copy of what they are considering is included in these materials.) The model rules for civil and for bankruptcy cases were originally approved by the Judicial Conference in September 2001. The Advisory Committee on Criminal Rules and the Technology Subcommittee were asked to review model local rules for criminal cases last summer; specific suggestions were provided to CACM and incorporated into the model. The Standing Committee also requested at that time that consideration by the Judicial

Conference be deferred until there was more experience with electronic filing in criminal cases. CACM is now considering a slightly updated version of model criminal rules, as well as correspondingly updated versions of the model civil and bankruptcy rules. CACM also may be asking the Judicial Conference for delegated authority to make future modifications to the model rules.

Local Electronic Filing Rules

Every court permitting electronic filing has issued some combination of local rules, general orders or other set of procedures addressing electronic filing. While we have not done a complete and detailed analysis, it is apparent that on some issues, there is considerable similarity in procedures across the courts, and on other issues, there is considerable variation. While many courts have used some or most of the model rules as the basis for their local procedures, no court has adopted them exactly, and some have used only certain provisions.

One area in which there is not uniformity is the extent to which courts are treating electronic filing as "voluntary." In some courts, the decision is left to individual filers whether they want to file electronically. In other courts, however, documents are required to be filed electronically absent an order of the court or exceptional circumstances. In a few (primarily bankruptcy) courts, failure to file electronically is subject to an order to show cause.

Some other areas in which there is variation among courts include the scope and period (1-7 years) of retention of documents for which counsel are required to keep signed paper originals, the types and sizes of attachments and exhibits to be filed electronically, the eligibility of pro se parties to request a login and password, and the handling of certificates of service.

In some areas, practice across courts appears to be quite uniform. For example, almost all courts are treating transmission of the CM/ECF notice of electronic service (which contains a hyperlink to the filed document) as service of the document, as permitted by the recent amendments to the Federal Rules. All courts are treating documents filed electronically with a login and password as having been signed by the holder of that login and password.

Courts Currently Operational on CM/ECF
** Courts Accepting Electronic Filing*

District Courts
California Northern*
District of Columbia*
Indiana Southern*
Kansas*
Kentucky Eastern
Maryland*
Maine
Michigan Western*
Missouri Western*
Nebraska*
New York Eastern*
Ohio Northern*
Oregon*
Pennsylvania Eastern*
Pennsylvania Middle*
Texas Northern
Wisconsin Eastern

Court of International Trade
Court of Federal Claims*

Bankruptcy Courts
Alabama Middle*
Alabama Southern*
Alaska*
Arizona*
Arkansas Eastern*
Arkansas Western*
California Northern
California Southern*
Colorado*
Delaware*
Florida Middle
Georgia Northern*
Illinois Southern*
Indiana Northern*
Iowa Northern*
Kentucky Eastern*
Kentucky Western*
Louisiana Eastern*
Louisiana Middle*
Louisiana Western*
Maine*
Maryland
Massachusetts
Missouri Eastern
Missouri Western*
Montana*
Nebraska*
Nevada*
New Hampshire*
New Jersey*
New York Eastern*
New York Northern
New York Southern*
North Carolina Western*
Ohio Northern*
Ohio Southern
Pennsylvania Eastern*
Pennsylvania Western*
Rhode Island
South Carolina*
South Dakota*
Texas Eastern*
Texas Northern
Texas Southern*
Texas Western*
Utah*
Vermont*
Virginia Eastern*
Washington Western*
West Virginia Northern
West Virginia Southern
Wisconsin Western*
Wyoming

Courts Currently in the Process of Implementing CM/ECF

District Courts

Alabama Middle
Alabama Southern
California Central
Connecticut
Florida Northern
Georgia Northern
Illinois Northern
Illinois Southern
Indiana Northern
Iowa Northern
Kentucky Western
Louisiana Western
Massachusetts
Michigan Eastern
Minnesota
Missouri Eastern
New Hampshire
New Jersey
New York Northern
New York Southern
New York Western
Ohio Southern
Oklahoma Northern
Oklahoma Western
Puerto Rico
South Dakota
Texas Eastern
Texas Southern
Virginia Western
Washington Western
Wyoming

Bankruptcy Courts

Alabama Northern
Connecticut
District of Columbia
Florida Northern
Florida Southern
Georgia Middle
Guam
Hawaii
Illinois Central
Illinois Northern
Iowa Southern
Kansas
Michigan Western
Minnesota
Mississippi Northern
Mississippi Southern
New Mexico
New York Western
North Carolina Eastern
North Carolina Middle
Oklahoma Eastern
Oklahoma Northern
Oregon
Pennsylvania Middle
Puerto Rico
Tennessee Eastern
Tennessee Middle
Tennessee Western
Virginia Western
Washington Eastern
Wisconsin Eastern

Model Local Bankruptcy Court Rules for Electronic Case Filing

~~**Approved by the Judicial Conference of the United States**~~

~~**September 2001**~~

Proposed Revisions
Submitted to the Committee on Court Administration and Case Management

Spring 2003

This document is a draft version of amended Model Local Rules for bankruptcy cases. The marked revisions reflect suggested modifications to the version approved by the Judicial Conference of the United States in September 2001.

Introduction

Because most existing court rules and procedures have been designed with paper court documents in mind, some modifications are needed to address issues arising when court documents are filed in electronic form. This set of model local rules was ~~has been~~ developed for federal ~~district and~~ bankruptcy courts implementing the electronic case filing capabilities of the federal judiciary's Case Management/Electronic Case Files (CM/ECF) Project, and can be adapted by courts that offer some other method of electronic filing of court documents.

The original model was compiled by a subcommittee of the Court Administration and Case Management Committee that included as members representatives from the Committee on Automation and Technology (now the Committee on Information Technology) and the Committee on Rules of Practice and Procedure. The subcommittee reviewed the rules and procedures for electronic filing developed in the CM/ECF prototype district and bankruptcy courts. It also undertook an informal survey of those courts to find out how well those procedures operated. The information indicated general satisfaction with courts' existing procedures. There was also general agreement that it was essential to include the bar in the process of developing and modifying the local procedures governing electronic filing.

This set of model local rules for electronic case filing ~~is~~ was based to a significant extent on the procedures used in courts that served as prototype courts for the federal judiciary's CM/ECF Project. It was approved by the Judicial Conference in September 2001. Additional experience suggests that some modifications are appropriate.

There are separate sets of model local civil and criminal rules for district courts and this set of model local rules for bankruptcy courts. They use the same terminology and are identical to the extent possible and appropriate. Courts are free to adapt the provisions of these model local rules as they choose. (Please note that "Interim Bankruptcy Rules" will be promulgated and recommended for adoption as local rules to implement pending comprehensive bankruptcy reform legislation upon enactment. Unlike model local rules, including these model local rules governing electronic case filing, courts will be urged to adopt the "interim bankruptcy rules" as local rules without change.)

The Federal Rules of Procedure (~~Civil Rule 5(e),~~ e.g., Bankruptcy Rules 5005, 7005 and 8008) provide that a court may "by local rule" permit filing, signing and verification of documents by electronic means. The Federal Rules also authorize each district court to make and amend rules governing bankruptcy practice (Bankruptcy Rule 9029(a)). Thus, each court that intends to allow electronic filing should have at least a general authorizing provision in its local

rules.[1] The model rules developed here may be used either as a set of local rules, or as the contents for a general order or other administrative procedures. The use of local rules promotes the requirements of the Rules Enabling Act, provides better public notice of applicable procedures, and allows for input from the bar. On the other hand, use of general orders gives courts more flexibility to modify requirements and rules in response to changing circumstances. If local rules are used, it should be noted that Fed.R.Bankr.P. 9029 and related Judicial Conference policy require that rule numbering conform to the numbering system of the Federal Rules. The model rules could be added as a group to local rules corresponding to Fed.R.Bankr.P. 5005 or 9029, or existing local rules on specific topics could be amended..

Note: These model procedures use the term "Electronic Filing System" to refer to the court's system that receives documents filed in electronic form. The term "Filing User" is used to refer to those who have a court-issued log-in and password to file documents electronically.

---

[1]An example of a local rule authorizing electronic filing is as follows:

The court will accept for filing documents submitted, signed or verified by electronic means that comply with procedures established by the court.

Rule 1– Scope of Electronic Filing

The court will designate which cases will be assigned to the Electronic Filing System. Except as expressly provided and in exceptional circumstances preventing a Filing User from filing electronically, all petitions, motions, memoranda of law, or other pleadings and documents required to be filed with the court in connection with a case assigned to the Electronic Filing System must be electronically filed.

In a case assigned to the Electronic Filing System after it has been opened, parties must promptly provide the clerk with electronic copies of all documents previously provided in paper form. All subsequent documents must be filed electronically except as provided in these rules or as ordered by the court.

Notwithstanding the foregoing, attorneys and others who are not Filing Users in the Electronic Filing System are not required to electronically file pleadings and other papers in a case assigned to the System. Once registered, a Filing User may withdraw from participation in the Electronic Filing System by providing the clerk's office with written notice of the withdrawal.

Derivation

The first and third paragraphs of the Model Rule are derived from the Southern District of California Bankruptcy procedures, with the exception of the last sentence of the third paragraph, which is derived from the Eastern District of Virginia Bankruptcy procedures. The second paragraph is adapted from the Northern District of Ohio procedures.

Commentary

1. The Model Rule provides that the court will designate which cases will be assigned to the electronic filing system. It also establishes a presumption that all documents filed in cases assigned to the electronic filing system should be electronically filed. Some courts have designated certain types of cases for electronic filing, while some have determined that all cases are appropriate for electronic filing. However, the Rule does not make electronic filing mandatory. Mandatory electronic filing appears to be inconsistent with Fed.R.Bankr.P. 5005, which states that a court "may permit" papers to be filed electronically, and provides that the clerk "shall not refuse to accept for filing any paper presented . . . solely because it is not presented in proper form." However, the Federal Rules clearly permit a court to strongly encourage lawyers to participate in electronic case filing, and the Model Rule is written to provide such encouragement.

2. For cases assigned to the electronic filing system after documents have already been filed conventionally, the Model Rule states that the parties must provide electronic copies of all previously filed documents. In cases removed to the federal court, parties in cases assigned to the electronic filing system are required to provide electronic copies of all previous filings in the state court. Where documents filed in paper form were previously scanned by the court, electronic filing would not be necessary.

3. Some courts offering electronic filing require fees to be paid in the traditional manner, while others permit or require electronic payment of fees. Nothing in the rule would constrain the court in providing for a desired method of payment of fees.

4. Electronic case filing raises privacy concerns. Electronic case files can be more easily accessible than traditional paper case files, so there is a greater risk of public dissemination of sensitive information found in case files. See Model Rule 12. The Judicial Conference is investigating and evaluating the privacy concerns attendant to electronic case files, and is working to develop a policy.

Rule 2– Eligibility, Registration, Passwords

> Attorneys admitted to the bar of this court (including those admitted pro hac vice and attorneys authorized to represent the United States), United States trustees and their assistants, bankruptcy administrators and their assistants, private trustees, and others as the court deems appropriate, may register as Filing Users of the court's Electronic Filing System. Registration is in a form prescribed by the clerk and requires the Filing User's name, address, telephone number, Internet e-mail address, and, in the case of an attorney, a declaration that the attorney is admitted to the bar of this court.
>
> If the court permits, a party to a pending action who is not represented by an attorney may register as a Filing User in the Electronic Filing System solely for purposes of the action. Registration is in a form prescribed by the clerk and requires identification of the action as well as the name, address, telephone number and Internet e-mail address of the party. If, during the course of the action, the party retains an attorney who appears on the party's behalf, the attorney must advise the clerk to terminate the party's registration as a Filing User upon the attorney's appearance.
>
> Provided that a Filing User has an Internet e-mail address, registration as a Filing User constitutes: (1) waiver of the right to receive notice by first class mail and consent to receive notice electronically; and (2) waiver of the right to service by personal service or first class mail and consent to electronic service, except with regard to service of a summons and complaint under Fed.R.Bankr.P. 7004. Waiver of service and notice by first class mail applies to notice of the entry of an order or judgment under Fed.R.Bankr.P. 9022.

Once registration is completed, the Filing User will receive notification of the user log-in and password. Filing Users agree to protect the security of their passwords and immediately notify the clerk if they learn that their password has been compromised. Users may be subject to sanctions for failure to comply with this provision.

Derivation

The first ~~two~~ three paragraphs of Model Rule 2 are adapted from the Eastern District of New York procedures. The last paragraph is derived from the Northern District of Ohio procedures.

Commentary

1. The Model Rule specifically provides that attorneys admitted pro hac vice, U.S. trustees and their assistants, attorneys for the United States, bankruptcy administrators and their assistants, and private trustees can be Filing Users in electronic filing systems. It also recognizes that the court may wish to permit others, e.g., claims filers, to participate. These additional filers could at the court's option be provided with limited filing privileges. The Model Rule also recognizes that a court may wish under certain circumstances to permit pro se filers to take part in electronic case filing. Such participation is left to the discretion of the court.

2. The Model Rule provides that a person who registers with the System (a Filing User) thereby consents to electronic service and notice of documents subject to the electronic case filing system. ~~Pending a~~ Amendments to Fed.R.Civ.P. 5, which is incorporated by reference into Fed.R.Bankr.P 7005 and 9014, permit electronic service on a person who consents "in writing." The Committee Notes indicate that the consent may be provided by electronic means. A court may "establish a registry or other facility that allows advance consent to service by specified means for future action." Thus, a court might use CM/ECF registration as a means to have parties consent to receive service electronically.

3. The consent to receive electronic notice and service is intended to cover the full range of notice and service except those documents to which the service requirements of Fed.R.Bankr.P. 7004 apply. These provisions operate independently from the notices sent by the Bankruptcy Noticing Center under Fed.R.Bankr.P. 9036.

4. Several districts currently have provisions addressing the possibility of compromised passwords. Such a provision may be useful in a User Manual for the electronic filing system. The provision might read as follows:

Attorneys may find it desirable to change their court assigned passwords periodically. In the event that a Filing User believes that the security of an existing

password has been compromised and that a threat to the System exists, the Filing User must give immediate notice by telephone to the clerk, chief deputy clerk or systems department manager and confirm by facsimile in order to prevent access to the System by use of that password.

Rule 3–Consequences of Electronic Filing

Electronic transmission of a document to the Electronic Filing System consistent with these rules, together with the transmission of a Notice of Electronic Filing from the court, constitutes filing of the document for all purposes of the Federal Rules of Bankruptcy Procedure and the local rules of this court, and constitutes entry of the document on the docket kept by the clerk under Fed.R.Bankr.P. 5003.

Before filing a scanned document with the court, a Filing User must verify its legibility.

When a document has been filed electronically, the official record is the electronic recording of the document as stored by the court, and the filing party is bound by the document as filed. Except in the case of documents first filed in paper form and subsequently submitted electronically under Rule 1, a document filed electronically is deemed filed at the date and time stated on the Notice of Electronic Filing from the court.

Filing a document electronically does not alter the filing deadline for that document. Filing must be completed before midnight local time where the court is located in order to be considered timely filed that day.

Derivation

The first ~~two~~ and third paragraphs of Model Rule 3 are adapted from the Eastern District of New York procedures. The second paragraph is derived from the District of Nebraska procedures. The ~~third~~ fourth paragraph is adapted from the Northern District of Ohio procedures.

Commentary

1. The Model Rule provides a "time of filing" rule that is analogous to the traditional system of file stamping by the Clerk's office. A filing is deemed made when it is acknowledged by the Clerk's office through the CM/ECF system's automatically generated Notice of Electronic Filing.

2. The Model Rule makes clear that the electronically filed documents are considered to be entries on the official docket.

Rule 4– Entry of Court ~~Orders~~-Issued Documents

All orders, decrees, judgments, and proceedings of the court will be filed in accordance with these rules, which will constitute entry on the docket kept by the clerk under Fed.R.Bankr.P. 5003 and 9021. All signed orders will be filed electronically by the court or court personnel. Any order or other court-issued document filed electronically without the original signature of a judge or clerk has the same force and effect as if the judge or clerk had ~~affixed the judge's signature to~~ signed a paper copy of the order and it had been entered on the docket in a conventional manner.

Orders may also be issued as "text-only" entries on the docket, without an attached document. Such orders are official and binding.

The court may issue a summons electronically, although a summons may not be served electronically.

A Filing User submitting a document electronically that requires a judge's signature must promptly deliver the document in such form as the court requires.

Derivation

The first two sentences of the first paragraph of the Model Rule are adapted from the Eastern District of New York procedures. The last sentence is derived from the procedures of the Northern District of Georgia Bankruptcy Court. The second paragraph is derived from the District of Columbia and District of Nebraska procedures. The ~~second~~ fourth paragraph is adapted from Eastern District of New York procedures

Commentary

1. Not all courts have a provision in their electronic filing procedures addressing the electronic entry of court orders. In at least one court without such a provision, a question arose about the validity of electronically filed court orders. The Model Rule specifically states that an electronically filed court order has the same force and effect as an order conventionally filed. Judges in many courts authorize "text-only" orders, which are docket entries that themselves constitute the order. These text-only orders, which are generally used for routine matters, do not require production of a .pdf document.

2. The Model Rule contemplates that a judge can authorize personnel, such as a law clerk or judicial assistant, to electronically enter an order on the judge's behalf.

3. The Model Rule leaves the method for submitting proposed orders to the discretion of the court. Courts have been using a variety of methods, including having them sent by email to the court in word-processing format or having them filed as .pdf documents.

4. The Model Rule expressly provides that a court may issue a summons electronically. This authorizes only issuance of the summons. A summons may not be served electronically, however.

Rule 5– Attachments and Exhibits

Filing Users must submit in electronic form all documents referenced as exhibits or attachments, unless the court permits conventional filing. A Filing User must submit as exhibits or attachments only those excerpts of the referenced documents that are directly germane to the matter under consideration by the court. Excerpted material must be clearly and prominently identified as such. Filing Users who file excerpts of documents as exhibits or attachments under this rule do so without prejudice to their right to timely file additional excerpts or the complete document. Responding parties may timely file additional excerpts or the complete document that they believe are directly germane. The court may require parties to file additional excerpts or the complete document.

Derivation

The Model Rule is adapted from the Southern District of New York Bankruptcy procedures. The last sentence is derived from the rules of the District of Kansas.

Commentary

1. One issue that has arisen in most courts using electronic filing relates to attachments or exhibits not originally available to the filer in electronic form, and that must be scanned (or imaged) into Portable Document Format before filing. Examples include leases, contracts, proxy statements, charts and graphs. A scanned document creates a much larger electronic file than one prepared directly on the computer (*e.g.*, through word processing). The large documents can take considerable time to file and retrieve. The Model Rule provides that if the case is assigned to the electronic filing system, the party must file this type of material electronically, unless the court specifically permits conventional filing.

2. It is often the case that only a small portion of a much larger document is relevant to the matter before the court. In such cases, scanning the entire document imposes an inappropriate burden on both the litigants and the courts. To alleviate some of this inconvenience, the Model Rule provides that a Filing User must submit as the exhibit only the relevant excerpts of a larger document. The responding party then has a right to submit other excerpts of the same document under the principle of completeness.

3. This rule is not intended to alter traditional rules with respect to materials that are before the court for decision. Thus, any material on which the court is asked to rely must be specifically provided to the court.

4. For courts permitting claims to be filed electronically, this rule also governs proofs of claim. Official Form 10, the Proof of Claim, already permits creditors to file a summary if the documentation for the claim is voluminous.

Rule 6–Sealed Documents

Documents ordered to be placed under seal must be filed conventionally, and not electronically, unless specifically authorized by the court. A motion to file documents under seal may be filed electronically unless prohibited by law. The order of the court authorizing the filing of documents under seal may be filed electronically unless prohibited by law. A paper copy of the order must be attached to the documents under seal and be delivered to the clerk.

Derivation

The Model Rule is adapted from the Western District of Missouri procedures.

Commentary

1. The Model Rule recognizes that other laws may affect whether a motion to file documents under seal, or an order authorizing the filing of such documents, can or should be electronically filed. It is possible that electronic access to the motion or order may raise the same privacy concerns that gave rise to the need to file a document conventionally in the first place. For similar reasons, the actual documents to be filed under seal should ordinarily be filed conventionally.

2. See Model Rule 12 for another provision addressing privacy concerns arising from electronic filing.

Rule 7– Retention Requirements

Documents that are electronically filed and require original signatures other than that of the Filing User must be maintained in paper form by the Filing User until [number] years after all time periods for appeals expire. On request of the court, the Filing User must provide original documents for review.

Derivation

Model Rule 7 is adapted from the Eastern District of Virginia Bankruptcy procedures.

Commentary

1. Because electronically filed documents do not include original, handwritten signatures, it is necessary to provide for retention of certain signed documents in paper form in case they are needed as evidence in the future. The Model Rule requires retention only of those documents containing original signatures of persons other than the person who files the document electronically. The filer's use of a log-in and password to file the document is itself a signature under the terms of Model Rule 8.

2. The Model Rule places the retention requirement on the person who files the document. One alternative is to place retention responsibility on counsel and/or the firm representing the party on whose behalf the document was filed. (Thus, if counsel changes, the documents would be transferred along with the rest of the case file.) Another possible solution is to require the filer to submit the signed original to the court, so that the court can retain it. Some government officials have expressed a preference to have such documents retained by the court, in order to make it easier to retrieve the documents for purposes such as a subsequent prosecution for fraud. Some have suggested that a debtor's original signature be filed with the court because the signature is so important on bankruptcy petitions and schedules.

3. Courts have varied considerably on the required retention period. Some have limited it to the end of the litigation (plus the time for appeals). Others have required longer retention periods (four or five years). Assuming that the purpose of document retention is to preserve relevant evidence for a subsequent proceeding, the appropriate retention period might relate to relevant statutes of limitations.

4. Some districts require the filer to retain a paper copy of *all* electronically filed documents. Such a requirement seems unnecessary, and it tends to defeat one of the purposes of using electronic filing. Other courts have required retention of "verified documents," i.e., documents required to be verified under Fed.R.Bankr.P. 1008 or documents in which a person

verifies, certifies, affirms, or swears under oath or penalty of perjury. See, *e.g.*, 28 U.S.C. § 1746 (unsworn declarations under penalty of perjury).

Rule 8– Signatures

The user log-in and password required to submit documents to the Electronic Filing System serve as the Filing User's signature on all electronic documents filed with the court. They also serve as a signature for purposes of Fed.R.Bankr. P. 9011, the Federal Rules of Bankruptcy Procedure, the local rules of this court, and any other purpose for which a signature is required in connection with proceedings before the court. Each document filed electronically must, if possible, indicate that it has been electronically filed. Electronically filed documents must include a signature block [in compliance with local rule number [ ] if applicable] and must set forth the name, address, telephone number and the attorney's [name of state] bar registration number, if applicable. In addition, the name of the Filing User under whose log-in and password the document is submitted must be preceded by an "s/" and typed in the space where the signature would otherwise appear.

No Filing User or other person may knowingly permit or cause to permit a Filing User's password to be used by anyone other than an authorized agent of the Filing User.

Documents containing the signature of non-Filing Users are to be filed electronically with the signature represented by a "s/" and the name typed in the space where a signature would otherwise appear, or as a scanned image.

Documents requiring signatures of more than one party must be electronically filed either by: (1) submitting a scanned document containing all necessary signatures; (2) representing the consent of the other parties on the document; (3) identifying on the document the parties whose signatures are required and by the submission of a notice of endorsement by the other parties no later than three business days after filing; or (4) in any other manner approved by the court.

Derivation

The first and ~~third~~fourth paragraphs of the Model Rule are adapted from the Northern District of Ohio procedures. The second paragraph is derived from the Southern District of New York Bankruptcy procedures.

Commentary

1. Signature issues are a subject of considerable interest and concern. The CM/ECF system is designed to require a log-in and password to file a document. The Model Rule provides that use of the log-in and password constitutes a signature, and assures that such a signature has the same force and effect as a written signature for purposes of the Federal Rules of Bankruptcy Procedure, including Fed.R.Bankr. P. 9011, and any other purpose for which a signature is required on a document in connection with proceedings before the court.

2. At the present time, other forms of digital or other electronic signature have received only limited acceptance. It is possible that over time and with further technological development, a system of digital signatures may replace the current password system.

3. Some users of electronic filing systems have questioned whether an s-slash requirement is worth retaining. The better view is that an s-slash is necessary; otherwise there is no indication that documents printed out from the website were ever signed. The s-slash provides some indication when the filed document is viewed or printed that the original was in fact signed.

4. The second paragraph of the Model Rule does not require an attorney or other Filing User to personally file his or her own documents. The task of electronic filing can be delegated to an authorized agent, who may use the log-in and password to make the filing. However, use of the log-in and password to make the filing constitutes a signature by the Filing User under the Rule, even though the Filing User does not do the physical act of filing.

5. Issues arise when documents being electronically filed have been signed by persons other than the filer, *e.g.*, stipulations and affidavits. For documents signed by individuals without log-ins and passwords (non-Filing Users), the Model Rule provides that the signature can appear as a "s/" or as a scanned image. Under Model Rule 7 above, the Filing User must retain a paper copy with the original signature of any such document filed by the Filing User. The Model Rule provides for ~~a substantial amount of~~ considerable flexibility in the filing of ~~these~~ documents signed by more than one party, e.g., stipulations. Courts may wish to modify or narrow the options if, for example, they believe that administering the three-day period for endorsements would be burdensome. Or, another solution is to provide an immediate but short opportunity, e.g., 10 days from the receipt of the Notice of Electronic Filing, for others to challenge the authenticity of their signatures on an electronic document.

6. Courts may wish to underscore the fact that a Filing User's log-in and password constitutes the Filing User's signature, by including a statement to that effect on the registration form.

Rule 9– Service of Documents by Electronic Means

~~Each entity electronically filing a pleading or other document must transmit a "Notice of Electronic Filing" to parties entitled to service or notice under the Federal Rules of Bankruptcy Procedure and the local rules. The "Notice of Electronic Filing" must be transmitted by e-mail, hand, facsimile, or by first-class mail postage prepaid. Electronic transmission of the "Notice of Electronic Filing" constitutes service or notice of the filed document. Parties not deemed to have consented to electronic notice or service are entitled to receive a paper copy of any electronically filed pleading or other document. Service or notice must be made according to the Federal Rules of Bankruptcy Procedure and the local rules.~~

The "Notice of Electronic Filing" that is automatically generated by the court's Electronic Filing System constitutes service or notice of the filed document on Filing Users. Parties who are not Filing Users must be provided notice or service of any pleading or other document electronically filed in accordance with the Federal Rules of Bankruptcy Procedure and the local rules.

A certificate of service must be included with all documents filed electronically, indicating that service was accomplished through the Notice of Electronic Filing for parties and counsel who are Filing Users and indicating how service was accomplished on any party or counsel who is not a Filing User.

Derivation

The first sentence of Model Rule 9 is derived from the rules of the District of Kansas. The second paragraph is derived from the Northern District of Ohio's procedures.

Commentary

1. The ~~pending~~ amendments to the Federal Rules (Fed.R.Bankr.P. 7005, 9014, Fed.R.Civ.P. 5(b)) authorizing service of documents by electronic means do not permit electronic service of process for purposes of obtaining personal jurisdiction (i.e., Rule 7004 service).

2. The CM/ECF system automatically generates a Notice of Electronic Filing at the time a document is filed with the system. The Notice indicates the time of filing, the name of the party and attorney filing the document, the type of document, and the text of the docket entry. It also contains an electronic link (hyperlink) to the filed document, allowing anyone receiving the Notice by e-mail to retrieve the document automatically. The CM/ECF system automatically sends this Notice to all case participants registered to use the electronic filing system. If the court is willing to have this Notice itself constitute service, it may, under ~~pending~~ the amendments to

the Federal Rules, do so through a local rule. The ~~pending~~ amendments require a local rule if a court wants to authorize parties to use its "transmission facilities" to make electronic service. The Model Rule ~~does not~~ includes such a provision~~, but could be easily modified to provide~~ by providing that the court's automatically generated notice of electronic filing constitutes service.

3. Parties who are not Filing Users are not deemed under the Model Rules to have consented to electronic notice or service of the Notice of Electronic Filing. They must be served in some other way authorized by the Federal Rules of Bankruptcy Procedure (which incorporate Fed.R.Civ.P. 5(b)). Under the rules, they can be served in the traditional way with a paper copy of the electronically filed document, or they can consent in writing to service by any other method, including other forms of electronic service such as fax or direct e-mail.

4~~3~~. An ~~pending~~ amendment to Fed.R.Bankr.P. 9006(f) provides that the three additional days to respond to service by mail will apply to electronic service as well. The Committee Note on the parallel amendment to Fed.R.Civ.P. 6(e) states:

> Electronic transmission is not always instantaneous, and may fail for any 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 make electronic service ever more attractive.

5. While some courts accept the Notice of Electronic Filing as a certificate of service, other courts require a separate certificate of service to be included with the filed document indicating that the document was electronically filed using the CM/ECF system and the manner, electronically through the Notice of Electronic Filing or otherwise, in which parties were served.

~~The Model Rule does not specifically provide for the added three days, but such a provision would not be necessary if the proposed amendment to Fed.R.Bankr. P. 9006(f) takes effect.~~

~~4. The CM/ECF system is designed so that a person may request electronic notice of all filings in a matter even though that person has not obtained a password and registered as a Filing User. Such electronic notice would not constitute service under the Model Rule, because the effectiveness of electronic service is dependent on registration with the system. The court should be aware of this possibility and should encourage all those who request electronic notice to register for a system password.~~

Rule 10– Notice of Court Orders and Judgments

Immediately upon the entry of an order or judgment in an action assigned to the Electronic Filing System, the clerk will transmit to Filing Users in the case, in electronic

form, a Notice of Electronic Filing. Electronic transmission of the Notice of Electronic Filing constitutes the notice required by Fed.R.Bankr.P. 9022. The clerk must give notice to a person who has not consented to electronic service in paper form in accordance with the Federal Rules of Bankruptcy Procedure.

Derivation

The Model Rule is adapted from the Eastern District of New York procedures.

Commentary

1. ~~Pending a~~ Amendments to Fed.R.Bankr.P 9022 authorize electronic notice of court orders where the parties consent. The Model Rule provides that for all Filing Users in the electronic filing system, electronic notice of the entry of an order or judgment has the same force and effect as traditional notice. The CM/ECF system automatically generates and sends a Notice of Electronic Filing upon entry of the order or judgment. The Notice contains a hyperlink to the document.

Rule 11– Technical Failures

A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.

Derivation

The Model Rule is adapted from the Eastern District of New York procedures.

Commentary

1. CM/ECF is designed so that filers access the court through its Internet website. The Model Rule addresses the possibility that a party may not meet a filing deadline because the court's website is not accessible for some reason. Cf. Fed.R.Bankr.P. 9006(a) (permitting extension of time when "weather or other conditions have made the clerk's office inaccessible"). The Model Rule also addresses the possibility that the filer's own unanticipated system failure might make the filer unable to meet a filing deadline.

2. The Model Rule does not require the court to excuse the filing deadline allegedly caused by a system failure. The court has discretion to grant or deny relief in light of the

circumstances.

Rule 12– Public Access

Any person or organization, other than one registered as a Filing User under Rule 2 of these rules, may access the Electronic Filing System at the court's Internet site [Internet address] by obtaining a PACER log-in and password. Those who have PACER access but who are not Filing Users may retrieve docket sheets and documents, but they may not file documents.

In connection with the filing of any material in an action assigned to the Electronic Filing System, any person may apply by motion for an order limiting electronic access to or prohibiting the electronic filing of certain specifically-identified materials on the grounds that such material is subject to privacy interests and that electronic access or electronic filing in the action is likely to prejudice those privacy interests.

Information posted on the System must not be downloaded for uses inconsistent with the privacy concerns of any person.

Derivation

The first paragraph of the Model Rule is adapted from the District of Arizona Bankruptcy procedures. The second paragraph is adapted from the Eastern District of New York procedures. The third paragraph is adapted from the Southern District of New York Bankruptcy procedures.

Commentary

1. A subcommittee of the Judicial Conference Committee on Court Administration and Case Management is currently assessing the privacy concerns arising from electronic case filing. The Judicial Conference may at some point develop policies to address these concerns. The rule can be adapted to reflect any future specific policies or suggestions adopted by the Judicial Conference.

2. The Model Rule is consistent with Judicial Conference policy to limit remote public access to electronic case files to those who have obtained a PACER password.

3. The second paragraph of the Model Rule is not intended to create substantive rights. It simply highlights the fact that a person may apply for a protective order when Internet access to a case file or document is likely to result in the loss of that person's legitimate interest in privacy.

Model Local District Court Rules for Electronic Case Filing In Civil Cases

~~**Approved by the Judicial Conference of the United States**~~

~~**September 2001**~~

~~**(modified March 2002)**~~

Submitted to the Committee on Court Administration and Case Management

Spring 2003

This document is a draft version of amended Model Local Rules for civil cases. The marked revisions reflect suggested modifications to the current version approved by the Judicial Conference of the United States through March 2002.

Introduction

Because most existing court rules and procedures have been designed with paper court documents in mind, some modifications are needed to address issues arising when court documents are filed in electronic form. This set of model local rules was ~~has been~~ developed for federal district ~~and bankruptcy~~ courts implementing the electronic case filing capabilities of the federal judiciary's Case Management/Electronic Case Files (CM/ECF) Project in civil cases, and can be adapted by courts that offer some other method of electronic filing of court documents.

The original model was compiled by a subcommittee of the Court Administration and Case Management Committee that included as members representatives from the Committee on Automation and Technology (now the Committee on Information Technology) and the Committee on Rules of Practice and Procedure. The subcommittee reviewed the rules and procedures for electronic filing developed in the CM/ECF prototype district and bankruptcy courts. It also undertook an informal survey of those courts to find out how well those procedures operated. The information indicated general satisfaction with courts' existing procedures. There was also general agreement that it was essential to include the bar in the process of developing and modifying the local procedures governing electronic filing.

This set of model local rules for electronic case filing ~~is~~ was based to a significant extent on the procedures used in courts that served as prototype courts for the federal judiciary's CM/ECF Project. It was approved by the Judicial Conference in September 2001, and slightly modified in March 2002. Additional experience suggests that some modifications are appropriate.

There are separate sets of model local civil and criminal rules for district courts and a set of model local rules for bankruptcy courts. They use the same terminology and are identical to the extent possible and appropriate. Courts are free to adapt the provisions of these model local rules as they choose.

The Federal Rules of Procedure (Civil Rule 5(e)~~, Bankruptcy Rules 5005, 7005 and 8008~~) provide that a court may "by local rule" permit filing, signing and verification of documents by electronic means. The Federal Rules also authorize each district court to make and amend rules governing its practice (Civil Rule 83(a)). Thus, each court that intends to allow electronic filing should have at least a general authorizing provision in its local rules.[1] The model rules developed here may be used either as a set of local rules, or as the contents for a general order or

---

[1] An example of a local rule authorizing electronic filing is as follows:

The court will accept for filing documents submitted, signed or verified by electronic means that comply with procedures established by the court.

other administrative procedures. The use of local rules promotes the requirements of the Rules Enabling Act, provides better public notice of applicable procedures, and allows for input from the bar. On the other hand, use of general orders gives courts more flexibility to modify requirements and rules in response to changing circumstances. If local rules are used, it should be noted that Fed.R.Civ.P. 83~~; Fed.R.Bankr.P. 9029~~ and related Judicial Conference policy require that rule numbering conform to the numbering system of the Federal Rules. The model rules could be added as a group to local rules corresponding to Fed.R.Civ.P. 5 or 83, or existing local rules on specific topics could be amended.

Note: These model procedures use the term "Electronic Filing System" to refer to the court's system that receives documents filed in electronic form. The term "Filing User" is used to refer to those who have a court-issued log-in and password to file documents electronically.

Rule 1– Scope of Electronic Filing

The court will designate which cases will be assigned to the Electronic Filing System. Except as expressly provided and in exceptional circumstances preventing a Filing User from filing electronically, all petitions, motions, memoranda of law, or other pleadings and documents required to be filed with the court in connection with a case assigned to the Electronic Filing System must be electronically filed.

The filing of the initial papers, including the complaint and the issuance and service of the summons, will be accomplished in the traditional manner on paper rather than electronically. In a case assigned to the Electronic Filing System after it has been opened, parties must promptly provide the clerk with electronic copies of all documents previously provided in paper form. All subsequent documents must be filed electronically except as provided in these rules or as ordered by the court.

Notwithstanding the foregoing, attorneys and others who are not Filing Users in the Electronic Filing System are not required to electronically file pleadings and other papers in a case assigned to the System. Once registered, a Filing User may withdraw from participation in the Electronic Filing System by providing the clerk's office with written notice of the withdrawal.

Derivation

The first and third paragraphs of the Model Rule are derived from the Southern District of California Bankruptcy procedures, with the exception of the last sentence of the third paragraph, which is derived from the Eastern District of Virginia Bankruptcy procedures. The second paragraph is adapted from the Northern District of Ohio procedures.

Commentary

1. The Model Rule provides that the court will designate which cases will be assigned to the electronic filing system. It also establishes a presumption that all documents filed in cases assigned to the electronic filing system should be electronically filed. Some courts have designated certain types of cases for electronic filing, while some have determined that all cases are appropriate for electronic filing. However, the Rule does not make electronic filing mandatory. Mandatory electronic filing appears to be inconsistent with Fed.R.Civ.P. 5, which states that a court "may permit" papers to be filed electronically, and provides that the clerk "shall not refuse to accept for filing any paper presented . . . solely because it is not presented in proper form." However, the Federal Rules clearly permit a court to strongly encourage lawyers

to participate in electronic case filing, and the Model Rule is written to provide such encouragement.

2. For cases assigned to the electronic filing system after documents have already been filed conventionally, the Model Rule states that the parties must provide electronic copies of all previously filed documents. This will include the summons and complaint. In cases removed to the federal court, parties in cases assigned to the electronic filing system are required to provide electronic copies of all previous filings in the state court. Where documents filed in paper form were previously scanned by the court, electronic filing would not be necessary.

3. Some courts offering electronic filing require fees to be paid in the traditional manner, while others permit or require electronic payment of fees. Nothing in the rule would constrain the court in providing for a desired method of payment of fees.

4. Electronic case filing raises privacy concerns. Electronic case files can be more easily accessible than traditional paper case files, so there is a greater risk of public dissemination of sensitive information found in case files. See Model Rule 12. The Judicial Conference is investigating and evaluating the privacy concerns attendant to electronic case files, and is working to develop a policy.

Rule 2– Eligibility, Registration, Passwords

Attorneys admitted to the bar of this court, including those admitted pro hac vice and attorneys authorized to represent the United States, may register as Filing Users of the court's Electronic Filing System. Registration is in a form prescribed by the clerk and requires the Filing User's name, address, telephone number, Internet e-mail address, and a declaration that the attorney is admitted to the bar of this court.

If the court permits, a party to a pending civil action who is not represented by an attorney may register as a Filing User in the Electronic Filing System solely for purposes of the action. Registration is in a form prescribed by the clerk and requires identification of the action as well as the name, address, telephone number and Internet e-mail address of the party. If, during the course of the action, the party retains an attorney who appears on the party's behalf, the attorney must advise the clerk to terminate the party's registration as a Filing User upon the attorney's appearance.

Provided that a Filing User has an Internet e-mail address, registration as a Filing User constitutes consent to electronic service of all documents as provided in these rules in accordance with the Federal Rules of Civil Procedure.

Once registration is completed, the Filing User will receive notification of the user log-in and password. Filing Users agree to protect the security of their passwords and immediately notify the clerk if they learn that their password has been compromised. Users may be subject to sanctions for failure to comply with this provision.

Derivation

The first three paragraphs of Model Rule 2 are derived from the Eastern District of New York procedures. The last clause of the first sentence of the first paragraph is derived from the Southern District of New York procedures. The last paragraph is derived from the Northern District of Ohio procedures.

Commentary

1. The Model Rule specifically provides that attorneys admitted pro hac vice can be filing users in electronic filing systems. The Model Rule also recognizes that a court may wish under certain circumstances to permit pro se filers to take part in electronic case filing. Such participation is left to the discretion of the court. The Model Rule also contains language covering attorneys representing the United States for any court not requiring them to be members of the court's bar.

2. The Model Rule provides that a person who registers with the System (a Filing User) thereby consents to electronic service of documents subject to the electronic filing system. ~~Pending a~~Amendments to the Federal Rules of Civil Procedure (Fed.R.Civ.P. 5(b)) permit electronic service on a person who consents "in writing." The Committee Notes indicate that the consent may be provided by electronic means. A court may "establish a registry or other facility that allows advance consent to service by specified means for future action." Thus, a court might use CM/ECF registration as a means to have parties consent to receive service electronically.

3. Several districts currently have provisions addressing the possibility of compromised passwords. Such a provision may be useful in a User Manual for the electronic filing system. The provision might read as follows:

> Attorneys may find it desirable to change their court assigned passwords periodically. In the event that an attorney believes that the security of an existing password has been compromised and that a threat to the System exists, the attorney must give immediate notice by telephone to the clerk, chief deputy clerk or systems department manager and confirm by facsimile in order to prevent access to the System by use of that password.

Rule 3–Consequences of Electronic Filing

Electronic transmission of a document to the Electronic Filing System consistent with these rules, together with the transmission of a Notice of Electronic Filing from the court, constitutes filing of the document for all purposes of the Federal Rules of Civil Procedure and the local rules of this court, and constitutes entry of the document on the docket kept by the clerk under Fed.R.Civ.P. 58 and 79.

Before filing a scanned document with the court, a Filing User must verify its legibility.

When a document has been filed electronically, the official record is the electronic recording of the document as stored by the court, and the filing party is bound by the document as filed. Except in the case of documents first filed in paper form and subsequently submitted electronically under Rule 1, a document filed electronically is deemed filed at the date and time stated on the Notice of Electronic Filing from the court.

Filing a document electronically does not alter the filing deadline for that document. Filing must be completed before midnight local time where the court is located in order to be considered timely filed that day.

Derivation

The first ~~two~~ and third paragraphs of Model Rule 3 are adapted from the Eastern District of New York procedures. The second paragraph is derived from the District of Nebraska procedures. The ~~third~~ fourth paragraph is adapted from the Northern District of Ohio procedures.

Commentary

1. The Model Rule provides a "time of filing" rule that is analogous to the traditional system of file stamping by the Clerk's office. A filing is deemed made when it is acknowledged by the Clerk's office through the CM/ECF system's automatically generated Notice of Electronic Filing.

2. The Model Rule makes clear that the electronically filed documents are considered to be entries on the official docket.

Rule 4– Entry of Court ~~Orders~~-Issued Documents

All orders, decrees, judgments, and proceedings of the court will be filed in accordance with these rules which will constitute entry on the docket kept by the clerk under Fed.R.Civ.P. 58 and 79. All signed orders will be filed electronically by the court or court personnel. Any order or other court-issued document filed electronically without the original signature of a judge or clerk has the same force and effect as if the judge or clerk had ~~affixed the judge's signature to~~ signed a paper copy of the order and it had been entered on the docket in a conventional manner.

Orders may also be issued as "text-only" entries on the docket, without an attached document. Such orders are official and binding.

The court may issue a summons electronically, although a summons may not be served electronically.

A Filing User submitting a document electronically that requires a judge's signature must promptly deliver the document in such form as the court requires.

Derivation

The first two sentences of the first paragraph of the Model Rule are adapted from the Eastern District of New York procedures. The last sentence is derived from the procedures of the Northern District of Georgia Bankruptcy Court. The second paragraph is derived from the District of Columbia and District of Nebraska procedures. The ~~second~~ fourth paragraph is adapted from Eastern District of New York procedures.

Commentary

1. Not all courts have a provision in their electronic filing procedures addressing the electronic entry of court orders. In at least one court without such a provision, a question arose about the validity of electronically filed court orders. The Model Rule specifically states that an electronically filed court order has the same force and effect as an order conventionally filed. Judges in many courts authorize "text-only" orders, which are docket entries that themselves constitute the order. These text-only orders, which are generally used for routine matters, do not require production of a .pdf document.

2. The Model Rule contemplates that a judge can authorize personnel, such as a law clerk or judicial assistant, to electronically enter an order on the judge's behalf.

3. The Model Rule leaves the method for submitting proposed orders to the discretion of the court. Courts have been using a variety of methods, including having them sent by email to the court in word-processing format or having them filed as .pdf documents.

4. The Model Rule expressly provides that a court may issue a summons electronically. This authorizes only issuance of the summons. A summons may not be served electronically, however.

Rule 5– Attachments and Exhibits

Filing Users must submit in electronic form all documents referenced as exhibits or attachments, unless the court permits conventional filing. A Filing User must submit as exhibits or attachments only those excerpts of the referenced documents that are directly germane to the matter under consideration by the court. Excerpted material must be clearly and prominently identified as such. Filing Users who file excerpts of documents as exhibits or attachments under this rule do so without prejudice to their right to timely file additional excerpts or the complete document. Responding parties may timely file additional excerpts or the complete document that they believe are directly germane. The court may require parties to file additional excerpts or the complete document.

Derivation

The Model Rule is adapted from the Southern District of New York Bankruptcy procedures. The last sentence is derived from the rules of the District of Kansas.

Commentary

1. One issue that has arisen in most courts using electronic filing relates to attachments or exhibits not originally available to the filer in electronic form, and that must be scanned (or imaged) into Portable Document Format before filing. Examples include leases, contracts, proxy statements, charts and graphs. A scanned document creates a much larger electronic file than one prepared directly on the computer (*e.g.*, through word processing). The large documents can take considerable time to file and retrieve. The Model Rule provides that if the case is assigned to the electronic filing system, the party must file this type of material electronically, unless the court specifically permits conventional filing.

2. It is often the case that only a small portion of a much larger document is relevant to the matter before the court. In such cases, scanning the entire document imposes an

inappropriate burden on both the litigants and the courts. To alleviate some of this inconvenience, the Model Rule provides that a Filing User must submit as the exhibit only the relevant excerpts of a larger document. The opposing party then has a right to submit other excerpts of the same document under the principle of completeness.

3. This rule is not intended to alter traditional rules with respect to materials that are before the court for decision. Thus, any material on which the court is asked to rely must be specifically provided to the court.

Rule 6–Sealed Documents

Documents ordered to be placed under seal must be filed conventionally and not electronically unless specifically authorized by the court. A motion to file documents under seal may be filed electronically unless prohibited by law. The order of the court authorizing the filing of documents under seal may be filed electronically unless prohibited by law. A paper copy of the order must be attached to the documents under seal and be delivered to the clerk.

Derivation

The Model Rule is adapted from the Western District of Missouri procedures.

Commentary

1. The Model Rule recognizes that other laws may affect whether a motion to file documents under seal, or an order authorizing the filing of such documents, can or should be electronically filed. It is possible that electronic access to the motion or order may raise the same privacy concerns that gave rise to the need to file a document conventionally in the first place. For similar reasons, the actual documents to be filed under seal should ordinarily be filed conventionally.

2. See Model Rule 12 for another provision addressing privacy concerns arising from electronic filing.

Rule 7– Retention Requirements

Documents that are electronically filed and require original signatures other than that of the Filing User must be maintained in paper form by the Filing User until [number] years after all time periods for appeals expire. On request of the court, the Filing User must provide original documents for review.

Derivation

Model Rule 7 is adapted from the Eastern District of Virginia Bankruptcy procedures.

Commentary

1. Because electronically filed documents do not include original, handwritten signatures, it is necessary to provide for retention of certain signed documents in paper form in case they are needed as evidence in the future. The Model Rule requires retention only of those documents containing original signatures of persons other than the person who files the document electronically. The filer's use of a log-in and password to file the document is itself a signature under the terms of Model Rule 8.

2. The Model Rule places the retention requirement on the person who files the document. One alternative is to place retention responsibility on counsel and/or the firm representing the party on whose behalf the document was filed. (Thus, if counsel changes, the documents would be transferred along with the rest of the case file.) Another possible solution is to require the filer to submit the signed original to the court, so that the court can retain it. Some government officials have expressed a preference to have such documents retained by the court, in order to make it easier to retrieve the documents for purposes such as a subsequent prosecution for fraud.

3. Courts have varied considerably on the required retention period. Some have limited it to the end of the litigation (plus the time for appeals). Others have required longer retention periods (four or five years). Assuming that the purpose of document retention is to preserve relevant evidence for a subsequent proceeding, the appropriate retention period might relate to relevant statutes of limitations.

4. Some districts require the filer to retain a paper copy of *all* electronically filed documents. Such a requirement seems unnecessary, and it tends to defeat one of the purposes of using electronic filing. Other courts have required retention of "verified documents," i.e., documents in which a person verifies, certifies, affirms, or swears under oath or penalty of perjury. See, *e.g.*, 28 U.S.C. § 1746 (unsworn declarations under penalty of perjury).

Rule 8– Signatures

The user log-in and password required to submit documents to the Electronic Filing System serve as the Filing User's signature on all electronic documents filed with the court. They also serve as a signature for purposes of Fed.R.Civ.P. 11, the Federal Rules of Civil Procedure, the local rules of this court, and any other purpose for which a signature is required in connection with proceedings before the court. Each document filed electronically must, if possible, indicate that it has been electronically filed. Electronically filed documents must include a signature block [in compliance with local rule number [ ] if applicable] and must set forth the name, address, telephone number and the attorney's [name of state] bar registration number, if applicable. In addition, the name of the Filing User under whose log-in and password the document is submitted must be preceded by an "s/" and typed in the space where the signature would otherwise appear.

No Filing User or other person may knowingly permit or cause to permit a Filing User's password to be used by anyone other than an authorized agent of the Filing User.

Documents containing the signature of non-Filing Users are to be filed electronically with the signature represented by a "s/" and the name typed in the space where a signature would otherwise appear, or as a scanned image.

Documents requiring signatures of more than one party must be electronically filed either by: (1) submitting a scanned document containing all necessary signatures; (2) representing the consent of the other parties on the document; (3) identifying on the document the parties whose signatures are required and by the submission of a notice of endorsement by the other parties no later than three business days after filing; or (4) in any other manner approved by the court.

Derivation

The first and ~~third~~ fourth paragraphs of the Model Rule are adapted from the Northern District of Ohio procedures. The second paragraph is derived from the Southern District of New York Bankruptcy procedures.

Commentary

1. Signature issues are a subject of considerable interest and concern. The CM/ECF system is designed to require a log-in and password to file a document. The Model Rule provides that use of the log-in and password constitutes a signature, and assures that such a signature has the same force and effect as a written signature for purposes of the Federal Rules of

Civil Procedure, including Fed.R.Civ.P. 11, and any other purpose for which a signature is required on a document in connection with proceedings before the court.

2. At the present time, other forms of digital or other electronic signature have received only limited acceptance. It is possible that over time and with further technological development a system of digital signatures may replace the current password system.

3. Some users of electronic filing systems have questioned whether an s-slash requirement is worth retaining. The better view is that an s-slash is necessary; otherwise there is no indication that documents printed out from the website were ever signed. The s-slash provides some indication when the filed document is viewed or printed that the original was in fact signed.

4. The second paragraph of the Model Rule does not require an attorney or other Filing User to personally file his or her own documents. The task of electronic filing can be delegated to an authorized agent, who may use the log-in and password to make the filing. However, use of the log-in and password to make the filing constitutes a signature by the Filing User under the Rule, even though the Filing User does not do the physical act of filing.

5. Issues arise when documents being electronically filed have been signed by persons other than the filer, *e.g.*, stipulations and affidavits. For documents signed by individuals without log-ins and passwords (non-Filing Users), the Model Rule provides that the signature can appear as a "s/" or as a scanned image. Under Model Rule 7 above, the Filing User must retain a paper copy with the original signature of any such document filed by the Filing User. The Model Rule provides for ~~a substantial amount of~~ considerable flexibility in the filing of ~~these~~ documents signed by more than one party, e.g., stipulations. Courts may wish to modify or narrow the options if, for example, they believe that administering the three-day period for endorsements would be burdensome. Or, another solution is to provide an immediate but short opportunity, e.g., 10 days from the receipt of the Notice of Electronic Filing, for others to challenge the authenticity of their signatures on an electronic document.

6. Courts may wish to underscore the fact that a Filing User's log-in and password constitutes the Filing User's signature, by including a statement to that effect on the registration form.

Rule 9– Service of Documents by Electronic Means

~~Each person electronically filing a pleading or other document must serve a "Notice of Electronic Filing" to parties entitled to service under the Federal Rules of Civil Procedure and the local rules. The "Notice of Electronic Filing" must be served by e-mail, hand, facsimile, or by first-class mail postage prepaid. Electronic service of the~~

~~"Notice of Electronic Filing" constitutes service of the filed document. Parties not deemed to have consented to electronic service are entitled to receive a paper~~ The "Notice of Electronic Filing" that is automatically generated by the court's Electronic Filing System constitutes service of the filed document on Filing Users. Parties who are not Filing Users must be served with a copy of any ~~electronically filed~~ pleading or other document filed electronically in accordance with ~~. Service of such paper copy must be made according to~~ the Federal Rules of Civil Procedure and the local rules.

A certificate of service must be included with all documents filed electronically, indicating that service was accomplished through the Notice of Electronic Filing for parties and counsel who are Filing Users and indicating how service was accomplished on any party or counsel who is not a Filing User.

Derivation

The first sentence of Model Rule 9 is derived from the rules of the District of Kansas. The second paragraph is derived from the Northern District of Ohio's procedures.

Commentary

1. The ~~pending~~ amendments to the Federal Rules (Fed.R.Civ.P. 5(b)) authorizing service of documents by electronic means do not permit electronic service of process for purposes of obtaining personal jurisdiction (i.e., Rule 4 service). The Model Rule covers only service of documents after the initial service of the summons and complaint.

2. The CM/ECF system automatically generates a Notice of Electronic Filing at the time a document is filed with the system. The Notice indicates the time of filing, the name of the party and attorney filing the document, the type of document, and the text of the docket entry. It also contains an electronic link (hyperlink) to the filed document, allowing anyone receiving the Notice by e-mail to retrieve the document automatically. The CM/ECF system automatically sends this Notice to all case participants registered to use the electronic filing system. If the court is willing to have this Notice itself constitute service, it may, under the ~~pending~~ amendments to the Federal Rules (Civil Rule 5(b)(2)(D)), do so through a local rule. The ~~pending~~ amendments require a local rule if a court wants to authorize parties to use its "transmission facilities" to make electronic service. The Model Rule ~~does not~~ includes such a provision~~, but could be easily modified to provide~~ by providing that the court's automatically generated notice of electronic filing constitutes service.

3. Parties who are not Filing Users are not deemed under the Model Rules to have consented to electronic service of the Notice of Electronic Filing. They must be served in some other way authorized by the Federal Rules of Civil Procedure (Fed.R.Civ.P. 5(b)). Under the

rules, they can be served in the traditional way with a paper copy of the electronically filed document, or they can consent in writing to service by any other method, including other forms of electronic service such as fax or direct e-mail.

43. An ~~pending~~ amendment to Fed.R.Civ.P. 6(e) provides that the three additional days to respond to service by mail will apply to electronic service as well. The Committee Note states:

> Electronic transmission is not always instantaneous, and may fail for any 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 make electronic service ever more attractive.

~~The Model Rule does not specifically provide for the added three days, but such a provision would not be necessary if the proposed amendment to Fed.R.Civ.P. 6(e) takes effect.~~

5. While some courts accept the Notice of Electronic Filing as a certificate of service, other courts require a separate certificate of service to be included with the filed document indicating that the document was electronically filed using the CM/ECF system and the manner, electronically through the Notice of Electronic Filing or otherwise, in which parties were served.

~~4. The CM/ECF system is designed so that a person may request electronic notice of all filings in a matter even though that person has not obtained a password and registered as a Filing User. Such electronic notice would not constitute service under the Model Rule, because the effectiveness of electronic service is dependent on registration with the system. The court should be aware of this possibility and should encourage all those who request electronic notice to register for a system password.~~

Rule 10– Notice of Court Orders and Judgments

> Immediately upon the entry of an order or judgment in an action assigned to the Electronic Filing System, the clerk will transmit to Filing Users in the case, in electronic form, a Notice of Electronic Filing. Electronic transmission of the Notice of Electronic Filing constitutes the notice required by Fed.R.Civ.P. 77(d). The clerk must give notice in paper form to a person who has not consented to electronic service ~~in paper form~~ in accordance with the Federal Rules of Civil Procedure.

Derivation

The Model Rule is adapted from the Eastern District of New York procedures.

Commentary

1. ~~Pending~~ Recent amendments to Fed.R.Civ.P 77(d) authorize electronic notice of court orders where the parties consent. The Model Rule provides that for all Filing Users in the electronic filing system, electronic notice of the entry of an order or judgment has the same force and effect as traditional notice. The CM/ECF system automatically generates and sends a Notice of Electronic Filing upon entry of the order or judgment. The Notice contains a hyperlink to the document.

Rule 11– Technical Failures

A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.

Derivation

The Model Rule is adapted from the Eastern District of New York procedures.

Commentary

1. CM/ECF is designed so that filers access the court through its Internet website. The Model Rule addresses the possibility that a party may not meet a filing deadline because the court's website is not accessible for some reason. Cf. Fed.R.Civ.P. 6 (permitting extension of time when "weather or other conditions have made the office of the clerk of the district court inaccessible"). The Model Rule also addresses the possibility that the filer's own unanticipated system failure might make the filer unable to meet a filing deadline.

2. The Model Rule does not require the court to excuse the filing deadline allegedly caused by a system failure. The court has discretion to grant or deny relief in light of the circumstances.

Rule 12– Public Access

A person may review at the clerk's office filings that have not been sealed by the court. A person also may access the Electronic Filing System at the court's Internet site [Internet address] by obtaining a PACER log-in and password. A person who has PACER access may retrieve docket sheets and documents. Only a Filing User under Rule 2 of these rules may file documents.

Derivation

This rule was developed by the Judicial Conference Committee on Court Administration and Case Management to be consistent with the Judicial Conference Policy on Privacy and Public Access to Electronic Case Files. ~~It was approved by the Judicial Conference in March 2002.~~

Commentary

1. ~~The first paragraph of t~~This rule is intended to make it clear that anyone can access all unsealed court files and documents at the courthouse, whether such file is electronic or in hard copy. It also explains that a person or entity that has a PACER login and password may access these same court files and documents over the Internet.

~~2. The original second paragraph explaining that a person may apply for an order limiting access to or prohibiting the electronic filing of certain identifying information has been omitted. This portion of the rule is not necessary given that the policy for civil cases requires the redaction of any personal identifier (social security number, financial account number, date of birth, names of minor children) if it must be included in a filed document. (See Proposed Model Guideline Rule for United States District Courts Addressing Judicial Conference Privacy Policy Regarding Public Access to Electronic Case Files and Proposed Model Notice of Electronic Availability of Case File Information.) There was also concern that any suggestion of the filing of a specific motion in the rules might encourage such a motion to be filed when it is not necessary.~~

~~3. The original third paragraph was deleted out of concern that it may not be constitutional or enforceable. There are identity theft statutes that could be enforced if any such activity were tied to the access of electronic case files.~~

Model Local District Court Rules for Electronic Case Filing In Criminal Cases

Submitted to the Committee on Court Administration and Case Management

Spring 2003

This document is a draft version of the Model Local Rules for criminal cases. The marked revisions reflect suggested modifications of the version reviewed by the Committee on Court Administration and Case Management in June 2002. No version of the Model Local Rules for criminal cases has been approved by the Judicial Conference.

Introduction

Because most existing court rules and procedures have been designed with paper court documents in mind, some modifications are needed to address issues arising when court documents are filed in electronic form. ~~This~~ The Judicial Conference in September 2001 approved a set of model local rules ~~has been developed~~ for federal district courts (for civil cases) and bankruptcy courts implementing the electronic case filing capabilities of the federal judiciary's Case Management/Electronic Case Files (CM/ECF) Project, and ~~can be adapted~~ adaptable by courts that offer some other method of electronic filing of court documents.

The original model was compiled by a subcommittee of the Court Administration and Case Management Committee that included as members representatives from the Committee on Automation and Technology (now the Committee on Information Technology) and the Committee on Rules of Practice and Procedure. The subcommittee reviewed the rules and procedures for electronic filing developed in the CM/ECF prototype district and bankruptcy courts. It also undertook an informal survey of those courts to find out how well those procedures operated. The information indicated general satisfaction with courts' existing procedures. There was also general agreement that it was essential to include the bar in the process of developing and modifying the local procedures governing electronic filing.

~~This set of~~ The model local rules for electronic case filing ~~is~~ in civil cases and bankruptcy cases were based to a significant extent on the procedures used in courts that served as prototype courts for the federal judiciary's CM/ECF Project. There are separate sets of model local rules for district courts and bankruptcy courts. They use the same terminology and are identical to the extent possible and appropriate. Courts are free to adapt the provisions of these model local rules as they choose.

This set of model local electronic filing rules for criminal cases is based to the extent appropriate on the model local electronic filing rules for civil cases. They have been modified to reflect differences in the nature of the cases or practice, and experience to date in courts that are using electronic filing in criminal cases. Suggestions from the Advisory Committee on Criminal Rules have also been incorporated.

The Federal Rules of Procedure (Civil Rule 5(e), incorporated into the Federal Rules of Criminal Procedure through Criminal Rule 49(d)), ~~Bankruptcy Rules 5005, 7005 and 8008)~~ provide that a court may "by local rule" permit filing, signing and verification of documents by electronic means. The Federal Rules of Criminal Procedure also provide that service upon an attorney or upon a party shall be made in the manner provided in civil actions (Criminal Rule 49(b), incorporating Civil Rule 5(b)). The Federal Rules of Criminal Procedure also authorize each district court to make and amend rules governing its practice (Criminal Rule 57(a)(1)). Thus, each court that intends to allow electronic filing should have at least a general authorizing

provision in its local rules.[1] The model rules developed here may be used either as a set of local rules, or as the contents for a general order or other administrative procedures. The use of local rules promotes the requirements of the Rules Enabling Act, provides better public notice of applicable procedures, and allows for input from the bar. On the other hand, use of general orders gives courts more flexibility to modify requirements and rules in response to changing circumstances. If local rules are used, it should be noted that Criminal Rule 57(a)(1) and related Judicial Conference policy require that rule numbering conform to the numbering system of the Federal Rules. The model rules could be added as a group to local rules corresponding to Criminal Rule 49 or 57, or existing local rules on specific topics could be amended..

Note: These model procedures use the term "Electronic Filing System" to refer to the court's system that receives documents filed in electronic form. The term "Filing User" is used to refer to those who have a court-issued log-in and password to file documents electronically.

---

[1] An example of a local rule authorizing electronic filing is as follows:

The court will accept for filing documents submitted, signed or verified by electronic means that comply with procedures established by the court.

Rule 1– Scope of Electronic Filing

The court will designate which cases will be assigned to the Electronic Filing System. Except as expressly provided and in exceptional circumstances preventing a Filing User from filing electronically, all petitions, motions, memoranda of law, or other pleadings and documents required to be filed with the court in connection with a case assigned to the Electronic Filing System must be electronically filed.

In a criminal case, the charging documents, including the complaint, information, indictment and superseding information or indictment, shall be filed either in the traditional manner in paper form or as electronic documents that contain an image of any legally required signature. In a case assigned to the Electronic Filing System after it has been opened, parties must promptly provide the clerk with electronic copies of all documents previously provided in paper form. All subsequent documents must be filed electronically except as provided in these rules or as ordered by the court.

Notwithstanding the foregoing, attorneys and others who are not Filing Users in the Electronic Filing System are not required to electronically file pleadings and other papers in a case assigned to the System. Once registered, a Filing User may withdraw from participation in the Electronic Filing System by providing the clerk's office with written notice of the withdrawal.

Derivation

The first and third paragraphs of the Model Rule are derived from the Southern District of California Bankruptcy procedures, with the exception of the last sentence of the third paragraph, which is derived from the Eastern District of Virginia Bankruptcy procedures. The second paragraph is adapted from the Northern District of Ohio procedures. The first sentence of the second paragraph reflects the suggestions of the Advisory Committee on Criminal Rules.

Commentary

1. The Model Rule provides that the court will designate which cases will be assigned to the electronic filing system. It also establishes a presumption that all documents filed in cases assigned to the electronic filing system should be electronically filed. Some courts have designated certain types of cases for electronic filing, while some have determined that all cases are appropriate for electronic filing. However, the Rule does not make electronic filing mandatory. Mandatory electronic filing appears to be inconsistent with Fed.R.Civ.P. 5 (and thus Fed.R.Crim.P. 49), which states that a court "may permit" papers to be filed electronically, and

provides that the clerk "shall not refuse to accept for filing any paper presented . . . solely because it is not presented in proper form." However, the Federal Rules clearly permit a court to strongly encourage lawyers to participate in electronic case filing, and the Model Rule is written to provide such encouragement.

2. For cases assigned to the electronic filing system after documents have already been filed conventionally, the Model Rule states that the parties must provide electronic copies of all previously filed documents. This will include any charging documents in a criminal case that have been filed in paper form. Where documents filed in paper form were previously scanned by the court, electronic filing would not be necessary.

3. Some courts offering electronic filing require fees to be paid in the traditional manner, while others permit or require electronic payment of fees. Nothing in the rule would constrain the court in providing for a desired method of payment of fees.

4. Electronic case filing raises privacy concerns. Electronic case files can be more easily accessible than traditional paper case files, so there is a greater risk of public dissemination of sensitive information found in case files. The Judicial Conference has adopted a policy recommending that certain personal identifying information be excluded from all documents filed with the courts. In addition, until further notice, documents in criminal cases should be available only to counsel for the government and for the defendants in those cases and should not be available to the general public through remote public access. See Model Rule 12.

Rule 2– Eligibility, Registration, Passwords

> Attorneys admitted to the bar of this court, including those admitted pro hac vice and attorneys authorized to represent the United States, may register as Filing Users of the court's Electronic Filing System. Registration is in a form prescribed by the clerk and requires the Filing User's name, address, telephone number, Internet e-mail address, and a declaration that the attorney is admitted to the bar of this court.
>
> If the court permits, a party to a pending proceeding who is not represented by an attorney may register as a Filing User in the Electronic Filing System solely for purposes of the action. Registration is in a form prescribed by the clerk and requires identification of the action as well as the name, address, telephone number and Internet e-mail address of the party. If, during the course of the proceeding, the party retains an attorney who appears on the party's behalf, the attorney must advise the clerk to terminate the party's registration as a Filing User upon the attorney's appearance.

Provided that a Filing User has an Internet e-mail address, registration as a Filing User constitutes consent to electronic service of all documents as provided in these rules in accordance with the Federal Rules of Criminal Procedure.

Once registration is completed, the Filing User will receive notification of the user log-in and password. Filing Users agree to protect the security of their passwords and immediately notify the clerk if they learn that their password has been compromised. Users may be subject to sanctions for failure to comply with this provision.

Derivation

The first three paragraphs of Model Rule 2 are derived from the Eastern District of New York procedures. The last clause of the first sentence of the first paragraph is derived from the Southern District of New York procedures. The last paragraph is derived from the Northern District of Ohio procedures.

Commentary

1. The Model Rule specifically provides that attorneys admitted pro hac vice can be filing users in electronic filing systems. The Model Rule also recognizes that a court may wish under certain circumstances to permit pro se filers to take part in electronic case filing. Such participation is left to the discretion of the court. The Model Rule also contains language covering attorneys representing the United States for any court not requiring them to be members of the court's bar.

2. The Model Rule provides that a person who registers with the System (a Filing User) thereby consents to electronic service of documents subject to the electronic filing system. Amendments to the Federal Rules of Civil Procedure (Fed.R.Civ.P. 5(b), applicable to criminal proceedings through Fed.R.Crim.P. 49(b)) permit electronic service on a person who consents "in writing." The Committee Notes to Civil Rule 5(b) indicate that the consent may be provided by electronic means. A court may "establish a registry or other facility that allows advance consent to service by specified means for future action." Thus, a court might use CM/ECF registration as a means to have parties consent to receive service electronically.

3. Several districts currently have provisions addressing the possibility of compromised passwords. Such a provision may be useful in a User Manual for the electronic filing system. The provision might read as follows:

> Attorneys may find it desirable to change their court assigned passwords periodically. In the event that an attorney believes that the security of an existing password has been compromised and that a threat to the System exists, the attorney must

give immediate notice by telephone to the clerk, chief deputy clerk or systems department manager and confirm by facsimile in order to prevent access to the System by use of that password.

Rule 3–Consequences of Electronic Filing

Electronic transmission of a document to the Electronic Filing System consistent with these rules, together with the transmission of a Notice of Electronic Filing from the court, constitutes filing of the document for all purposes of the Federal Rules of Criminal Procedure, and the local rules of this court, and constitutes entry of the document on the docket kept by the clerk under Fed.R.Crim.P. 49 and 55.

Before filing a scanned document with the court, a Filing User must verify its legibility.

When a document has been filed electronically, the official record is the electronic recording of the document as stored by the court, and the filing party is bound by the document as filed. Except in the case of documents first filed in paper form and subsequently submitted electronically under Rule 1, a document filed electronically is deemed filed at the date and time stated on the Notice of Electronic Filing from the court.

Filing a document electronically does not alter the filing deadline for that document. Filing must be completed before midnight local time where the court is located in order to be considered timely filed that day.

Derivation

The first ~~two~~ and third paragraphs of Model Rule 3 are adapted from the Eastern District of New York procedures. The second paragraph is derived from the District of Nebraska procedures. The ~~third~~ fourth paragraph is adapted from the Northern District of Ohio procedures.

Commentary

1. The Model Rule provides a "time of filing" rule that is analogous to the traditional system of file stamping by the Clerk's office. A filing is deemed made when it is acknowledged by the Clerk's office through the CM/ECF system's automatically generated Notice of Electronic Filing.

2. The Model Rule makes clear that the electronically filed documents are considered to be entries on the official docket.

Rule 4– Entry of Court ~~Orders~~-Issued Documents

All orders, decrees, judgments, and proceedings of the court will be filed in accordance with these rules which will constitute entry on the docket kept by the clerk under Fed.R.Crim.P. 49 and 55. All signed orders will be filed electronically by the court or court personnel. Any order or other court-issued document filed electronically without the original signature of a judge or clerk has the same force and effect as if the judge or clerk had signed ~~had affixed the judge's signature to~~ a paper copy of the order and it had been entered on the docket in a conventional manner.

Orders may also be issued as "text-only" entries on the docket, without an attached document. Such orders are official and binding.

The court may issue a warrant or summons electronically. They may be only be served in accordance with Fed.R.Crim.P 4(c).

A Filing User submitting a document electronically that requires a judge's signature must promptly deliver the document in such form as the court requires.

Derivation

The first two sentences of the first paragraph of the Model Rule are adapted from the Eastern District of New York procedures. The last sentence is derived from the procedures of the Northern District of Georgia Bankruptcy Court. The second paragraph is derived from the District of Columbia and District of Nebraska procedures. The ~~second~~ fourth paragraph is adapted from Eastern District of New York procedures.

Commentary

1. Not all courts have a provision in their electronic filing procedures addressing the electronic entry of court orders. In at least one court without such a provision, a question arose about the validity of electronically filed court orders. The Model Rule specifically states that an electronically filed court order has the same force and effect as an order conventionally filed. Judges in many courts authorize "text-only" orders, which are docket entries that themselves constitute the order. These text-only orders, which are generally used for routine matters, do not require production of a .pdf document.

2. The Model Rule contemplates that a judge can authorize personnel, such as a law clerk or judicial assistant, to electronically enter an order on the judge's behalf.

3. The Model Rule leaves the method for submitting proposed orders to the discretion of the court. Courts have been using a variety of methods, including having them sent by e-mail to the court in word-processing format or having them filed as .pdf documents.

4. The Model Rule expressly provides that a court may issue a warrant or summons electronically. This authorizes only issuance of those documents. They may not be served electronically. See Fed.R.Crim.P. 4(c).

Rule 5– Attachments and Exhibits

Filing Users must submit in electronic form all documents referenced as exhibits or attachments, unless the court permits conventional filing. A Filing User must submit as exhibits or attachments only those excerpts of the referenced documents that are directly germane to the matter under consideration by the court. Excerpted material must be clearly and prominently identified as such. Filing Users who file excerpts of documents as exhibits or attachments under this rule do so without prejudice to their right to timely file additional excerpts or the complete document. Responding parties may timely file additional excerpts or the complete document that they believe are directly germane. The court may require parties to file additional excerpts or the complete document.

Derivation

The Model Rule is adapted from the Southern District of New York Bankruptcy procedures. The last sentence is derived from the rules of the District of Kansas.

Commentary

1. One issue that has arisen in most courts using electronic filing relates to attachments or exhibits not originally available to the filer in electronic form, and that must be scanned (or imaged) into Portable Document Format before filing. Examples include leases, contracts, proxy statements, charts and graphs. A scanned document creates a much larger electronic file than one prepared directly on the computer (*e.g.*, through word processing). The large documents can take considerable time to file and retrieve. The Model Rule provides that if the case is assigned to the electronic filing system, the party must file this type of material electronically, unless the court specifically permits conventional filing.

2. It is often the case that only a small portion of a much larger document is relevant to the matter before the court. In such cases, scanning the entire document imposes an inappropriate burden on both the litigants and the courts. To alleviate some of this inconvenience, the Model Rule provides that a Filing User must submit as the exhibit only the relevant excerpts of a larger document. The opposing party then has a right to submit other excerpts of the same document under the principle of completeness.

3. This rule is not intended to alter traditional rules with respect to materials that are before the court for decision. Thus, any material on which the court is asked to rely must be specifically provided to the court.

Rule 6–Sealed Documents

Documents ordered to be placed under seal must be filed conventionally and not electronically unless specifically authorized by the court. A motion to file documents under seal may be filed electronically unless prohibited by law. The order of the court authorizing the filing of documents under seal may be filed electronically unless prohibited by law. A paper copy of the order must be attached to the documents under seal and be delivered to the clerk.

Derivation

The Model Rule is adapted from the Western District of Missouri procedures.

Commentary

1. The Model Rule recognizes that other laws may affect whether a motion to file documents under seal, or an order authorizing the filing of such documents, can or should be electronically filed. It is possible that electronic access to the motion or order may raise the same privacy concerns that gave rise to the need to file a document conventionally in the first place. For similar reasons, the actual documents to be filed under seal should ordinarily be filed conventionally.

2. See Model Rule 12 for another provision addressing privacy concerns arising from electronic filing.

Rule 7– Retention Requirements

Documents that are electronically filed and require original signatures other than that of the Filing User must be maintained in paper form by the Filing User until [number] years after all time periods for appeals expire. On request of the court, the Filing User must provide original documents for review.

Derivation

Model Rule 7 is adapted from the Eastern District of Virginia Bankruptcy procedures.

Commentary

1. Because electronically filed documents do not include original, handwritten signatures, it is necessary to provide for retention of certain signed documents in paper form in case they are needed as evidence in the future. The Model Rule requires retention only of those documents containing original signatures of persons other than the person who files the document electronically. The filer's use of a log-in and password to file the document is itself a signature under the terms of Model Rule 8.

2. The Model Rule places the retention requirement on the person who files the document. One alternative is to place retention responsibility on counsel and/or the firm representing the party on whose behalf the document was filed. (Thus, if counsel changes, the documents would be transferred along with the rest of the case file.) Another possible solution is to require the filer to submit the signed original to the court, so that the court can retain it. Some government officials have expressed a preference to have such documents retained by the court, in order to make it easier to retrieve the documents for purposes such as a subsequent prosecution for fraud. See Rule 8 concerning documents containing the signature of a criminal defendant.

3. Courts have varied considerably on the required retention period. Some have limited it to the end of the litigation (plus the time for appeals). Others have required longer retention periods (four or five years). Assuming that the purpose of document retention is to preserve relevant evidence for a subsequent proceeding, the appropriate retention period might relate to relevant statutes of limitations.

4. Some districts require the filer to retain a paper copy of *all* electronically filed documents. Such a requirement seems unnecessary, and it tends to defeat one of the purposes of using electronic filing. Other courts have required retention of "verified documents," i.e., documents in which a person verifies, certifies, affirms, or swears under oath or penalty of perjury. See, *e.g.*, 28 U.S.C. § 1746 (unsworn declarations under penalty of perjury).

5. Those courts that require charging documents in criminal cases and/or documents containing a criminal defendant's signature to be filed in paper form should retain those documents in paper form. (See Rule 1 above and Rule 8 below.)

Rule 8– Signatures

The user log-in and password required to submit documents to the Electronic Filing System serve as the Filing User's signature on all electronic documents filed with the court. They also serve as a signature for purposes of Fed.R.Civ.P. 11, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the local rules of this court, and any other purpose for which a signature is required in connection with proceedings before the court. Each document filed electronically must, if possible, indicate that it has been electronically filed. Electronically filed documents must include a signature block [in compliance with local rule number [ ] if applicable] and must set forth the name, address, telephone number and the attorney's [name of state] bar registration number, if applicable. In addition, the name of the Filing User under whose log-in and password the document is submitted must be preceded by an "s/" and typed in the space where the signature would otherwise appear.

No Filing User or other person may knowingly permit or cause to permit a Filing User's password to be used by anyone other than an authorized agent of the Filing User.

A document containing the signature of a defendant in a criminal case may at the court's option be filed either: (1) in paper form with an original written signature or (2) in a scanned format that contains an image of the defendant's signature. Documents containing the signature of other non-Filing Users are to be filed electronically with the signature represented by a "s/" and the name typed in the space where a signature would otherwise appear, or as a scanned image.

Documents requiring signatures of more than one party must be electronically filed either by: (1) submitting a scanned document containing all necessary signatures; (2) representing the consent of the other parties on the document; (3) identifying on the document the parties whose signatures are required and by the submission of a notice of endorsement by the other parties no later than three business days after filing; or (4) in any other manner approved by the court.

Derivation

The first and fourth paragraphs of the Model Rule are adapted from the Northern District of Ohio procedures. The second paragraph is derived from the Southern District of New

York Bankruptcy procedures. The first sentence of the third paragraph reflects the suggestions of the Advisory Committee on Criminal Rules.

Commentary

1. Signature issues are a subject of considerable interest and concern. The CM/ECF system is designed to require a log-in and password to file a document. The Model Rule provides that use of the log-in and password constitutes a signature, and assures that such a signature has the same force and effect as a written signature for purposes of the Federal Rules of Civil Procedure, including Fed.R.Civ.P. 11, the Federal Rules of Criminal Procedure, and any other purpose for which a signature is required on a document in connection with proceedings before the court.

2. At the present time, other forms of digital or other electronic signature have received only limited acceptance. It is possible that over time and with further technological development a system of digital signatures may replace the current password system.

3. Some users of electronic filing systems have questioned whether an s-slash requirement is worth retaining. The better view is that an s-slash is necessary; otherwise there is no indication that documents printed out from the website were ever signed. The s-slash provides some indication when the filed document is viewed or printed that the original was in fact signed.

4. The second paragraph of the Model Rule does not require an attorney or other Filing User to personally file his or her own documents. The task of electronic filing can be delegated to an authorized agent, who may use the log-in and password to make the filing. However, use of the log-in and password to make the filing constitutes a signature by the Filing User under the Rule, even though the Filing User does not do the physical act of filing.

~~5~~7. The Model Rule provides that in criminal cases, documents signed by a defendant are to be treated somewhat differently than in civil cases, reflecting differences in the importance of the criminal defendant's signature. The Model Rule provides that such documents should either be filed and retained by the court in paper form or filed in scanned format, so that an image of the defendant's signature is visible. Each court should determine its preference.

~~6. Issues arise when documents being electronically filed have been signed by persons other than the filer, *e.g.*, stipulations and affidavits.~~ For documents signed by others without log-ins and passwords (non-Filing Users), the Model Rule provides that the signature can appear as a "s/" or as a scanned image. Under Model Rule 7 above, the Filing User must retain a paper copy with the original signature of any such document filed by the Filing User.

7. The Model Rule provides for ~~a substantial amount of~~ considerable flexibility in the filing of ~~these~~ documents signed by more than one party, e.g., stipulations. Courts may wish to modify or narrow the options if, for example, they believe that administering the three-day period for endorsements would be burdensome. Or, another solution is to provide an immediate but short opportunity, e.g., 10 days from the receipt of the Notice of Electronic Filing, for others to challenge the authenticity of their signatures on an electronic document.

~~8~~6. Courts may wish to underscore the fact that a Filing User's log-in and password constitutes the Filing User's signature, by including a statement to that effect on the registration form.

Rule 9– Service of Documents by Electronic Means

~~Each person electronically filing a pleading or other document must serve a "Notice of Electronic Filing" to parties entitled to service under the Federal Rules of Criminal Procedure and the local rules. The "Notice of Electronic Filing" must be served by e-mail, hand, facsimile, or by first-class mail postage prepaid. Electronic service of the "Notice of Electronic Filing" constitutes service of the filed document.~~ The "Notice of Electronic Filing" that is automatically generated by the court's Electronic Filing System constitutes service of the filed document on Filing Users. Parties who are not Filing Users must be served with a ~~not deemed to have consented to electronic service are entitled to receive a paper~~ copy of any ~~electronically filed~~ pleading or other document filed electronically ~~. Service of such paper copy must be made according to~~ in accordance with the Federal Rules of Criminal Procedure and the local rules.

A certificate of service must be included with all documents filed electronically, indicating that service was accomplished through the Notice of Electronic Filing for parties and counsel who are Filing Users and indicating how service was accomplished on any party or counsel who is not a Filing User.

Derivation

The first sentence of Model Rule 9 is derived from the rules of the District of Kansas. The last paragraph is derived from the Northern District of Ohio's procedures.

Commentary

1. The amendments to the Federal Rules (Fed.R.Civ.P. 5(b)) authorizing service of documents by electronic means (which are incorporated into Fed.R.Crim.P 49(b)) do not permit electronic service of process for purposes of obtaining personal jurisdiction (i.e., Rule 4 service).

The Model Rule covers only service of documents after the initial service of the summons and complaint.

2. The CM/ECF system automatically generates a Notice of Electronic Filing at the time a document is filed with the system. The Notice indicates the time of filing, the name of the party and attorney filing the document, the type of document, and the text of the docket entry. It also contains an electronic link (hyperlink) to the filed document, allowing anyone receiving the Notice by e-mail to retrieve the document automatically. The CM/ECF system automatically sends this Notice to all case participants registered to use the electronic filing system. If the court is willing to have this Notice itself constitute service, it may, under amendments to the Federal Rules, do so through a local rule. The amendments require a local rule if a court wants to authorize parties to use its "transmission facilities" to make electronic service. The Model Rule ~~does not~~ includes such a provision~~, but could be easily modified to provide~~ by providing that the court's automatically generated notice of electronic filing constitutes service.

3. Parties who are not Filing Users are not deemed under the Model Rules to have consented to electronic service of the Notice of Electronic Filing. They must be served in some other way authorized by the Federal Rules of Criminal Procedure (Rule 49(b),which incorporates Fed.R.Civ.P. 5(b)). Under the rules, they can be served in the traditional way with a paper copy of the electronically filed document, or they can consent in writing to service by any other method, including other forms of electronic service such as fax or direct e-mail.

4~~3~~. ~~A pending~~ A recent amendment to Fed.R.Crim.P. 45(c) provides that the three additional days ~~to respond~~ allowed for responding to service by mail will apply to electronic service as well. The Committee Note to the parallel civil rule (Fed.R.Civ.P. 6(e)) states:

> Electronic transmission is not always instantaneous, and may fail for any 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 make electronic service ever more attractive.

5. While some courts accept the Notice of Electronic Filing as a certificate of service, other courts require a separate certificate of service to be included with the filed document indicating that the document was electronically filed using the CM/ECF system and the manner, electronically through the Notice of Electronic Filing or otherwise, in which parties were served.

Rule 10– Notice of Court Orders and Judgments

Immediately upon the entry of an order or judgment in a proceeding assigned to the Electronic Filing System, the clerk will transmit to Filing Users in the case, in

electronic form, a Notice of Electronic Filing. Electronic transmission of the Notice of Electronic Filing constitutes the notice required by Fed.R.Crim.P. 49(c). The clerk must give notice in paper form to a person who has not consented to electronic service in accordance with the Federal Rules of Procedure.

Derivation

The Model Rule is adapted from the Eastern District of New York procedures

Commentary

1. ~~Pending~~ Recent amendments to Fed.R.Crim.P. 49(c) authorize electronic notice of court orders where the parties consent. (Rule 49(c) provides for notice "in a manner provided for in a civil action." This incorporates the provisions of Fed.R.Civ.P. 5(b), which permit notice by electronic means where the parties consent.) The Model Rule provides that for all Filing Users in the electronic filing system, electronic notice of the entry of an order or judgment has the same force and effect as traditional notice. The CM/ECF system automatically generates and sends a Notice of Electronic Filing upon entry of the order or judgment. The Notice contains a hyperlink to the document.

Rule 11– Technical Failures

A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.

Derivation

The Model Rule is adapted from the Eastern District of New York procedures.

Commentary

1. CM/ECF is designed so that filers access the court through its Internet website. The Model Rule addresses the possibility that a party may not meet a filing deadline because the court's website is not accessible for some reason. Cf. Fed.R.Crim.P. 45(a) (permitting extension of time when "weather or other conditions have made the office of the clerk of the district court inaccessible"). The Model Rule also addresses the possibility that the filer's own unanticipated system failure might make the filer unable to meet a filing deadline.

2. The Model Rule does not require the court to excuse the filing deadline allegedly caused by a system failure. The court has discretion to grant or deny relief in light of the circumstances.

Rule 12 – Public Access

> A person may review at the clerk's office filings that have not been sealed by the court. A person also may access the Electronic Filing System at the court's Internet site [Internet address] by obtaining a PACER log-in and password. A person who has PACER access may retrieve docket sheets in civil and criminal cases and documents in a civil case, but only counsel for the government and for a defendant may retrieve documents in a criminal case. Only a Filing User under Rule 2 of these rules may file documents.

Commentary

1. This rule is intended to make it clear that anyone can access all unsealed court files and documents at the courthouse, whether such file is electronic or in hard copy. It also explains that a person or entity that has a PACER login and password may access these same court files and documents over the Internet in a civil case but access to such documents over the Internet is limited in a criminal case to the Filing Users in that case.

2. In a criminal case, remote public access to electronically filed documents is not currently permitted, except by counsel for the government and for the defendant to documents in their cases. The Judicial Conference has undertaken to continue to study the availability of remote public access and documents in criminal cases.

3. The court may also wish to consider an exception to the general prohibition on remote public access to criminal case file documents to allow such access in cases that impose extraordinary demands on a court's resources upon consent of all parties and a finding by the trial judge that such access is warranted under the circumstances. This exception would allow public access to documents in cases where the public interest in court filings places unusual demands on the court. The Judicial Conference has approved this exception to the general prohibition on remote public access to criminal case files.

NOTE: The issue of remote public access to court files in criminal cases is currently under consideration by the Judicial Conference of the United States. Remote access to documents in criminal case files remains restricted at this time, as explained in Rule 12.

Long-Range Planning and Budgeting (Action)

The long-range planning meeting of Judicial Conference committee chairs was held on March 17, 2003. The meeting focused primarily on the judiciary's future budget outlook and issues related to workforce planning. A report is included as Attachment 1.

At the long-range planning meeting, Chief Judge John G. Heyburn II, chair of the Committee on the Budget, and Chief Judge Carolyn Dineen King, chair of the Executive Committee, discussed the likelihood that the judiciary will face an austere budget environment in the coming years. Due to federal fiscal constraints, the Budget Committee expects that growth in the judiciary's appropriations will be substantially below its projected funding needs, and Judge Heyburn emphasized the importance of reconsidering those needs. Judge King stressed that it is much better for program committees, rather than the Executive Committee, to identify methods of reducing future program costs and budget needs so that program goals do not suffer. Judge King emphasized that committees should carefully consider costs in their deliberations of program and policy changes and urged all judges to "know the price tag" of those aspects of court operations that they may impact.

In his March 28, 2003 guidance letter to chairs of committees with budget responsibility, Judge Heyburn asked (as he has on other occasions) that committees "challenge fundamental assumptions about the resources truly necessary to do the job of the judiciary." This planning agenda item asks that all committees consider ways to reduce the growth of the judiciary's resource needs.

In conjunction with considering ways to reduce future resource requirements, committees are asked to review their list of strategic issues and make any necessary modifications (see Attachment 2).

Attachment 1. Report of the Judicial Conference Committee Chairs' Long-Range Planning Meeting, March 17, 2003.

Attachment 2. Strategic Issues of the Committee on Rules of Practice and Procedure

Attachment 2.
Strategic Issues of the Committee on Rules of Practice and Procedure

1. Restyling of the rules for consistency and readability.
2. Impact of technology on rules.
3. Analyzing local rules of court for consistency with national rules.
4. Upholding the integrity of the rules process.
5. Seeking greater participation in the rulemaking process by bench, bar, and public.

Judicial Conference Committee Chairs Long-Range Planning Meeting

March 17, 2003

Report

Administrative Office of the United States Courts
Office of Management, Planning and Assessment

SUMMARY REPORT
MARCH 2003 LONG-RANGE PLANNING MEETING

The March 17, 2003 long-range planning meeting was held in Washington, D.C. It was facilitated by Judge D. Brock Hornby, planning coordinator for the Judicial Conference's Executive Committee. The meeting was attended by Chief Judge Carolyn Dineen King, chair of the Executive Committee, the chairs of 12 Judicial Conference committees, and by several additional members of the Executive Committee.[1] Also in attendance were: Administrative Office Director Leonidas Ralph Mecham; Associate Director Clarence A. Lee, Jr.; Deputy Associate Director Cathy A. McCarthy and William M. Lucianovic, Long-Range Planning Officer, who provide principal staff support for the integrated long-range planning process; and other Administrative Office staff. A list of all participants is included as Appendix A.

Judiciary Budget Outlook

Chief Judge John G. Heyburn II, chair of the Committee on the Budget, Judge King, and Bruce E. Johnson and James R. Baugher of the AO's Budget Division described the budget outlook and presented graphics to illustrate the issues. Judge Heyburn reported that due to the federal government's fiscal constraints for the near future, the Budget Committee expects that growth in the judiciary's appropriations will be substantially below the judiciary's projections of its funding needs. Over the past 5 years, the judiciary has received annual increases in appropriations averaging nearly 7%, and Judge Heyburn cautioned that with government-wide limits of about 2% planned for non-defense discretionary spending, maintaining 7% increases is about the best that can be anticipated. Yet, if current judiciary budget policies and practices remain unchanged, and if the judiciary were to receive only a 5% increase next year as anticipated, the FY 2005 request would need to be about 17% increase over 2004 and the increase would rise to more than 20% the following year and beyond.

In the light of these budgeting concerns, Judge King reiterated the Executive Committee's call for all committees and courts to adjust budget requests and spending plans to reflect the probable future budget environment. Both Judge Heyburn and Judge King suggested that the judiciary's future budget needs should be scaled back to enable

[1]Judge Hornby and the other members of the Executive Committee were unable to attend the entire meeting. In Judge Hornby's absence, the latter portion of the meeting was facilitated by Chief Judge John G. Heyburn II, chair of the Committee on the Budget.

the judiciary to operate effectively under realistic funding projections. Judge King implored the committees to identify the best ways to reduce the future costs and budget needs of their programs so that program goals do not suffer. The only other alternative, she pointed out, is less desirable. That is: the Executive Committee would have to make the determination about how to divide up limited dollars appropriated, and it could only do so using "blunt instruments."

Judge King expressed her confidence in the capabilities of court managers to cope with limited growth in funding and she urged all judges to "know the price tag" of those aspects of court operations that they may impact. She emphasized that committees should carefully consider costs in their deliberations of program changes, and she asked that committees make every effort to develop accurate cost estimates for recommendations made to the Executive Committee and the Judicial Conference, and to give an indication of the committee's degree of certainty with the cost estimates.

Staff Costs

Judge Heyburn said that staff pay and benefits account for over 60% of the courts' budget, and therefore it is important to look at ways to reduce future staffing costs. He noted that staffing and budget formulas seem to overstate what some courts may actually need both in terms of the number of staff and the amount required to fund each staff person. In 2002, actual court staffing was 6% below the staffing formula numbers and 2% below funded staffing (work unit) numbers. Importantly, on average, courts are spending less per person than the salary dollars allotted for each position. As a result, only 92% of the funds allocated for staff salaries was actually spent for salaries (see Appendix A). He suggested that staff and budget formulas should better reflect actual needs, and that examining staffing and budget formulas in order to reduce resource needs is preferable to imposing across-the-board percentage reductions in budget allotments to the courts, which may disproportionately harm smaller courts.

With regard to the question of whether budget targets could be met by limiting future staff growth, Judge Heyburn noted that it is important to identify ways to reduce growth in court staff because personnel costs account for such a large portion of the overall budget, but other efficiencies and cost-reductions are also needed. He said all committees should closely examine all program costs and the methodologies used for projecting budget needs in order to identify every feasible opportunity to achieve savings.

Workforce Planning

The chairs discussed several aspects of workforce planning, including the future impact of technology on the judiciary's workforce and future staffing trends.

Staffing Trends

Deputy Associate Director Cathy A. McCarthy briefed the chairs about staffing trends and projections of growth over the next five years (see Appendix C). Total court staff growth is projected at about 16%, with the largest growth, 22%, expected in probation and pretrial services. A graphic showed how personnel costs increase at a rate substantially higher than the inflation rate. The costs of current on-board staff alone would grow about 36% over the next five years, given average judiciary promotion rates and expected pay increases. A comparison of the long-term cost of hiring an employee versus purchasing equipment demonstrated that the judiciary's large investment in people has significant long-term budget implications. Associate Director Lee pointed out that the cost increases associated with staff are not all uncontrollable, and that certain aspects of staff pay growth are matters of Judicial Conference policies which could potentially be examined and altered.

Staffing for Efficiency

Judge Dennis Jacobs, chair of the Committee on Judicial Resources, noted that current staffing formulas have resulted in less growth than would have occurred with the previous formulas. Nonetheless, the committee recognizes that significant growth in future staff is unsustainable. Adjustments can and will be made to work measurement formulas to reflect any new efficiencies that may have occurred in the court units' operations. He observed that in many ways the strengths of the staffing formulas are also their weaknesses. The staffing formulas are inclusive, measure work as it is performed, and allow for courts to design their work processes independently. At the same time, there is little in the formulas that reflects an incentive for efficiency and productivity. He suggested that one possible approach to tighten the formulas could be to include data only from courts that appear to be able to do the work more efficiently, and to exclude data from courts that are least efficient in terms of the number of staff they devote to particular work.

Judge Jacobs said that although the Judicial Conference in 1999 approved the committee's recommended policy of annual studies of 20 courts in order to update the staffing formulas every three to four years, this cycle may be too slow to pick up changes in efficiency and incorporate them into the formulas. He stressed that the future fiscal

crisis must be met by everyone, and not to expect staffing reductions alone to produce the level of spending reductions that may be necessary. The Judicial Resources Committee is actively engaged in the following efforts:

- Recommending, along with the Budget Committee, that alternatives for the delivery of administrative services be studied.
- Renewing programs to identify better practices in court operations.
- Considering mathematics-based productivity adjustments in the staffing formulas.
- Accounting for automation-produced efficiencies in the formulas.
- Examining the need for additional specialized law clerks.

Chief Judge William W. Wilkins described the results of the Criminal Law Committee's efforts to reduce the supervision caseloads of probation officers by encouraging courts to identify offenders who might qualify for early termination of probation. In October 2002, the committee issued to the district courts criteria that could be used for conducting such assessments. Although it is too early to measure the impact of this effort, it is noted that there were more early terminations in the quarter ending December 31, 2002 than in any quarter during the previous fiscal year.

Initiatives such as these have allowed the committee to reduce projected staff increases for probation below the forecast growth in workload. An initial request for 286 new positions was reduced to 186 positions. Next, the committee will examine alternative requirements for certain presentence investigation reports.

Technology's Impact on Staffing

Judge James Robertson, chair of the Information Technology Committee, spoke about workforce and other process changes being brought about by the implementation of new technologies. In particular, the CM/ECF system offers the potential for courts to make substantial changes to their business practices to make them more efficient in the long run. Although implementation began earlier in the bankruptcy courts, both bankruptcy and district courts are making great strides in implementing the new CM/ECF capabilities. While there is often a short-term need to devote more resources to the implementation of this technology and to make process changes, over time, he anticipates

a gradual but steady reduction in the numbers of staff needed to handle administrative case processing and file management tasks.

Judge Robertson noted the impact of bar coding on the efficiency and staffing levels of supermarkets, which took several years to take effect. For courts, at present there are few staff savings, and there is actually additional workload pressure during this transition period, due to the necessity of operating both old and new systems and training lawyers how to use the new system. Once these conditions fade away, he said, the technology will give a return in terms of a reduction in people needed for case administration (see Appendix D).

Chief Judge John W. Lungstrum, chair of the Committee on Court Administration and Case Management, noted that the roles of chambers staff and clerk's office staff may undergo some changes with electronic filings. Also, new functions for docket clerks will entail quality control of electronic inputs from law offices. While the number of staff doing this work might decrease, it might require a higher-salaried person. In the long run, savings will be achieved if the court does not rely on paper copies. "We found we could work without paper better than we thought," said Judge Lungstrum of his court's move to electronic case files.

Glen K. Palman, Chief of the Bankruptcy Court Administration Division, reported on the recent experience of bankruptcy clerks' offices in the transition to electronic case files. Forty-seven bankruptcy courts have implemented the new systems, but they all rely to some extent on traditional methods of docketing. Those courts that use electronic filing report that a wide range of docketing is done by attorneys' offices, but any labor savings that may be realized in the long run are presently consumed by the need to train staff and attorneys and to scan the remaining paper documents into electronic form. He noted that there is a potential for significant savings in staff time and effort once most training has occurred and the need to scan paper documents decreases. In addition, upgraded versions of the software will automate additional time-consuming functions, such as the payment of fees by credit card, which is presently a manual process.

Assistant Director Ross Eisenman, staff to the Committee on Security and Facilities, commented on the impact of technology on space needs. He noted that computer room facilities are relatively costly to build, retrofit, and maintain compared to regular office space. Moreover, the increasing deployment of automation equipment in individual court units can necessitate building and retrofitting computer room space in several places within one courthouse. Mr. Eisenman mentioned a recent letter from a bankruptcy clerk in a relatively new courthouse who was already short of computer room space. It was noted that examining opportunities to reduce the number of servers situated

in each court unit can save both technology and facilities cost. He mentioned the reduction in file room space needed by the bankruptcy court of the Southern District of New York, a pilot court for CM/ECF (see quote in Appendix D). The implications of technology for the space configuration of clerks' offices will be reviewed to see if changes to the judiciary's *Design Guide* are necessary. For the most part, Mr. Eisenman noted, technological change has had little impact on chambers space needs, but libraries are used less for lawbook-based legal research and are increasingly configured for multiple uses.

Study of Alternatives for the Delivery of Administrative Services

Cathy McCarthy and Assistant Director Noel J. Augustyn reported on the status of the study of alternatives for the delivery of administrative services. Administrative services under study include general business functions such as budgeting, procurement, human resources management, etc. A survey was sent to all court units to determine the current staffing of administrative functions and the degree of sharing that is presently occurring in the courts. All responding appellate courts reported some sharing of administrative services, 51% of district court units (district clerk, probation, and pretrial services offices) reported some sharing of services among district court units or with bankruptcy courts, and 36% of the bankruptcy courts reported some administrative sharing with district courts. The courts reported that over 4,600 staff (full-time equivalents), or approximately 21% of the court units' total staff, are dedicated to administrative services, with more than one-third of these staff devoted to information technology work (see Appendix E).

Glen Palman described lessons learned from the creation of the Bankruptcy Noticing Center in 1993, which increased efficiency and quality, and achieved cost savings through the centralization of noticing services for the bankruptcy courts. Over $23 million in savings have been attributed to the contractor-run noticing center compared to court-based noticing. Mr. Palman outlined several factors that contributed to the success of the noticing center, including no loss of local autonomy or control because individual courts still have control of the substance of the work (i.e., what notices are sent to whom), and the fact that court personnel were involved with the creation and continued operation of the program. These and other critical success factors will be incorporated in the current assessment of potential administrative services arrangements.

Wrap-Up

The committee chairs agreed that their committees will examine how best to reduce future budget needs.

Next Long-Range Planning Meeting

The next committee chairs long-range planning meeting is scheduled for September 22, 2003.

Appendix A: Participants in the March 2003 Long-Range Planning Meeting

Committee Representatives	**Administrative Office Staff**
Planning Coordinator, Executive Committee	
Hon. D. Brock Hornby	Leonidas Ralph Mecham Clarence A. Lee, Jr. Cathy A. McCarthy William M. Lucianovic Brian Lynch
Executive Committee	
Hon. Carolyn Dineen King Hon. Gregory W. Carman Hon. Joel M. Flaum Hon. John M. Walker, Jr.	Helen G. Bornstein
Committee on the Administrative Office	
Hon. Lourdes G. Baird, Chair	Cathy A. McCarthy
Committee on Information Technology	
Hon. James Robertson, Chair	Melvin J. Bryson Terry A. Cain
Committee on the Administration of the Bankruptcy System	
Hon. Michael J. Melloy, Chair	Francis F. Szczebak Ralph E. Avery
Committee on the Budget	
Hon. John G. Heyburn II, Chair Hon. Lawrence L. Piersol	George H. Schafer Gregory D. Cummings Bruce E. Johnson James R. Baugher
Committee on Court Administration and Case Management	
Hon. John W. Lungstrum, Chair	Noel J. Augustyn Abel J. Mattos Mark S. Miskovsky

Committee on Criminal Law Hon. William W. Wilkins, Chair	John M. Hughes Kim M. Whatley
Committee on Defender Services Hon. Patti B. Saris, Chair	Noel J. Augustyn Theodore J. Lidz Steven G. Asin
Committee on Federal-State Jurisdiction Hon. Frederick P. Stamp, Jr., Chair	Mark W. Braswell
Committee on the Judicial Branch Hon. Deanell R. Tacha, Chair	Steven M. Tevlowitz
Committee on Judicial Resources Hon. Dennis Jacobs, Chair	R. Townsend Robinson Charlotte G. Peddicord H. Allen Brown
Committee on the Administration of the Magistrate Judges System Hon. Harvey E. Schlesinger, Chair	Thomas C. Hnatowski Charles E. Six
Committee on Rules of Practice and Procedure	Peter G. McCabe
Committee on Security and Facilities Hon. Jane R. Roth, Chair	Ross Eisenman Sandra J. Reese

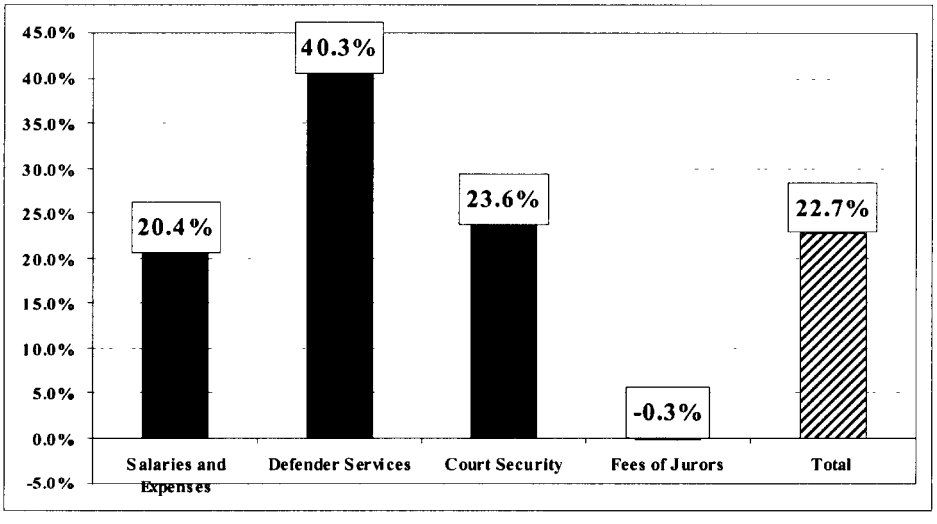
Other Administrative Office Staff in attendance:

Glen K. Palman	Ellyn L. Vail
Robert Lowney	Beverly J. Bone
John P. Hehman	Nancy G. Miller
Matthew Rowland	Robert P. Deyling
Anne (Nancy) Beatty Gregoire	Gary E. McCaffrey
Jeffrey A. Hennemuth	James (Robby) Robinson
Steven R. Schlesinger	Leeann R. Yufanyi

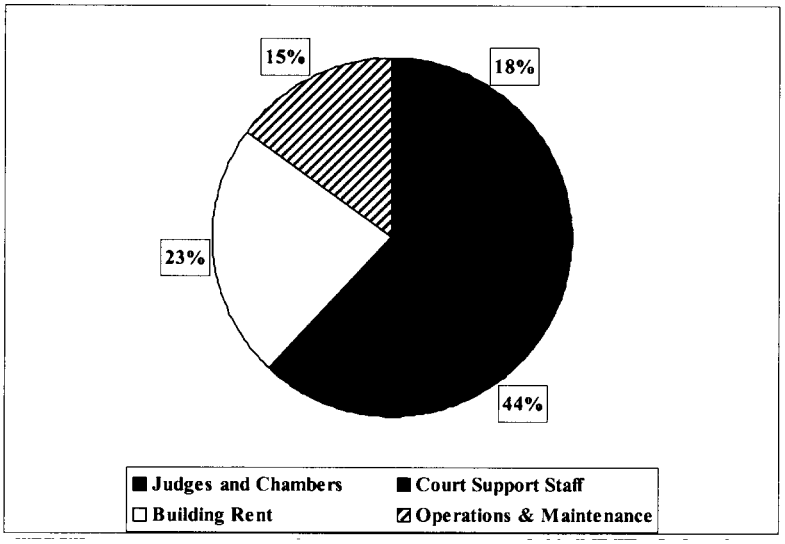
Update to the Judiciary's Long-Range Budget Estimates

Jim Baugher and Bruce Johnson
Budget Division
Office of Finance & Budget

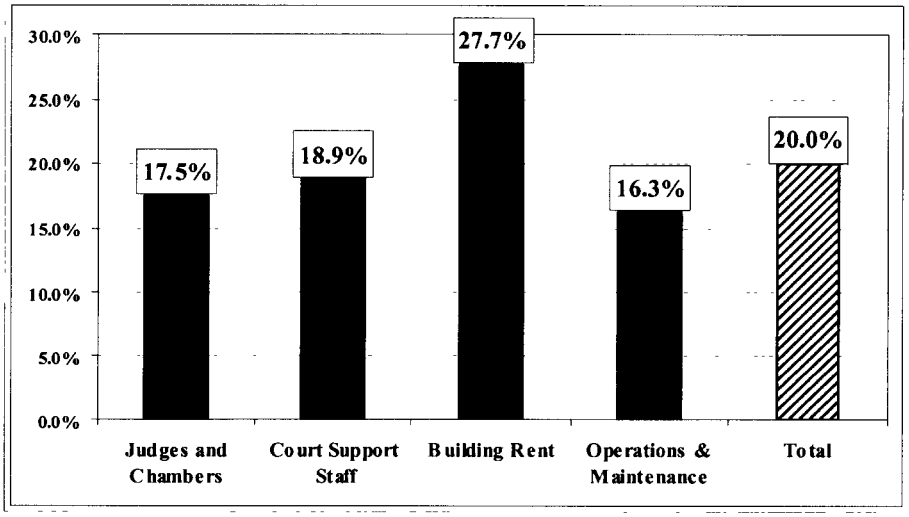
Projected Cumulative Growth in Requirements by Account
(FY 2004 to FY 2008)



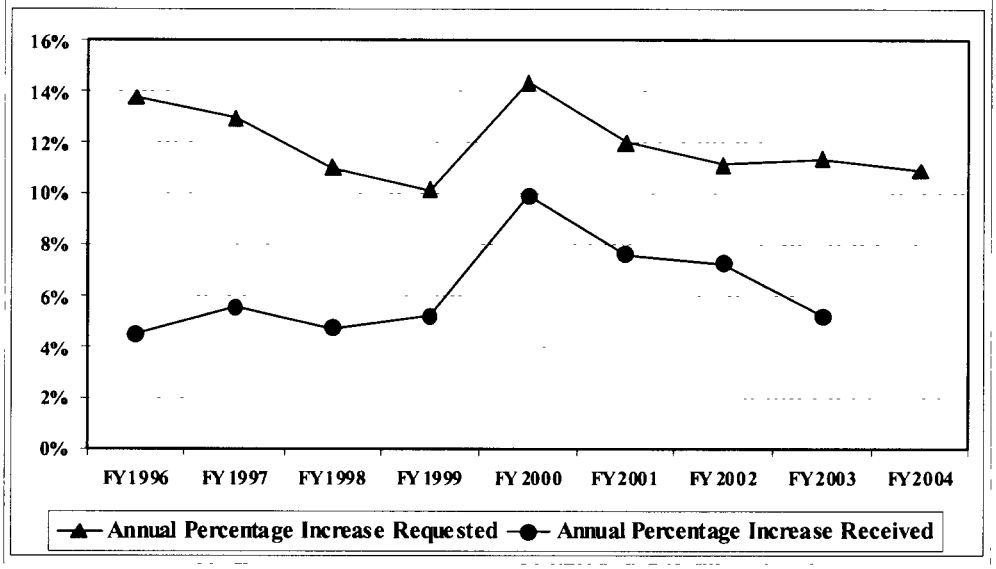
Breakdown of S&E Account by Type of Expense



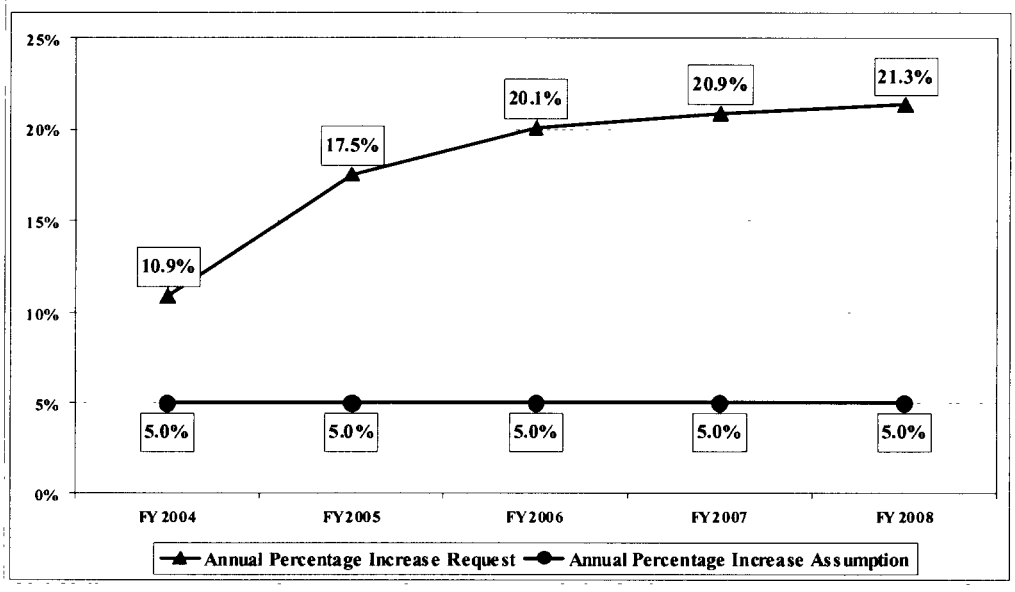
Projected Cumulative Growth in S&E Account by Type of Expense (FY 2004 – FY 2008)



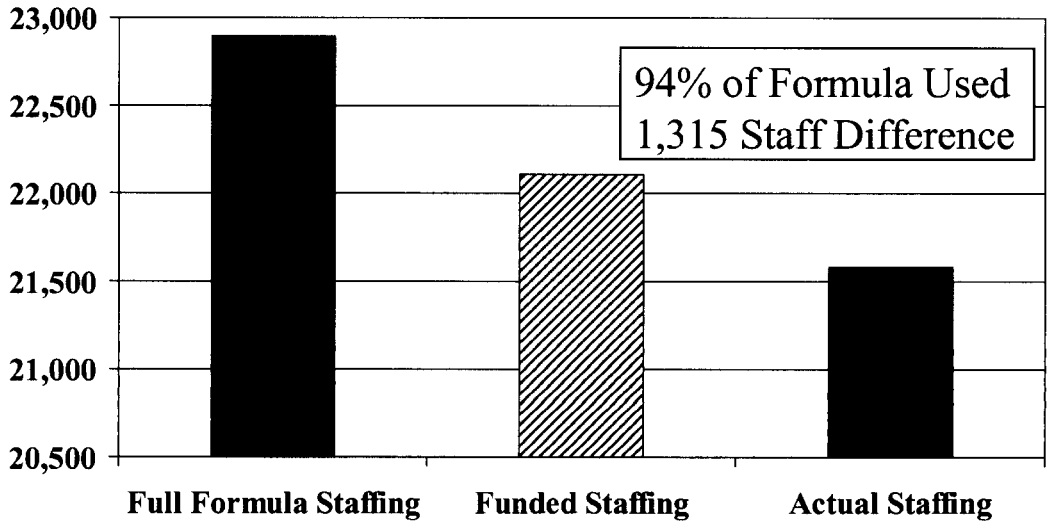
Historical Comparison of Appropriations
Salaries and Expenses Account



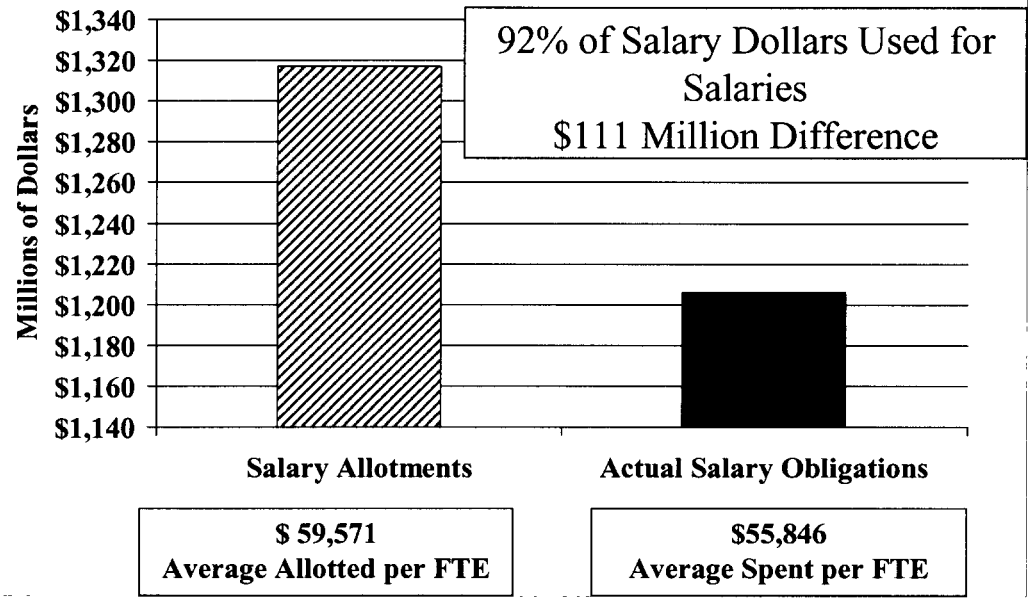
S&E Appropriation Requirements Using 5% Assumption



Full Formula, Funded, and Actual Staffing
Court Support Staff, 2002

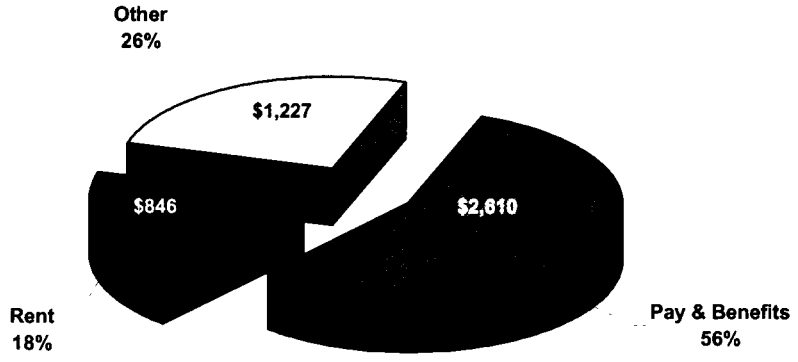


Salary Dollars Allocated and Used
Court Support Staff, 2002



Appendix C: Staffing Trends

Courts of Appeals, District Courts, and Other Judicial Services
Spending by Type of Expense, 2002
(Dollars in Millions)



Total Spending = $4.7 Billion

Chart 2

Judiciary Personnel by Position, 2002

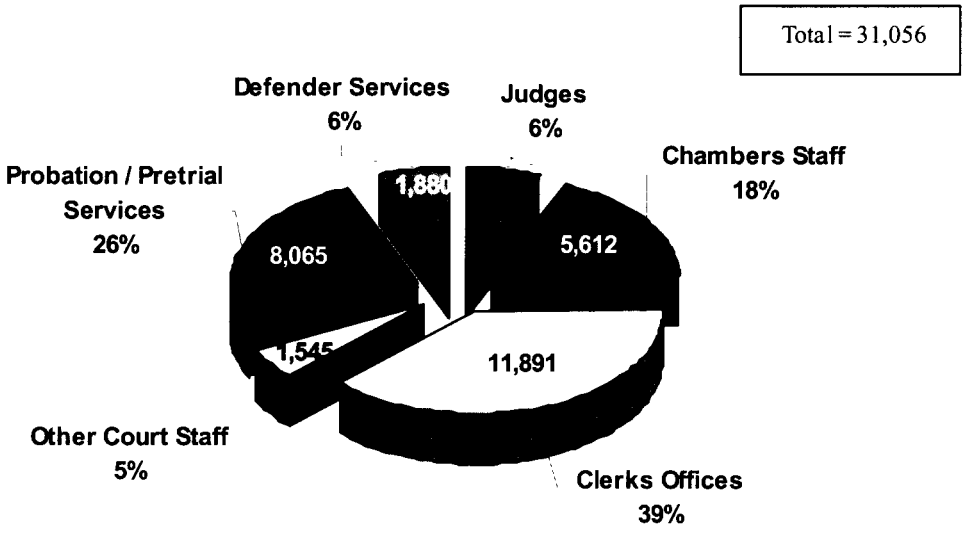


Chart 3

Judiciary Personnel by Program, 2002

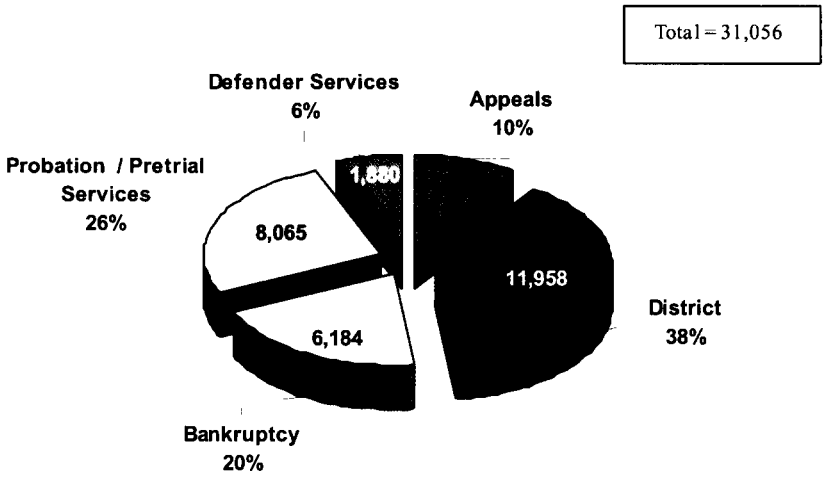
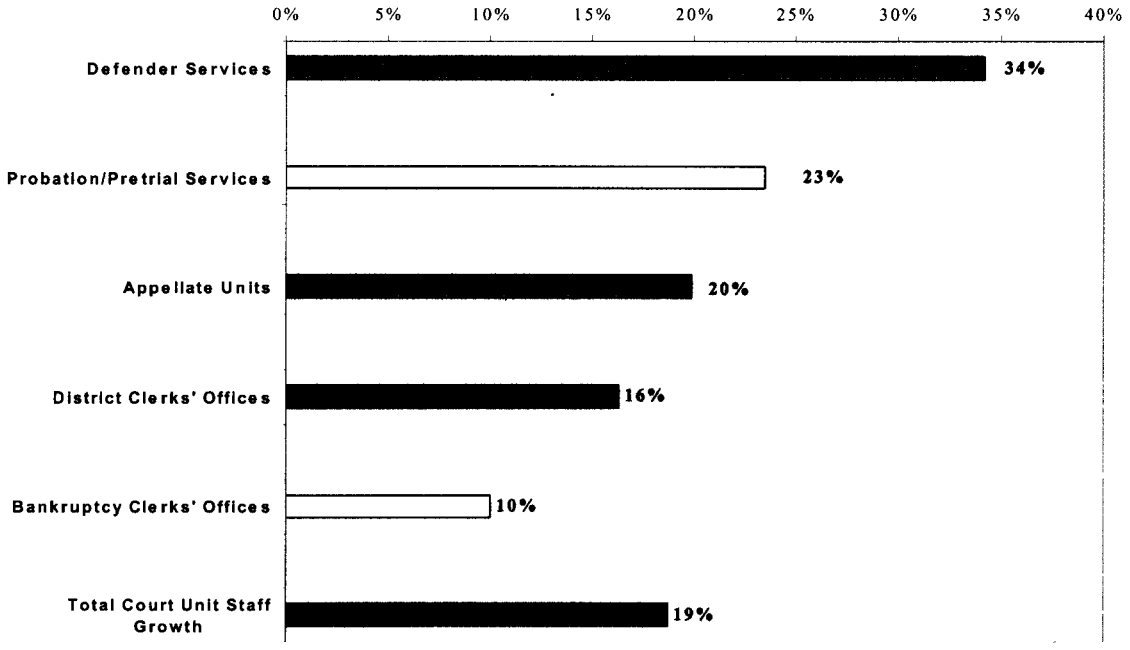


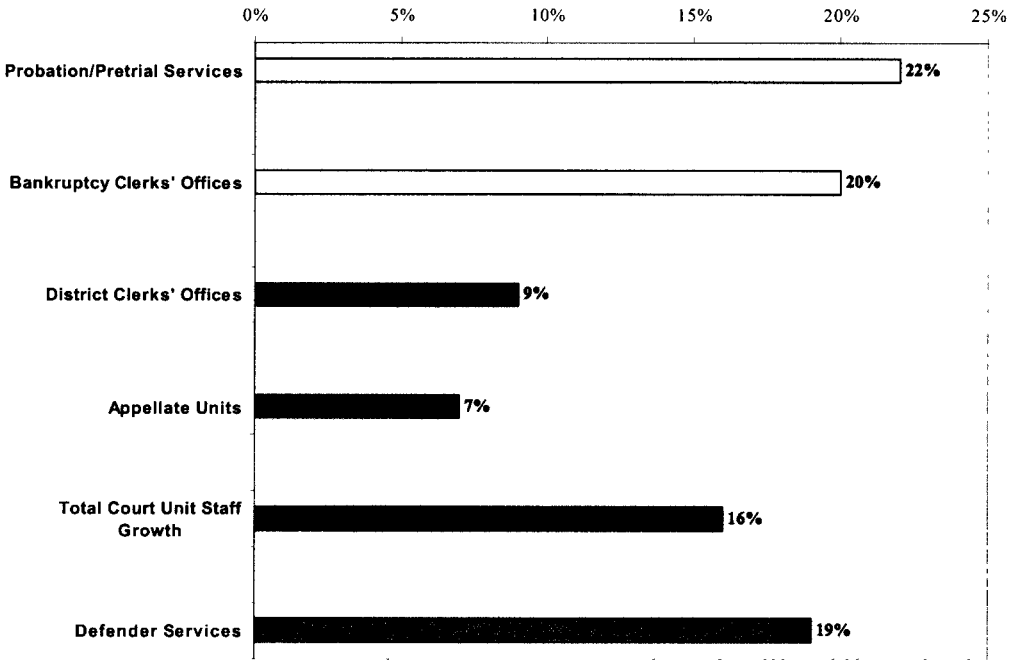
Chart 4

Staff Growth Areas, 1997-2002



Projected Staff Growth Areas, 2003-2008

Chart 5



Future Cost of Current On-Board Staff, Next 5 Years

Chart 6

Employment Cost Index (ECI) and Promotions/Step Increases*

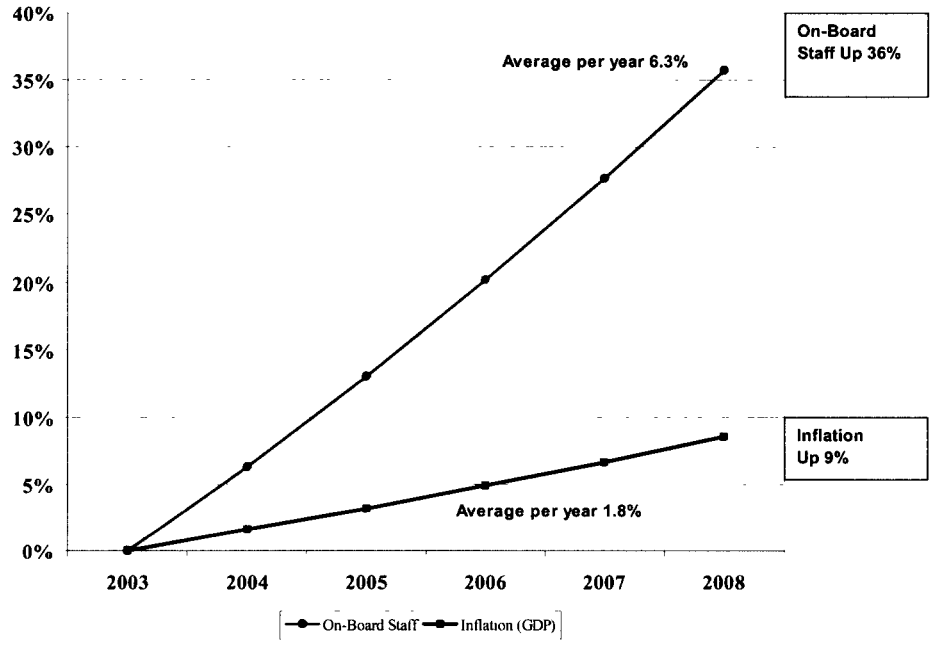


Chart 7

Future Costs of a $70,000 Investment

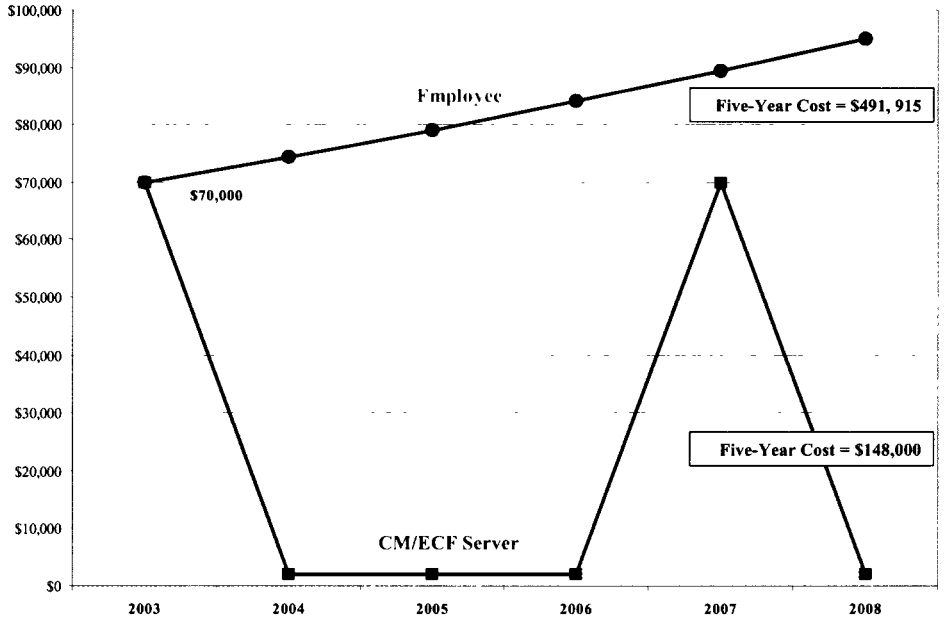
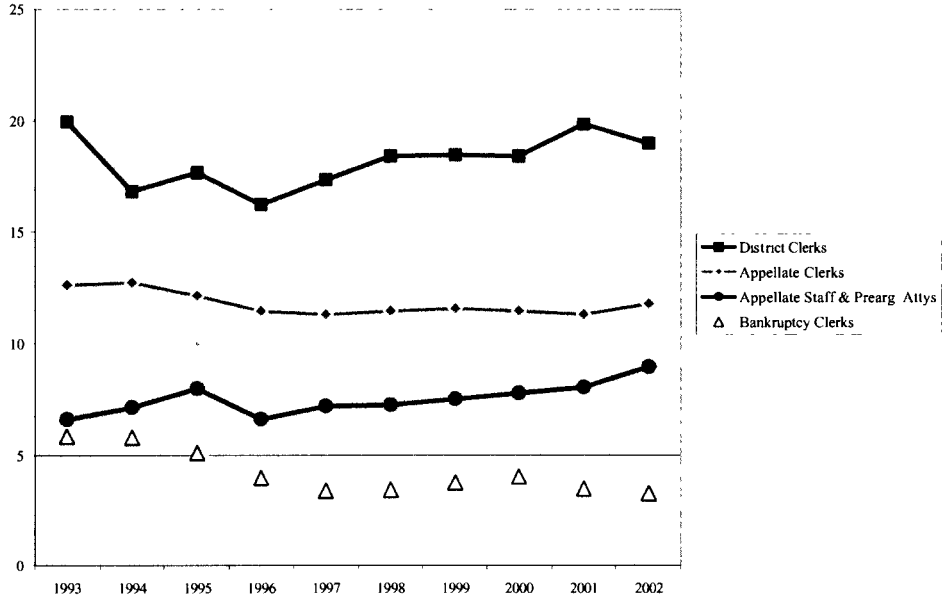


Chart 8

Staff per 1,000 Case Filings



Appendix D: Quotes About the Future Impact of Information Technology on Staffing

From *Transitioning to CM/ECF: Managing the People Side of Change,* Summer 2002

"Normally, before I had the CM/ECF system, I would have my judicial assistant go down to the file room, pull the case file, and I'd wait for the file to get up here. Then I'd look at the file, look at the document, and then make a decision whether or not I should accept it or reject it for filing. Now I turn to my computer, I go into CM/ECF, I type in the case number, and I pull up the docket. I click on the hypertext link to the docket with the documents I'm interested in."

– Bankruptcy Judge

"[D]ocket clerks had taken on other duties: scanning paper filings for entry into the system, conducting intensive data quality control on filings from attorneys and chambers, serving as CM/ECF trainers, writing and documenting new procedures, and manning help desk phones."

– Ohio Northern District Court

"A great measure of trust and responsibility has now been placed upon chambers staff, as now we are the ones making the changes and placing the judges' 'signature' on the orders instead of the judges themselves. The practice of simply ferrying signed orders downstairs is over."

– Courtroom Deputy (pp. 28-29)

From a Clerk Who Has Implemented CM/ECF:

"Paper is disappearing, and our records room is actually getting smaller."

– Kathleen Farrell-Willoughby, Bankruptcy Clerk, Southern District of New York

From Chief Judge Letters, April - September, 2002

"[I]t is becoming apparent that with the implementation of electronic case filing and case management – at some point in the not too distant future major changes may be coming to Clerk's offices – physical space requirements will be lessened as actual file folders are discontinued . . . and staffing requirements may go down as pleadings come in electronically and get docketed automatically. The issue I see coming is the possibility that some may see less of a 'need' for local clerk's offices in various divisions. This issue can be seen by an analogy to Westlaw – few users have a clue where the servers are – all they care about is that they can access it and it works . . . filing will be much like that in the future. So if one can file, receive and review pleadings from their home or office . . . they have little need of any actual interface with Clerk's offices . . . and with budget issues always being of major concern . . . I can see pressure in the future to 'retire' local divisional offices . . . perhaps consolidate District offices within a State, a Circuit or even nationally. To the extent any of us think local offices have a role – this topic may be deserving of some time as a 'long-range' planning issue."

– Larry E. Kelly, Chief Bankruptcy Judge, Western District of Texas

"Those staff whose roles historically have been that of docket clerk and intake clerk have seen the need to receive more training in customer service skills as they no longer only work with paper documents, but now are involved in the training and daily support of CM/ECF users outside of the court. The planning assumption that using an automated case filing system would make court employees more distant from attorneys and trustees was exactly wrong. There is now a much stronger relationship; in some cases a one to one personal relationship has developed as users come on the system. . . ."

– Dean Whipple, Chief Judge, Western District of Missouri
– Arthur B. Federman, Chief Bankruptcy Judge, Western District of Missouri

Appendix E: Study of Alternatives for the Delivery of Administrative Services

PURPOSE OF THE STUDY. Identify, assess, and recommend cost-effective and efficient structural options for the delivery of administrative support services to the courts that will ensure professional, high quality, and responsive services while not impeding local decision-making. Administrative services include business functions such as: budget management, accounting, personnel administration, information technology support services, procurement, property management, and facilities management.

Desired Outcomes

- Key Decision-Making Remains at Local Levels
- Increased Efficiency and Lower Costs
- Equal or Improved Quality of Service
- Enhanced Internal Controls
- Satisfactory Service Levels

Key Questions to be Considered

- How are courts currently organized and staffed to carry out their administrative functions? What is the cost?
- How are other decentralized organizations – including executive branch agencies, private organizations, and state court systems – organized and staffed to provide administrative support services?
- To what extent are court units already sharing various administrative services? What factors appear to be critical to successful sharing?
- What aspects of administrative work must occur on-site and what activities can be performed remotely?
- What potential options exist for performing administrative support work such as: sharing or delivering services locally (e.g., between court units), regionally (e.g., state-wide, circuit-wide), program-wide (e.g., among probation offices), nationally, or through service contracts (e.g., other agency or private company)?
- What service delivery options are most viable? Under what conditions?
- How can quality be measured? What impact will the various options have on the quality of services?
- What is the potential for savings, cost-avoidance, or efficiency?

Study Participants

Both the Budget and Judicial Resources Committees proposed a study in this area, to be undertaken in concert with committees on Court Administration and Case Management, Information Technology, Criminal Law, Administrative Office, and the Administration of the Bankruptcy System. The AO will conduct this study with the assistance of one or more contractors. Judges and court personnel will have ample opportunity to provide input and guidance to the study.

Reported Sharing of Administrative Services

- All responding appellate courts reported some sharing of administrative services.
- 51% of district courts reported some sharing among district court units, or with bankruptcy courts.
- 36% of bankruptcy courts reported some sharing administrative services with district court units.
- Information technology support is the most commonly shared administrative service.

Detail of Chart 1
in handout

Administrative Services Staffing

- 2002: overall administrative staffing proportion -- 21.4%
- 2002: over 4,600 FTEs dedicated to administrative services
- 1995: average court unit's administrative staffing proportion -- 15%

Reported Types of Administrative Functions Performed
2002 Survey on Administrative Services

Detail of Chart 1
in handout

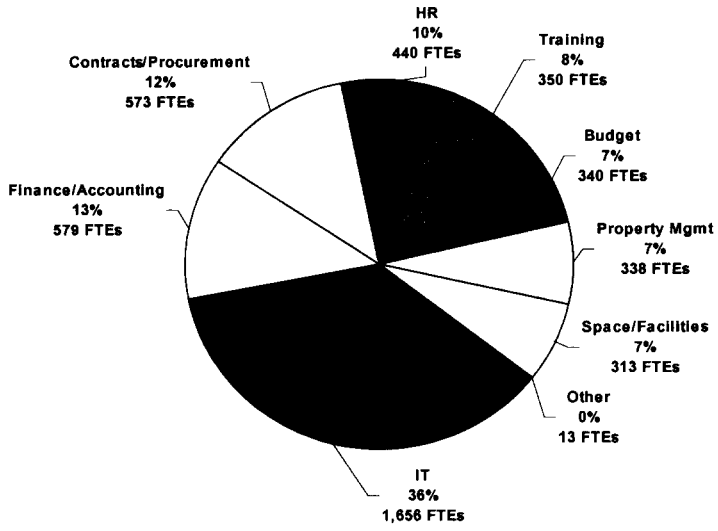


Chart 2

Reported Percentage of Staff Performing Administrative Functions
by Court Unit Type
2002 Survey on Administrative Services

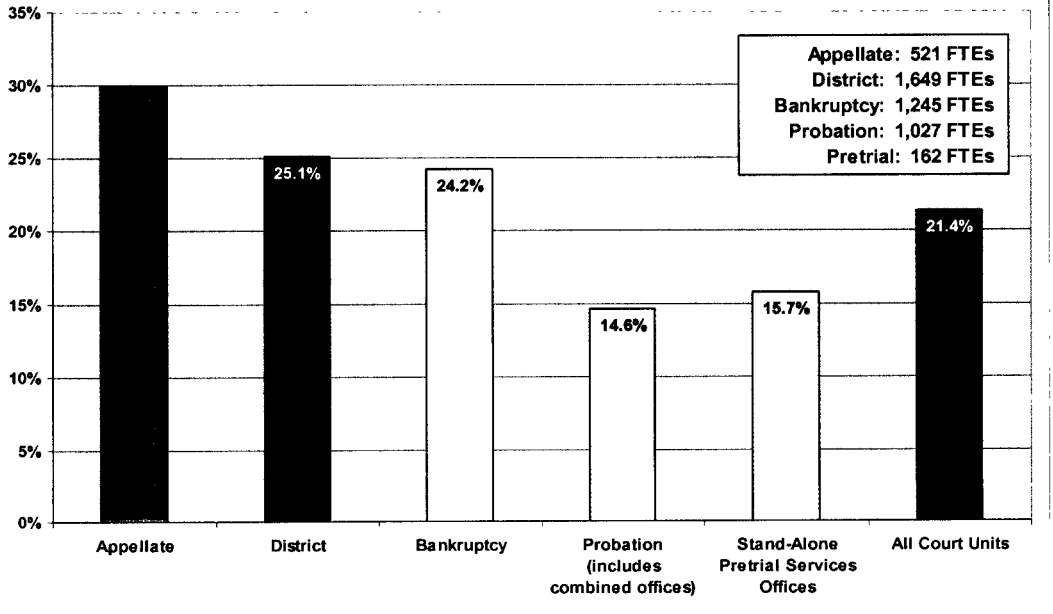
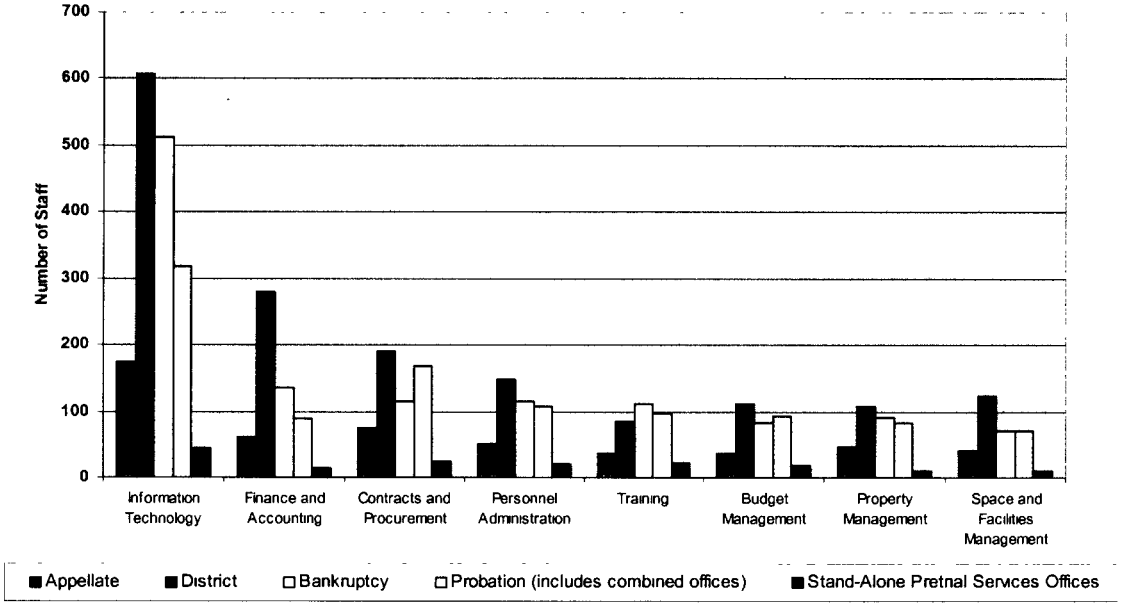
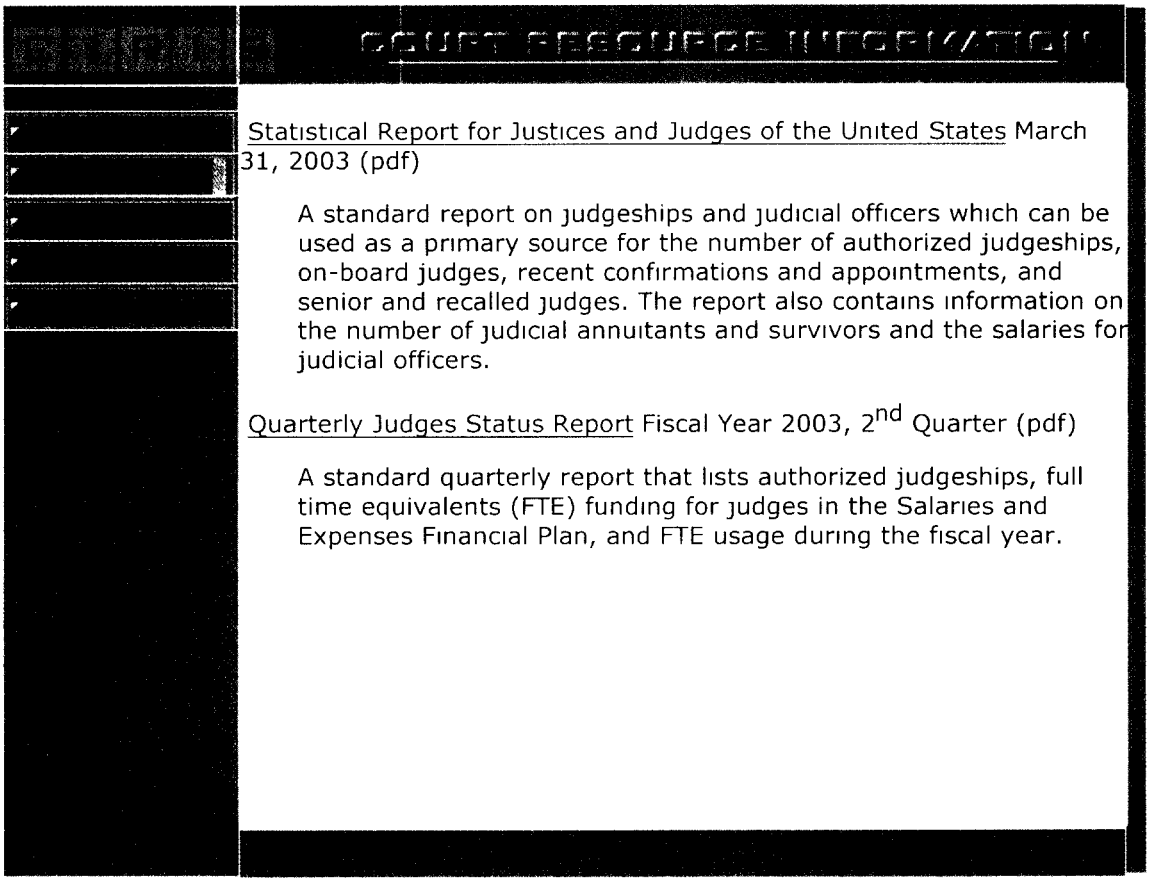


Chart 3

Reported Staff Performing Administrative Functions by Function and Court Unit Type 2002 Survey on Administrative Services





Statistical Report for Justices and Judges of the United States March 31, 2003 (pdf)

A standard report on judgeships and judicial officers which can be used as a primary source for the number of authorized judgeships, on-board judges, recent confirmations and appointments, and senior and recalled judges. The report also contains information on the number of judicial annuitants and survivors and the salaries for judicial officers.

Quarterly Judges Status Report Fiscal Year 2003, 2nd Quarter (pdf)

A standard quarterly report that lists authorized judgeships, full time equivalents (FTE) funding for judges in the Salaries and Expenses Financial Plan, and FTE usage during the fiscal year.