ADVISORY COMMITTEE
ON
CIVIL RULES

Kennebunkport, Maine
October 14-15, 1999

AGENDA
Advisory Committee on Civil Rules
October 14-15, 1999

I. Opening Remarks of Chairman

   A. Report on Actions taken by Judicial Conference on Proposed Rule Amendments
   B. Legislative Report
   C. Attorney Conduct Rules

II. Approval of Minutes April 19-20, 1999 meeting

III. "Simplified" Procedure Rules

IV. Report of Discovery Subcommittee

V. Report of Agenda Subcommittee

VI. Consideration of Proposed Amendments to Rule 51: Jury Instructions Requests before Trial

VII. Status of Federal Judicial Center Study of Financial Disclosure Statements

VIII. Rule 53-Special Master Subcommittee Status Report

IX. Designation and Time and Place of Next Meeting

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September 23, 1999
Doc. No 1651

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September 23, 1999
Doc No. 3811

I-A

NEWS RELEASE

Administrative Office of the U.S. Courts

September 15, 1999

Contact: David Sellers

Judicial Conference Adopts Rules Changes — Confronts Projected Budget Shortfalls

The Judicial Conference of the United States today approved a series of changes to court rules aimed at bringing uniformity to the pretrial exchange of information while reducing expense and delay in certain civil cases. At its biannual meeting in Washington, D.C., the Conference also received an update on the Judiciary's potentially severe budget shortfall for fiscal year 2000, which begins October 1.

While it will require $4.3 billion to operate the Judicial Branch in the upcoming fiscal year, the Senate has appropriated only $3.8 billion and the House $3.9 billion. A House-Senate conference to determine a final funding level is expected to occur soon. In a letter last month to congressional leaders, Chief Justice William H. Rehnquist said that the Senate level is "both unjustified and impractical" and the House level would "have a noticeable impact on court operations."

Cognizant of the budget constraints facing Congress, the Judiciary requested funding that would allow it to provide only the same level of services as FY 99, despite continuing growth in caseload. It also agreed to a court staffing freeze for the second year in a row. Nevertheless, depending on final funding levels, all court employees still could be furloughed for two weeks, money to pay lawyers who represent indigent defendants could run out next summer, and the number of probation and pretrial services officers (who supervise 100,000 released felons) could be cut - seriously compromising public safety.

It takes less than two-tenths of one percent of the entire federal budget to run the Judicial Branch. A copy of the Chief Justice's letter to Congress, a formal Judiciary appeal letter, and other background on the Judiciary's budget can be found on the Judiciary's Internet site (www.uscourts.gov, click on "What's New.")

The amendments approved today by the Conference affect the Federal Rules of Civil Procedure and follow a three-year study and extensive discussion by judges and lawyers across the country. These particular rules impact primarily on the pretrial exchange of information by attorneys known as "discovery." Discovery represents 50 percent of the litigation costs in the average case and up to 90 percent of the litigation costs in cases in which it is actively used. The changes approved by the Conference, (which can be found at www.uscourts.gov, click on "For Public Review") include the following:

Initial Disclosure — Rule 26(a)(1): This rule provides for the early automatic exchange of pretrial information, but permits courts to opt out of this requirement, leaving a wide variety of practices across the country. The amendment approved today provides for a

consistent national rule by removing the opt-out provision. Unlike the existing rule, however, the amended version provides that only information that is favorable to the disclosing party need be revealed.

Scope of Discovery — Rule 26(b)(1): Many lawyers want greater judicial involvement to control excessive discovery. This amendment enhances a judge's authority to get involved in particularly contentious discovery. It states that an attorney is still entitled to receive without judicial intervention information that is "relevant to the claim or defense" of any party. However, discovery that goes beyond this and the subject matter in general would be allowed only when ordered by a judge

Depositions — Rule 30: The pretrial questioning of potential witnesses, known as "depositions," often are the most expensive form of discovery. The amendment adopts a presumption that no deposition should last more than one seven hour day, unless approved by the court.

Congress has authorized the federal Judiciary to prescribe the rules of practice, procedure, and evidence for the federal courts, subject to the ultimate right of Congress to reject, modify or defer any rules. Because of the potential impact of rules changes, the process for amending rules typically involves a minimum of seven stages and usually takes three years. The rules changes approved today by the Conference will now be sent to the Supreme Court for consideration later this year. After conducting its review, the Court normally transmits proposed rules amendments to Congress by May 1. Congress has a statutory period of at least seven months to act on the rules submitted by the Court. If Congress does not enact legislation impacting on the rules, they take effect as a matter of law on December 1.

The Judicial Conference of the United States is the principal policy-making body for the federal court system. The Chief Justice serves as the presiding officer of the Conference, which is composed of the chief judges of the 13 courts of appeals, a district judge from each of the 12 geographic circuits, and the chief judge of the Court of International Trade. The Conference meets twice a year to consider administrative and policy issues affecting the court system and to make recommendations to Congress concerning legislation involving the Judicial Branch. A list of Conference members is attached.

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EVIDENCE RULES

September 1, 1999

TO: The Chief Justice of the United States and
Members of the Judicial Conference of the United States

FROM: Judge Paul V. Niemeyer, Advisory Committee on Civil Rules

RE: Comment on Letters on Disclosure and Discovery Proposals

Letters that have been sent directly to some of you as members of the Judicial Conference raise general questions about the Civil Rules discovery package that may give you pause. I write, as Chairman of the Civil Rules Advisory Committee, to address the concerns that have been raised most frequently during the three-year process of developing these proposals. I would welcome the opportunity to talk directly with you about these questions or about any aspect of the proposals.

When we launched this project three years ago at the request of the Judicial Conference, the committee shared many of the concerns expressed in the letters you have been receiving. We wondered whether disclosure procedures really need to be uniform. We were uncertain whether any real discovery problems remain that cannot be managed under current rules, and whether any improvements that might be made would be worth the problems and hassles that accompany any rules change — and particularly whether discovery practice should be changed again after the 1993 amendments.

Our report and appendices document the studies, data, comments, and testimony that convinced our committee and the Standing Rules Committee by a wide margin that there are problems with existing discovery practices. These problems are very serious in a significant number of contentious and high-stakes cases. The serious-problem cases often take up much judicial time, waste enormous sums of plaintiffs' and defendants' money, attract notoriety, and erode public respect for the courts. In many cases, of course, individual judges are able to manage discovery wisely under current rules. In other cases, however, the rules have been an unintended impediment to good case-management policies.

In addressing these problems, we tried mightily not to affect the way we do business in most cases. For example, we exempted from disclosure eight categories of cases that comprise nearly 40% of our civil docket. Moreover, the amendments provide a judge with the unfettered discretion to bypass initial disclosure in any individual case. Nor do we expect that the discovery changes will significantly affect the way we handle the bulk of our cases, which on average involve only three hours of discovery. And the initial proposals have been adjusted to address specific problems that had not been foreseen — the most significant adjustment accommodates courts, such as the Eastern District of Virginia, that have an accelerated case processing system. These adjustments are overlooked in some of the letters addressed to you.

It may help to extract from the full materials the four questions that have been asked most often, and to provide a brief summary of the committee's answers.

1. Is it necessary that initial disclosure procedures be uniform? The 1993 disclosure rules were made largely in response to the Civil Justice Reform Act. The strong opposition to the provision, which came from the bar, focused particularly on the breadth of the disclosures that were required, which some viewed as intruding on work-product privilege and the attorney-client privilege or the principles underlying those privileges. The opt-out provision, which was eventually adopted, blunted this opposition and supported continuing experimentation with different disclosure systems. But no one thought that this was a long-term solution; no one advocated that local variation in this very important area made sense for the long term.

The national character of the federal courts underlies the need for uniform disclosure practice. The committee determined that disclosure does not present a special case that justifies an exception. On the contrary, it found that initial disclosure is an integral part of discovery. Local variations on initial disclosure will lead to growing differences in discovery practices and other pretrial practices. In time, not only procedure but the application of federal substantive law will cease to be uniform.

The opt-out provision has already led to a riotous blooming of rules, creating divergent practices in the districts courts. The bar has reacted with a nearly universal demand for uniformity. Of course uniformity can be achieved by abandoning all initial disclosure, deleting the local rule opt-out from the present disclosure practice, or establishing a uniform regime that requires less disclosure. Several reasons persuaded the committee to adopt a uniform system that reduces present disclosure requirements.

Abandoning all disclosure was rejected because the Federal Judicial Center's study found some empirical support for the conclusion that initial disclosure has saved time and money. It found unequivocally that — contrary to fears expressed long and loud in 1993 — initial disclosure has not generated satellite litigation. The study also found that some form of disclosure is used in a majority of districts. Even in "opt-out" districts the courts or individual judges often impose some form of initial disclosure. Despite the apparent success of present initial disclosure where it has been used, however, the committee feared that an attempt to make it uniform would meet great resistance. The committee decided to remove the controversial portions of the disclosure rule, retain what is acceptable to most lawyers, and keep a modest disclosure requirement to be applied in all the districts. The proposals command widespread support from the bar, from adherents of disclosure as well as from groups that opposed the 1993 amendments.

2. Will the accelerated disposition processes adopted by some courts be delayed by continued adherence to the 1993 rule that defers discovery until after initial disclosure? Initial disclosure, coupled with the Rule 26(f) conference, quickly focuses litigation on the real issues and prevents unnecessary discovery. The timing provisions have been revised to accommodate courts that have an accelerated process and that, having opted out of present disclosure rules, fear interference from the new uniform rule.

3. Does discovery work too well now to be fixed? The FJC and RAND studies corroborate the general belief — shared by the committee — that discovery is indeed working well in most cases. The proposals will not affect these cases. But the studies also show that discovery is responsible for approximately 50% of the litigation costs in all cases and as much as 90% of the litigation costs in cases that involve the most active discovery. 83% of the attorneys who responded to the FJC study wanted some changes in the discovery rules.

The present subject-matter relevance test and the last sentence in Rule 26(b)(1) together make it difficult for a judge to limit the appropriate outer bounds of discovery. Unreasonable discovery persists because judges often are constrained to resolve doubts in favor of discovery under existing vague standards, and because — as the Committee heard — experienced litigators are reluctant to risk antagonizing the court by seeking protection in the absence of more definable standards. It is now more than 20 years since the American Bar Association proposed that the Rule 26(b)(1) scope of discovery be narrowed to address the problem cases. The proposal was endorsed by the Department of Justice in President Carter's administration, and became part of President Bush's policies. The American College of Trial Lawyers has most recently championed this proposal, and it has been supported by other bar groups. The problems persist. The actual Rule 26(b)(1) proposal, however, has cautiously refused to go as far as these groups have urged. The amendments do not restrict the outermost scope of discovery, but only require court approval when the parties dispute the need for discovery that goes beyond the claims and defenses already in the case.

4. Will the proposals unfairly limit legitimate discovery requests? The proposals leave a judge free to approve discovery to the same extent as the present rules. The change is that one party can no longer insist on a fishing expedition without showing good cause to go beyond the claims and defenses identified by the parties.

Some observers have worried that the proposal will prevent discovery of certain evidence now routinely admitted under Evidence Rule 404. The proposal is clearly to the contrary.

The Information Age. Apart from the questions addressed directly to the current proposals, the committee recognizes that electronic storage and retrieval of information are changing the opportunities for discovery and the dangers of excessive discovery. Anecdotes abound. The committee is just beginning to study the need to devise mechanisms that will ensure continued access to useful information without overwhelming the parties by burdens far beyond anything justified by the interests of fair litigation. The proposed amendments begin to establish a framework in which discovery can be tailored to handle new demands in the emerging information age.

The committee proposals are balanced. They are much less daring than many possibilities that were considered and put aside. But they also are important. They are so important that they have been explained and supported at great length. It may be easier to raise specific questions in conversation than to search the supporting materials. Please do not hesitate to call me or Judge Anthony Scirica if you have any questions, or would simply like to talk, about any of the proposals.

I-B

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

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

August 23, 1999

Honorable Henry J. Hyde
Chairman, Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
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Dear Mr. Chairman:

On July 23, 1999, the Executive Committee of the Judicial Conference of the United States voted to express its opposition to the class action provisions in H.R. 1875 and S. 353, in their present form. The Executive Committee noted, among other things, its serious concern about the practical effect these bills would have on the caseload of the federal courts by shifting a significant number of class actions from the state to the federal courts. Concern was also expressed about the conflict between these provisions of the bills and long-recognized principles of federalism. The Executive Committee encouraged further deliberate study of the complicated issues raised by class action and mass tort litigation.

On July 26th, this Judicial Conference position was transmitted to you and other members of the House Judiciary Committee in anticipation of the markup of H.R. 1875 that began the following day.[1] That letter also stated that a more detailed explanation of the position would be forthcoming. This letter provides a more complete explanation of both the federalism and workload concerns, following a brief description of the bill.

H.R. 1875, the "Interstate Class Action Jurisdiction Act of 1999," amends section 1332 of title 28, United States Code, to grant the United States district courts original jurisdiction over class actions having minimal diversity—where at least one plaintiff and one defendant are citizens of different states or nations. It precludes district courts from exercising jurisdiction over a class action if the action is: (1) an "intrastate case" (a case primarily governed by the laws of the state in which the action was filed and the substantial majority of the members of all proposed plaintiff classes are citizens of that state of which the primary defendants are also

[1]The House Judiciary Committee reported favorably H.R. 1875, as amended, on August 3, 1999. The changes made to the bill did not alter the provisions upon which the Judicial Conference position is based.

citizens); (2) a "limited scope case" (a case in which all claims aggregated do not exceed $1 million or where there are fewer than 100 members of the proposed plaintiff class); or (3) a "State action case" (a case in which the primary defendants are states, state officials, or other governmental entities against whom the district court may be foreclosed from ordering relief). Removal of class actions to federal court is permitted by any defendant without the consent of all defendants or by any plaintiff class member who is not a named or representative class member, without the consent of all members of such class. H.R. 1875 also excludes such class actions from the limitation, otherwise applicable to diversity cases, that prohibits removal more than one year after the commencement of the suit.[2]

The effect of the class action provisions of this bill would be to move virtually all class action litigation into the federal courts, thereby offending well-established principles of federalism. The state and federal courts in our country comprise an integrated system for the delivery of justice. State courts are courts of general jurisdiction and have traditionally adjudicated the vast majority of claims based on state law. They currently handle approximately 95% of the judicial caseload in our country. The courts of our federal system, on the other hand, are specialized courts of limited jurisdiction that are staffed and supported to function as such.

This bill focuses entirely on the litigation of state-created rights of action that presumptively belong in state courts. In expanding the scope of diversity jurisdiction, H.R. 1875 has no impact on the range of federal-law class actions that existing jurisdictional statutes have already made cognizable in federal court. Rather, the bill targets class actions involving claims that arise under the law of property, tort, contract, and state regulatory statutes—areas of law that have remained the province of state courts and legislatures in our federal system. In that system, state courts and legislatures enjoy presumptive competence, within constitutional limits, to fashion the rules of decision that will govern the resolution of state-created actions. Although federal courts may occasionally hear such claims in the exercise of diversity jurisdiction, such matters typically present no questions of federal law that implicate the expertise of the federal judiciary.

The federalization of class actions that would result from this legislation would not only deprive our integrated judicial system of the state court resources currently processing class actions pending there, it would also infringe upon the traditional authority of the states to manage their own judicial business. State legislatures and other rule-making bodies provide rules for the aggregation of state-law claims into class-wide litigation in order to achieve certain litigation economies of scale. By providing for class treatment, state policymakers express the view that the state's own resources can be best deployed not through repetitive and potentially duplicative

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[2]In addition, H.R. 1875 generally provides that the class action provisions do not apply to claims relating to certain securities and corporate governance activities.

individual litigation, but through some form of class treatment. The bill could deprive the state courts of the power to hear much of this class litigation and might well create incentives for plaintiffs who prefer a state forum to bring a series of individual claims. Such individual litigation might place a greater burden on the state courts and thwart the states' policies of more efficient disposition.

While it is difficult to predict with precision the impact that the federalization of class actions will have on the federal judicial system, one can predict with confidence that it will impose a very substantial burden. As of September 30, 1998, there were 3,114 class action civil cases pending in the United States district courts, up from 2,641 twelve months prior.[3] Statistics are not available indicating the number of class actions pending (or filed) in the state courts. An interim report of a pending study on class actions found, however, that more than half of the appellate decisions reported by LEXIS between July 1, 1995, and June 30, 1996, were from the state courts. *Preliminary Results of the RAND Litigation Study of Class Action Litigation* (1997) at 14.[4] If this finding reflects the distribution of class action cases today between the state and federal courts, the federalization of class actions holds the potential for increasing significantly the number of such cases currently being litigated in the federal system.

In order to appreciate how substantial that impact would be, it must also be understood that class action cases, by their nature, make extraordinary demands on judicial resources. A 1996 study by the Federal Judicial Center (FJC), for example, found that the median time from filing to disposition for class actions tends to be two to three times that of other civil cases. *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules*, Federal Judicial Center (1996) at 19. Moreover, the FJC report found that class action cases consume almost five times as much judicial time as the average civil case. *Id.* at 22-23. When the additional, burdensome litigation resulting from H.R. 1875 is added to the already overcrowded dockets of federal courts across our country, substantial backlogs and attendant delays can be expected.[5]

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[3]During the twelve-month period ending September 30, 1998, 1,881 class action cases were *filed* in federal court, up from 1,475 during the prior twelve months.

[4]The RAND Institute for Civil Justice is conducting a study of class action litigation, and its final report is anticipated this fall. The stated goals of that project are to: (1) provide a more detailed picture of the current class action landscape and suggest some implications of this landscape for rule changes; (2) describe current litigation practices and suggest some implications of these practices for rule changes; and (3) describe the specific and general consequences of class actions.

[5]The average weighted caseload per district judgeship (which is derived from a survey of the amount of judge time required by each type of case) has climbed 25% since 1991, from 386 to 484 (as of September 30, 1998). In addition, as of June 30, 1999, there were 19,112 civil cases pending three years or more in the district courts.

H.R. 1875 appears to be motivated by a desire to address abuses that have occurred on occasion in class action litigation (*e.g.*, collusive class certifications and settlements, modest awards for plaintiffs in conjunction with disproportionately large fees for attorneys, duplicative class action litigation, and forum shopping). The House Judiciary Committee heard anecdotal evidence of such abuses in a few state courts during its hearing on July 21, 1999. We do not discredit such evidence. Such abuses may occur in state courts, just as they unfortunately may occur from time to time in the federal system.

To the extent that there are abuses of class action processes, the states involved should be afforded a reasonable opportunity to take corrective measures. In fact, they have already begun to do so. For example, some of the anecdotal evidence heard by the Judiciary Committee concerned class action litigation in Alabama. The Supreme Court of Alabama has already responded, however, to specific problems in class certifications.[6] In addition, the Alabama State Legislature recently enacted a law that, among other things, tightens the requirements before a class may be certified and provides for interlocutory appellate review of certification decisions. (*See* Act 99-250, enacted May 25, 1999.)

Affording affected states an opportunity to take corrective measures would also have the benefit of providing Congress with an opportunity to determine whether the identified abuses reflect a systemic problem that warrants a national solution and to consider alternative measures, short of federalizing class actions. The final report of the RAND study of class actions will hopefully provide empirical data and analysis concerning the nature and extent of any problems. Based upon the limited empirical evidence now available, however, we are not persuaded that a *systemic* problem exists in class action litigation.

In addition, the federal judiciary is in the process of studying more generally the problems created by the aggregation of claims for litigation in the area of mass torts. The Mass Torts Working Group appointed by the Chief Justice in 1998 filed a report earlier this year that identifies the complex problems presented by the aggregation of large numbers of claims and catalogues the various solutions that have been suggested. That report is an immeasurably valuable resource for those studying class action litigation. It is anticipated that the work

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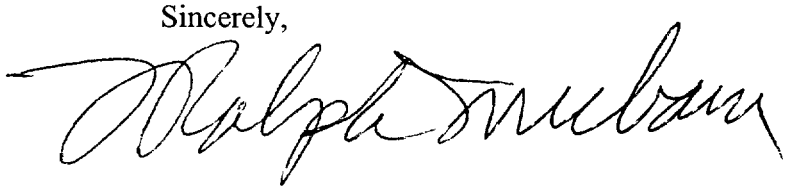
[6] *Ex parte* Green Tree Financial Corp., 723 So.2d 6 (Ala. 1998) (directing the trial court to vacate an order conditionally certifying a class because of the lack of evidence as to the issues of predominance and superiority under Rule 23(b)(3)); *Ex parte* Federal Express Corp., 718 So.2d 13 (Ala. 1998) (directing the trial court to vacate an order conditionally certifying a class action and to allow defendant time to undertake discovery before the court conducts an evidentiary hearing on request for class certification); *Ex parte* AmSouth Bancorporation, 717 So.2d 357 (Ala. 1998) (holding that the trial court abused its discretion in certifying the class); *Ex parte* First Nat'l Bank of Jasper, 717 So.2d 342 (Ala. 1997) (holding that the trial court's order of conditional certification failed to comply with Rule 23); and *Ex parte* Citicorp Acceptance Co., 715 So.2d 199 (Ala. 1997) (holding that the trial court improperly certified the class without first giving proper notice and that the prerequisites for class certification under Rule 23(a) had not been met).

reflected there will be carried forward by the relevant committees of the Judicial Conference or by an ad hoc committee created for that purpose. Whoever carries this work forward will stand ready to work with Congress in evaluation of the need for national action and in development of an alternative approach to handle the complicated issues raised by class action and mass tort litigation.

As the Judicial Conference has recognized, minimal diversity jurisdiction can be a useful approach in some contexts. The Conference has previously endorsed its use, for example, in streamlining the process for resolving multiple claims arising from single-event mass torts, like airplane crashes. Time-honored principles of federalism, however, counsel that access to the federal courts be expanded only where the expansion would serve a substantial federal interest and only where the parameters of the expansion have been carefully crafted to address the perceived problem without unnecessary adverse effects on state judicial processes. The class action provisions of H.R. 1875 fail to meet this standard. Even assuming that the limited evidence currently available warrants a conclusion that some federal action is warranted, the proposed federalization of class actions is not a remedy carefully tailored to address the identified abuses and carries a price tag entirely too high in terms of its potential adverse impact on both the federal and the state judicial systems.

The Judicial Conference would appreciate your consideration of its position opposing the class action provisions in H.R. 1875. We emphasize that we are not disputing the existence of significant problems of overreaching by a few state courts in some class actions. And we fully support the exploration of ways in which federal jurisdiction may wisely be extended to include some class actions that today cannot be brought in federal court. Further deliberate consideration is required to identify alternative approaches that will reduce the total costs borne by both federal and state courts and ensure the appropriate allocation of jurisdiction over class action litigation. The federal judiciary is available to explore with Congress less intrusive and burdensome approaches to address legitimate concerns identified with class action litigation. If you or your staff have any questions, please contact Michael W. Blommer, Assistant Director, Office of Legislative Affairs (202-502-1700).

Sincerely,



Leonidas Ralph Mecham
Secretary

cc: Honorable John Conyers, Jr., Ranking Member
Members of the Committee on the Judiciary

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

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

March 24, 1999

Honorable Henry J. Hyde
Chairman, Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515-1306

Dear Mr. Chairman:

On behalf of the Judicial Conference of the United States, I write to transmit views with respect to pending year 2000 ("Y2K") legislation. H.R. 775, as well as S. 96 and S. 461, seeks to promote the resolution of potentially large numbers of Y2K disputes. The federal judiciary recognizes the commendable efforts of Congress to resolve Y2K disputes short of full-scale litigation so as to alleviate the burden of such litigation on private parties as well as on federal and state courts. These are clearly laudable public policy objectives.

Some of the provisions, however, will affect the administration of justice in the federal courts. The Judicial Conference, at its March 16th session, determined to oppose the provisions expanding federal court jurisdiction over Y2K class actions in bills (H.R. 775, S. 96, and S. 461) currently under consideration by the 106th Congress. In addition, because the Y2K pleading requirements included in these bills circumvent the Rules Enabling Act, the Conference also opposes these provisions.

Class Actions

These bills create no federal cause of action. Instead, they assume that plaintiffs will rely on typical state causes of action to provide relief in Y2K disputes. Under the bills, individual plaintiffs, as opposed to class action plaintiffs, can bring their tort, contract, and fraud suits in a state court where they will remain until resolved. While federal defenses and liability limitations established in the legislation may be raised in such litigation, the bills recognize that state courts are fully capable of applying these provisions and carrying out federal policy. This reliance on state courts, which today handle 95 percent of the nation's judicial business, follows the traditional allocation of work between the state and federal courts.

The provisions of these Y2K bills take a radically different approach to Y2K class actions—one that would effect a major reallocation of class action workloads. These bills create original federal court jurisdiction over any Y2K class action based on state law, regardless of the amount in controversy, where there is minimal diversity of citizenship—that is, where any single member of the proposed plaintiff class and any defendant are from different states. They also provide for the removal of any such Y2K class action to federal court by any single defendant or any single member of the plaintiff class who is not a representative party. While the bills do identify limited circumstances in which a federal district court may abstain from hearing a Y2K class action, it is unlikely that many actions will meet the specified criteria. The net result of these provisions will be that most Y2K class action cases will be litigated in the federal courts.

This assignment of the class action workload to the federal courts is particularly troubling because the Y2K problem may result in a very large number of class actions. While no one knows how many cases will be filed, Senator Robert Bennett, Chair of the Special Committee on the Year 2000 Technology Problem, has predicted that there could be a "tidal wave" of litigation resulting from Y2K problems. Given the nature of the Y2K problem, it is reasonable to expect that similar claims will often arise in favor of multiple plaintiffs against the same defendant or defendants. Thus, it can be expected that a substantial portion of these cases will be brought as class actions. Responding to class actions, regardless of where they are filed, will likely be a monumental task. If the current class action provisions remain in these bills, however, the important contribution the state courts would otherwise make to meeting this challenge will be lost, and the burden on the federal system will be correspondingly increased. The transfer of this burden to the federal courts holds the potential of overwhelming federal judicial resources and the capacity of the federal courts to resolve not only Y2K cases, but other causes of action as well.

Federal administration of these state-law class action claims will impose other substantial burdens. By shifting state-created claims into federal court, the bills confront the federal courts with the responsibility to engage in difficult and time-consuming choice-of-law decisions. The *Erie* doctrine requires that federal district courts, sitting in diversity, apply the law of the forum state to determine which body of state law controls the existence of a right of action. The wholesale shift of state-law class actions into federal court makes this choice-of-law obligation all the more daunting as the sheer number of possible subclasses and relevant bodies of state law multiplies. Some federal courts have taken the position that such multiplicity of law itself stands as a barrier to the certification of a nationwide class action. Even where a district court agreed to certify a class, it would have to make choice of law and substantive determinations that would have no binding force in subsequent Y2K litigation in the states in question.

In addition to the potential adverse docket impact on the federal courts, the proposed bills infringe upon the traditional authority of the states to manage their own judicial business. State legislatures and other rule-making bodies provide rules for the aggregation of state-law claims

into class-wide litigation in order to achieve certain litigation economies of scale. By providing for class treatment, state policymakers express the view that the state's own resources can be best deployed not through repetitive and potentially duplicative individual litigation, but through some form of class treatment. The proposed bills could deprive the state courts of the power to hear much of this class litigation and might well create incentives for plaintiffs who prefer a state forum to bring a series of individual claims. Such individual litigation might place a greater burden on the state courts and thwart the states' policies of more efficient disposition.

Federal jurisdiction over class action litigation is an area where change should be approached with caution and careful consideration of the underlying relationship between state and federal courts. The Judicial Conference Advisory Committee on Civil Rules has recently devoted several years of study to the rules in class action litigation. One outgrowth of that study was the appointment by the Chief Justice of a Mass Torts Working Group. The Working Group undertook a study which revealed the complexities of litigation that aggregates large numbers of claims and illustrates the need for a deliberative review of the issues that must be addressed in attempting to improve the process for resolution of such litigation. Such issues involve not only procedural rules, but also the jurisdiction of federal and state courts and the interaction between federal and state law. Y2K class action litigation implicates the same complex and fundamental issues that the Working Group identified. Even for familiar categories of litigation, these issues can be satisfactorily resolved only by further study. An attempt to address them in isolation, for an unfamiliar category of cases that remains to be developed only in the future, is unwise.

It may well be that extending minimal diversity to mass torts may be appropriate if accompanied by suitable restrictions. The Judicial Conference, for example, has endorsed in principle the use of minimal diversity jurisdiction in single-event, mass tort situations, like airplane crash litigation, and there may be other situations in which the efficiencies to be gained from consolidating mass tort litigation in federal courts are justified. Expansion of class action jurisdiction over Y2K class actions in the manner provided in the pending bills, however, would be inconsistent with the objective of preserving the federal courts as tribunals of limited jurisdiction and the reality that the federal courts are staffed and supported to function as tribunals of limited jurisdiction.

Judicial federalism relies on the principle that state and federal courts together comprise an integrated system for the delivery of justice in the United States. There appears to be no substantial justification for the potentially massive transfer of workload under these bills, and such a transfer would seem to be counterproductive. State courts provide most of the nation's judicial capacity, and a decision to limit access to this capacity in the face of the burden that Y2K litigation may impose could have significant consequences for the efficient resolution of Y2K disputes.

Pleading Requirements

H.R. 775, as well as S. 96 and S. 461, sets forth specific pleading provisions in Y2K litigation that would require a plaintiff to state with particularity certain matters in the complaint regarding the nature and amount of damages, material defects, and the defendant's state of mind. These requirements are inconsistent with the general notice pleading provisions found in the Federal Rules of Civil Procedure (*i.e.*, Rule 8), which apply to civil cases. The bills' provisions bypass the rulemaking provisions in the Rules Enabling Act (28 U.S.C. §§ 2071-77). They have not been subjected to bench, bar, and public scrutiny envisioned under the Rules Enabling Act and are inconsistent with the policies underlying the Act, which the Judicial Conference has long supported.

Not only do the statutory pleading requirements bypass the Rules Enabling Act, they do so in a particularly objectionable way because they are contained in stand-alone statutory provisions outside the federal rules. This will cause confusion and traps for unwary lawyers who are accustomed to relying on the Federal Rules of Civil Procedure for pleading requirements. It also would signal yet another departure from uniform, national procedural rules, following closely in the wake of similar pleading requirements contained in the Private Securities Reform Litigation Act.

On behalf of the federal judiciary, I appreciate your consideration of these views. If you or your staff have any questions, please contact Mike Blommer, Assistant Director, Office of Legislative Affairs (202-502-1700).

Sincerely,

Leonidas Ralph Mecham
Secretary

cc: Honorable John Conyers, Jr., Ranking Member
Members of the Committee on the Judiciary

Union Calendar No. 190

106th CONGRESS

1st Session

H. R. 1875

[Report No. 106-320]

A BILL

To amend title 28, United States Code, to allow the application of the principles of Federal diversity jurisdiction to interstate class actions.

September 14, 1999

Reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

HR 1875 RH

Union Calendar No. 190

106th CONGRESS

1st Session

H. R. 1875

[Report No. 106-320]

To amend title 28, United States Code, to allow the application of the principles of Federal diversity jurisdiction to interstate class actions.

IN THE HOUSE OF REPRESENTATIVES

May 19, 1999

Mr. GOODLATTE (for himself, Mr. BOUCHER, Mr. BRYANT, Mr. MORAN of Virginia, Mr. DELAY, Mr. ARMEY, Mr. HYDE, Mr. SENSENBRENNER, Mr. MCCOLLUM, Mr. GEKAS, Mr. SMITH of Texas, Mr. GALLEGLY, Mr. CANADY of Florida, Mr. CHABOT, Mr. BARR of Georgia, Mr. HUTCHINSON, Mr. CANNON, Mr. ROGAN, Mrs. BONO, Mr. BLILEY, Mr. COX, Mr. CRAMER, Mr. DREIER, Mr. GOODE, Mr. HOLDEN, Mr. JOHN, Mrs. JOHNSON of Connecticut, Mr. LINDER, Mr. OXLEY, Mr. STENHOLM, Mr. SUNUNU, and Mr. UPTON) introduced the following bill; which was referred to the Committee on the Judiciary

September 14, 1999

Additional sponsors: Mr. GARY MILLER of California, Mr. GOSS, Mr. BARTLETT of Maryland, Mrs. BIGGERT, Mr. DAVIS of Virginia, and Mr. Bachus

September 14, 1999

Reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Strike out all after the enacting clause and insert the part printed in italic]

[For text of introduced bill, see copy of bill as introduced on May 19, 1999]

A BILL

To amend title 28, United States Code, to allow the application of the principles of Federal diversity jurisdiction to interstate class actions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE AND REFERENCE.

(a) SHORT TITLE- This Act may be cited as the `Interstate Class Action Jurisdiction Act of 1999'.

(b) REFERENCE- Whenever in this Act reference is made to an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 28, United States Code.

SEC. 2. FINDINGS.

The Congress finds that--

(1) as recently noted by the United States Court of Appeals for the Third Circuit, interstate class actions are `the paradigm for Federal diversity jurisdiction because, in a constitutional sense, they implicate interstate commerce, invite discrimination by a local State, and tend to attract bias against business enterprises';

(2) most such cases, however, fall outside the scope of current Federal diversity jurisdiction statutes;

(3) that exclusion is an unintended technicality, inasmuch as those statutes were enacted by Congress before the rise of the modern class action and therefore without recognition that interstate class actions typically are substantial controversies of the type for which diversity jurisdiction was designed;

(4) Congress is constitutionally empowered to amend the current Federal diversity jurisdiction statutes to permit most interstate class actions to be brought in or removed to Federal district courts; and

(5) in order to ensure that interstate class actions are adjudicated in a fair, consistent, and efficient manner and to correct the unintended, technical exclusion of such cases from the scope of Federal diversity jurisdiction, it is appropriate for Congress to amend the Federal diversity jurisdiction and related statutes to allow more interstate class actions to be brought in or removed to Federal court.

SEC. 3. JURISDICTION OF DISTRICT COURTS.

(a) EXPANSION OF FEDERAL JURISDICTION- Section 1332 is amended by redesignating subsections (b), (c), and (d) as subsections (c), (d), and (e), respectively, and by inserting after subsection (a) the following:

`(b)(1) The district courts shall have original jurisdiction of any civil action which is brought as a class action and in which--

`(A) any member of a proposed plaintiff class is a citizen of a State different from any defendant;

`(B) any member of a proposed plaintiff class is a foreign state and any defendant is a citizen of a State; or

`(C) any member of a proposed plaintiff class is a citizen of a State and any defendant is a citizen or subject of a foreign state.

As used in this paragraph, the term `foreign state' has the meaning given that term in section 1603(a).

`(2)(A) The district courts shall not exercise jurisdiction over a civil action described in paragraph (1) if the action is--

`(i) an intrastate case,

`(ii) a limited scope case, or

`(iii) a State action case.

`(B) For purposes of subparagraph (A)--

`(i) the term `intrastate case' means a class action in which the record indicates that--

`(I) the claims asserted therein will be governed primarily by the laws of the State in which the action was originally filed; and

`(II) the substantial majority of the members of all proposed plaintiff classes, and the primary defendants, are citizens of the State in which the action was originally filed;

`(ii) the term `limited scope case' means a class action in which the record indicates that all matters in controversy asserted by all members of all proposed plaintiff classes do not in the aggregate exceed the sum or value of $1,000,000, exclusive of interest and costs, or a class action in which the number of members of all proposed plaintiff classes in the aggregate is less than 100; and

`(iii) the term `State action case' means a class action in which the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief.

`(3) Paragraph (1) shall not apply to any claim concerning a covered security

as that term is defined in section 16(f)(3) of the Securities Act of 1933 and section 28(f)(5)(E) of the Securities Exchange Act of 1934.

`(4) Paragraph (1) shall not apply to any class action solely involving a claim that relates to--

`(A) the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

`(B) the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 and the regulations issued thereunder).'.

(b) CONFORMING AMENDMENT- Section 1332(c) (as redesignated by this section) is amended by inserting after `Federal courts' the following: `pursuant to subsection (a) of this section'.

(c) DETERMINATION OF DIVERSITY- Section 1332, as amended by this section, is further amended by adding at the end the following:

`(f) For purposes of subsection (b), a member of a proposed class shall be deemed to be a citizen of a State different from a defendant corporation only if that member is a citizen of a State different from all States of which the defendant corporation is deemed a citizen.'.

SEC. 4. REMOVAL OF CLASS ACTIONS.

(a) IN GENERAL- Chapter 89 is amended by adding after section 1452 the following:

`Sec. 1453. Removal of class actions

`(a) IN GENERAL- A class action may be removed to a district court of the United States in accordance with this chapter, but without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed--

`(1) by any defendant without the consent of all defendants; or

`(2) by any plaintiff class member who is not a named or representative class member of the action for which removal is sought, without the consent of all members of such class.

`(b) WHEN REMOVABLE- This section shall apply to any class action before or after the entry of any order certifying a class.

`(c) PROCEDURE FOR REMOVAL- The provisions of section 1446(a) relating to a defendant removing a case shall apply to a plaintiff removing a case under this section. With respect to the application of subsection (b) of such section, the requirement relating to the 30-day filing period shall be met if a plaintiff class member who is not a named or representative class member of the action for which removal is sought files notice of removal no later than 30 days after receipt by such class member, through service or otherwise, of the initial written notice of the class action provided at the court's direction.

`(d) EXCEPTIONS-

`(1) COVERED SECURITIES- This section shall not apply to any claim concerning a covered security as that term is defined in section 16(f)(3) of the Securities Act of 1933 and section 28(f)(5)(E) of the Securities Exchange Act of 1934.

`(2) INTERNAL GOVERNANCE OF BUSINESS ENTITIES- This section shall not apply to any class action solely involving a claim that relates to--

`(A) the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

`(B) the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 and the regulations issued thereunder).'.

(b) REMOVAL LIMITATIONS- Section 1446(b) is amended in the second sentence--

(1) by inserting `, by exercising due diligence,' after `ascertained'; and

(2) by inserting `(a)' after `section 1332'.

(c) TECHNICAL AND CONFORMING AMENDMENTS- The table of sections for chapter 89 is amended by adding after the item relating to section 1452 the following:

`1453. Removal of class actions.'.

(d) APPLICATION OF SUBSTANTIVE STATE LAW- Nothing in this section or the amendments made by this section shall alter the substantive law applicable to an action to which the amendments made by section 3 of this Act apply.

(e) PROCEDURE AFTER REMOVAL- Section 1447 is amended by adding at the end the following new subsection:

`(f) If, after removal, the court determines that no aspect of an action that is subject to its jurisdiction solely under the provisions of section 1332(b) may be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure, it shall dismiss the action. An action

dismissed pursuant to this subsection may be amended and filed again in a State court, but any such refiled action may be removed again if it is an action of which the district courts of the United States have original jurisdiction. In any action that is dismissed pursuant to this subsection and that is refiled by any of the named plaintiffs therein in the same State court venue in which the dismissed action was originally filed, the limitations periods on all reasserted claims shall be deemed tolled for the period during which the dismissed class action was pending. The limitations periods on any claims that were asserted in a class action dismissed pursuant to this subsection that are subsequently asserted in an individual action shall be deemed tolled for the period during which the dismissed class action was pending.'.

SEC. 5. APPLICABILITY.

The amendments made by this Act shall apply to any action commenced on or after the date of the enactment of this Act.

SEC. 6. GAO STUDY.

The Comptroller General of the United States shall, by not later than 1 year after the date of the enactment of this Act, conduct a study of the impact of the amendments made by this Act on the workload of the Federal courts and report to the Congress on the results of the study.

END

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

SENATE BILLS

S. 32 *No title*
- Introduced by: Thurmond
- Date Introduced: 1/19/99
- Status: Referred to the Committee on Judiciary
- Provisions affecting rules
  - **Criminal Rule 31(a)** is amended by striking "unanimous" and inserting "by five-sixths of the jury."

S. 96 Y2K Act (See H.R. 775) Pub. L. No 106-37.
- Introduced by: McCain
- Date Introduced: January 19, 1999
- Status: Referred to Committee on Commerce; Hearings held on February 9, 1999; Committee reported bill favorably on March 3, 1999; Letter from Director opposing class action and special pleading requirements sent on March 24, 1999; Cloture vote not obtain 5/18/99; Text inserted in H. R. 775 as passed Senate (CR S6998) on 6/15/99
- Provisions affecting rules: federalizing class actions and heightened pleading requirements

S. 248 Judicial Improvement Act of 1999
- Introduced by: Hatch (5 co-sponsors)
- Date Introduced: 1/19/99
- Status: Referred to the Committee on Judiciary; 3/24/99 Referred to Subcommittee on Oversight and Courts
- Provisions affecting rules
  - Sec. 4. Would amend Section 1292(b) of title 28, and allow for interlocutory appeals of court orders relating to class actions;
  - Sec. 5. Creates original federal jurisdiction based upon minimal diversity in certain single accident cases; and
  - Sec. 10. Clarifies sunset of civil justice expense and delay reduction plans.

S. 250 Federal Prosecutor Ethics Act
- Introduced by: Hatch (3 co-sponsors)
- Date Introduced: 1/19/99
- Status: Referred to the Committee on Judiciary
- Provisions affecting rules

- Sec. 2 authorizes Attorney General to establish special ethical standards governing federal prosecutors in certain situations. Those standards would override state standards.

S.353 Class Action Fairness Act of 1999

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

S.461 Year 2000 Fairness and Responsibility Act (See S. 96 and H.R. 775)

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

S. 625 *Bankruptcy Reform Act of 1999*

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

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

- Introduced by: Grassley (6 co-sponsors)
- Date Introduced: March 25, 1999

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

S. 755 No title
- Introduced by: Hatch (14 co-sponsors)
- Date Introduced: March 25, 1999
- Status: April 12 read the second time, placed on the calendar
- Provisions affecting rules: Delays effective date of the "McDade" provision on Rule 4.2 contacts with represented parties

S. 758 Fairness in Asbestos Compensation Act of 1999
- Introduced by: Ashcroft (13 co-sponsors)
- Date Introduced: March 25, 1999
- Status: Referred to the Committee on Judiciary.
- Provisions affecting rules:
  - Section 208 gives exclusive jurisdiction, regardless of the amount in controversy or citizenship of parties, to federal courts;
  - Section 301 requires the board of the Asbestos Resolution Corporation to establish procedures for ADR;
  - Section 307(j) creates an penalty for an inadequate offer; and
  - Section 402 bars class actions in asbestos cases without the consent of each defendant, and governs removal.

S. 855 Professional Standards for Government Attorneys Act of 1999
- Introduced by: Leahy (7 co-sponsors)
- Date Introduced: April 21, 1999
- Status: Referred to the Committee on Judiciary.
- Provisions affecting rules:
  - Requires the Judicial Conference to submit to the Chief Justice a report that includes recommendations with respect to amending the Federal Rules of Civil and Criminal Procedure to provide for such a uniform national rules governing conduct of government attorneys. Directs the Judicial Conference, in developing recommendations, to consider: (1) the needs and circumstances of multi-forum and multi-jurisdictional litigation; (2) the special needs and interests of the United States in investigating and prosecuting violations of Federal criminal and civil

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

S. 899 21st Century Justice Act of 1999

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

S. 934 Crime Victims Assistance Act

- Introduced by: Leahy (5 co-sponsors)
- Date Introduced: April 30, 1999
- Status: Referred to the Committee on Judiciary.
- Provisions affecting rules:
  - Section 121 would amend **Criminal Rule 11** to require the Government to make a reasonable effort to notify the victim of a crime of violence of the time and date of any hearing on entering a plea of guilty or nolo contendere, and the victim's right to attend that hearing. If the victim attends the proceeding, the court shall afford the victim an opportunity to be heard on the plea.
  - Section 122 would amend **Criminal Rule 32** detailing the contents of the Victim Impact Statement; give the victim an opportunity to submit a written or oral statement, or an audio or videotaped statement; require the Government to make a reasonable effort to notify the victim of a crime of violence of the time and date of any sentencing hearing and the victim's right to attend that hearing. If the victim attends the proceeding, the court shall afford the victim an opportunity to be heard.
  - Section 123 would amend **Criminal Rule 32.1** require the Government to make a reasonable effort to notify the victim of a crime of violence of the time and date of

any hearing to revoke or modify sentence and the victim's right to attend that hearing. If the victim attends the proceeding, the court shall afford the victim an opportunity to be heard.

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

S. 957 Sunshine in Litigation Act of 1999

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

S. 1360 Secret Service Protection Privilege Act of 1999

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

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

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

HOUSE BILLS

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

- Introduced by: Gallegly (27 co-sponsors)
- Date Introduced: February 2, 1999
- Status: Referred to the Committee on Judiciary; 2/25/ 99 Referred to the Subcommittee on Courts and Intellectual Property.
- Provisions affecting rules:

- Sec. 2 would amend **Civil Rule 11** creating special sanction rules for prisoner litigation.

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

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

H.R. 771 No title

- Introduced by: Coble (15 co-sponsors)
- Date Introduced: February 23, 1999
- Status: Referred to the Committee on Judiciary; 3/11/99 Forwarded by Subcommittee to Full Committee; Letter from Judge Niemeyer to Hyde 3/22/99
- Provisions affecting rules:
  - Amends **Civil Rule 30** to require that depositions be recorded by stenographic or stenomask means unless the court upon motion orders, or the parties stipulate in writing, to the contrary.

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

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

H.R. 833 Bankruptcy Reform Act of 1999

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

H.R. 967 Multiparty, Multiforum Jurisdiction Act of 1999

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

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

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

H.R. 1658 Civil Asset Forfeiture Reform Act

- Introduced by: Hyde (29 co-sponsors)
- Date Introduced: May 4, 1999
- Status: 5/4/99 Referred to the House Committee on the Judiciary; Measure passed House on June 24, 1999, received in the Senate June 28, 1999

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

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

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

- Introduced by: Goodlatte (37 co-sponsor)
- Date Introduced: May 19, 1999
- Status: Referred to the Committee on Judiciary; Hearings Held on July 21, 1999, Mark-up held July 27, 1999 and August 3, 1999; Ordered to be Reported (Amended) by the Yeas and Nays: 15 - 12.; letter from Executive Committee generally stating Judiciary's opposition more detailed letter to follow.
- Provisions affecting rules: None directly; general class action considerations

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

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

JOINT RESOLUTIONS

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

- Introduced by: Kyl (33 Co-sponsors) Date Introduced: 1/19/99
- Status: Referred to the Committee on Judiciary; 3/23/99 Referred to Subcommittee on Constitution, Federalism, Property; 3/24/99 Committee on Judiciary. Hearings held.
- Provisions affecting rules
    - Calls for a Constitutional Amendments enumerating victim's rights.

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

April 19 and 20, 1999

The Civil Rules Advisory Committee met on April 19 and April 20, 1999, at Gleneden, Oregon. The meeting was attended by all Committee members: Judge Paul V. Niemeyer, Chair; Sheila Birnbaum, Esq.; Judge John L. Carroll; Justice Christine M. Durham; Mark O. Kasanin, Esq.; Judge Richard H. Kyle; Judge David F. Levi; Myles V. Lynk, Esq.; Acting Assistant Attorney General David W. Ogden; Judge Lee H. Rosenthal; Professor Thomas D. Rowe, Jr.; Judge Shira Ann Scheindlin; Andrew M. Scherffius, Esq.; and Chief Judge C. Roger Vinson. Frank W. Hunger attended this meeting as the first after conclusion of his service as a member. Edward H. Cooper was present as Reporter, and Richard L. Marcus was present as Special Reporter for the Discovery Subcommittee. Judge Anthony J. Scirica attended as Chair of the Standing Committee on Rules of Practice and Procedure, and Sol Schreiber, Esq., attended as liaison member from the Standing Committee. Peter G. McCabe, John K. Rabiej, and Mark Shapiro represented the Administrative Office of the United States Courts. Thomas E. Willging represented the Federal Judicial Center. Observers included Scott J. Atlas (American Bar Association Litigation Section); John Beisner; Robert Campbell (American College of Trial Lawyers); Alfred W. Cortese, Jr.; Francis H. Fox (American College of Trial Lawyers); Marsha Rabiteau; Fred Souk; and Jackson Williams (Defense Research Institute).

Judge Niemeyer greeted all present, and introduced David Ogden. On behalf of the committee, he thanked Frank Hunger for his enormous contributions over the years to the committee's work. He will be sorely missed in future committee deliberations. A certificate of recognition and appreciation for service on the committee from 1993 to 1999 was presented. General Hunger responded that work with the committee has been a most enjoyable and rewarding professional experience. Work with the committee really is a public service; the committee work affects the everyday practice of law.

It was announced that Judge Fern M. Smith, currently chair of the Evidence Rules Advisory Committee, will become the new director of the Federal Judicial Center.

It also was noted with pride that the National Center for State Courts has presented a Distinguished Service Award to Justice Durham.

The Report of the ad hoc Mass Torts Working Group was presented to Chief Justice Rehnquist punctually on February 15. There has not yet been any direct response from the Chief Justice, but he has agreed that the Report and appendices be public documents. The Report will be distributed to all who attended Working Group meetings, and to the staffs of the judiciary committees. If a successor committee is appointed, the Civil Rules committee may well take up Rule 23 again, considering further the items that have been put on the table and perhaps new ideas that may emerge from the mass torts committee.

Report on Standing Committee

At its January meeting, the Standing Committee approved publication of this Committee's proposals to abrogate the Copyright Rules of Practice adopted under the 1909 Copyright Act, to amend Civil Rule 65 to make clear the availability of Rule 65 pretrial remedies in Copyright infringement actions, and to make conforming amendments to Civil Rule 81.

The Standing Committee also considered two drafts of Civil Rule 83 that would impose uniform effective date limits on local district-court rules. The first draft substantially tracked a proposal advanced by the Appellate Rules Committee; the second would add further constraints on local rules. These local rules problems are well suited to Standing Committee deliberation. There is some apparent tension between the local-rules power established by 28 U.S.C.A. § 2071 and the general supersession power established by § 2072. There also are tensions between the strong desires of many districts to adopt extensive local rules and the goal of a nationally uniform set of procedural rules. The questions raised by this Committee's drafts may best be explored, in conjunction with parallel proposals by other advisory committees, under the direction of the Standing Committee. Judge Scirica observed that the Standing Committee hopes to find funding to continue its longstanding Local Rules Project; it is an important undertaking.

John Rabiej noted that the Standing Committee has established a subcommittee to consider the question whether the Enabling Act process should be used to adopt a body of Federal Rules of Attorney Conduct. The subcommittee includes two representatives from each of the advisory committees — Judge Rosenthal and Myles Lynk are the representatives from the Civil Rules committee. There will be an informational meeting this May, and a meeting in late summer that is designed to make recommendations to be considered at the fall meetings of the advisory committees. The three alternatives that have remained in contention are to do nothing about the present situation, in which each district determines for itself what rules to apply to regulate attorney conduct; to adopt a simple national rule that incorporates for each district local state professional responsibility rules; or to adopt a uniform body of Federal Rules of Attorney Conduct that speak directly to some matters of special federal interest, while incorporating local state rules for all other matters. The statute that subjects government attorneys to state rules took effect recently, but it is acknowledged that the statute has problems. Congress is continuing to consider these matters. Much of the difficulty with state regulation of government attorneys has centered on the Department of Justice policy that allows government attorneys to conduct investigations that include private interviews with persons who are represented by attorneys.

Report on Legislation

Congress continually considers bills that affect procedure, at times directly amending a Federal Rule of Civil Procedure. The Administrative Office maintains constant vigil to ensure that the Standing Committee and advisory committees are kept informed of these proposals, and facilitates communication between the committees and Congress.

John Rabiej presented a report on present matters of interest to the Enabling Act Committees. This Congress is still relatively young, and there have not yet been many bills of direct interest.

Representative Coble has introduced a bill to require stenographic recordings of Civil Rule 30 and Rule 31 depositions. This bill has moved out of subcommittee. The Administrative Office continues to respond with letters that explain the reasons for the Civil Rules amendments that permit recording by other means chosen by the party who notices the deposition, and that permit other parties to arrange alternative means of recording. There has not yet been any apparent action on these issues in the Senate.

The bills designed to deal with computer problems anticipated to arise with the advent of the year 2000 include heightened pleading provisions and would establish federal jurisdiction over class actions based on minimal diversity. The class-action provisions are very similar to the provisions in bills that would establish minimum-diversity jurisdiction for class actions in general. Some "Y2K" legislation is expected to pass, but it is not clear whether the class-action provisions will remain in the bill. The general class-action bill has been reintroduced in the Senate, but does not seem headed for immediate consideration. Committee discussion noted that this committee has been reluctant to adopt heightened pleading requirements for specific substantive areas. It may be appropriate to adopt a low-key position with respect to substance-specific heightened pleading requirements, although it is always appropriate to remind Congress of the basic notice-pleading procedure system. It also was noted that it is useful to remind Congress continually of the basic nature of the Enabling Act process. The Enabling Act recognizes that the judiciary should bear primary responsibility for shaping rules of judicial procedure, subject to deferential review by Congress.

The concluding observation was that Congress is generally aware of the Enabling Act process and respects the virtues of the process. At the same time, procedural provisions often are incorporated in bills because the sponsors feel a need to act faster than is possible under the Enabling Act. Generally these procedural provisions are not adopted.

Approval of Minutes

The draft minutes of the November 1998 meeting were approved.

Published Proposals: Rules 4, 12

Proposals to amend Rules 4 and 12 were published in August 1998. The purpose of the amendments is to require service on the United States when a federal employee is sued in an individual capacity for acts done in connection with the performance of duties on behalf of the United States. Most of the comments were favorable.

Some of the comments suggested that it would be desirable to expand this provision to require service on a state when a state official is sued in an individual capacity for acts done in connection with the performance of state duties. This possibility was discussed at the March 1998 meeting and put aside. Brief discussion found no reason to revisit the original decision.

Two comments suggested the need for drafting improvements. The first of these comments pointed out that, read literally, proposed Rule 4(i)(2) subparagraphs (A) and (B) would require that both the United States and the employee be served twice when suit is brought against an employee

in both official and individual capacities. Although it might be hoped that this foolish consequence would not be read into these separate provisions, it was concluded that it would be better to adopt an express subordination of subparagraph (A) to subparagraph (B). This change was accomplished in two steps. Subparagraph (A) is revised to apply when an officer is sued "only" in an official capacity. In addition, subparagraph (B) is revised to apply when an officer or employee is sued in an individual capacity, "whether or not the officer or employee is sued also in an official capacity." (The committee left it to the Reporter and Style Committee to resolve the drafting choice between "whether or not" and "regardless of whether.") A motion to delete this new phrase was made on the ground that it is redundant. The Note can point out that subparagraph (A) applies only when the officer is sued only in an official capacity. The motion was opposed on the ground that it is better to make things clear, even if redundantly clear, to the pro se litigants who bring many of these actions. The motion failed by vote of 4 in favor and 9 against.

The second drafting comment pointed out a lack of parallelism between proposed Rule 12(a)(3)(A) and proposed Rule 4(i)(2)(A). Rule 12 refers to "an officer or employee" sued in an individual capacity, while Rule 4 refers only to an "officer" sued in an individual capacity. Discussion of the best choice reflected that there is no technical definition of "officer" for purposes of the Civil Rules. It is possible, although it seems awkward, that an "employee" may be sued in an official capacity; certainly many actions are filed that seem to proceed on this premise. This concern led to the decision to add "employee" to Rule 4(i)(2)(A), making it read: "(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 * * *." "Employee" also should be added at the end of the subparagraph: " * * * also sending a copy of the summons and complaint * * * to the officer, employee, agency or corporation." With this change in Rule 4, there is no need to change Rule 12.

Published Proposals: Admiralty Rules

Proposals to amend Admiralty Rules B, C, and E were published in August 1998. Civil Rule 14 would be amended in two places to reflect the changed terminology proposed for Rule C. The comments and testimony generally favored the proposals. Some drafting changes were suggested.

In response to the drafting suggestions, the committee unanimously determined to make two sets of changes. The first change is to Rule B(1), moving "in an in personam action" from paragraph (a) up to the introductory line of subdivision (1).

The second set of changes affects Rules B(d)(i) and (ii) and also C(3)(b)(i) and (ii). The published proposals drew from present Rule C(3), which provides that the clerk is to deliver the arrest warrant in an in rem proceeding to the marshal. The comments suggested that practice varies from district to district, but that in some districts it has proved more expeditious to have the clerk deliver the papers to the attorney, who then delivers them to the marshal. The Maritime Law Association has considered this comment, and endorses the suggestion that the rules be changed to provide that the warrant, summons, or process be delivered to the marshal or other person responsible for service; the requirement that the clerk effect delivery would be removed. The committee adopted this change for the reasons given. The committee also concluded that there is no need to republish the C(3) proposal, even though this action will effect a change in the language

of the present rule that was not identified in the August, 1998 publication. These parallel provisions in Rules B and C should be expressed in parallel fashion, and the change is fully in keeping with the process that led to the Rule 4 provision that the clerk delivers the summons in a civil action to the plaintiff for service on the defendant.

The Committee unanimously rejected two other proposed drafting changes. One change would add language to Rule B(1)(a): "If a defendant is not found within the district, a verified complaint that asserts an admiralty or maritime claim may contain a prayer for process to attach the defendant's tangible or intangible personal property." This suggestion reflected concern that lawyers unsophisticated in admiralty practice might attempt to use maritime attachment or garnishment in actions not brought in the admiralty jurisdiction. Such attempted misuse might in turn reopen the questions of notice practice that have been resolved in reliance on the special needs of admiralty proceedings. Rule A, however, makes it clear that the Admiralty Rules apply only to admiralty and maritime proceedings. This particular redundancy seemed unnecessary.

The other rejected change would have revised Rule B(1)(e) to refer to "restraint" of person, rather than "seizure" of person, for the purpose of securing satisfaction of the judgment. The published language, however, draws directly from Civil Rule 64: Rule B(1)(e) allows a plaintiff to "invoke state-law remedies under Rule 64 for seizure of person or property," the very language used in Rule 64. It seems better not to depart from the language of the rule incorporated.

The committee unanimously adopted a suggestion from the Maritime Law Association to add a new sentence to the Note on Rule B(1)(e). The note would make it clear that deletion of the superseded Rule E(8) reference to a restricted appearance under Civil Rule 4(e) does not affect reliance on similar state procedures when state prejudgment remedies are invoked through Civil Rule 64. The sentence reads: "But if state law allows a special, limited, or restricted appearance as an incident of the remedy adopted from state law, the state practice applies through Rule 64 'in the manner provided by' state law."

Published Proposals: Discovery Rules

An extensive package of discovery rules amendments was published in August, 1998. 301 numbered comments were received; more than 70 witnesses testified at three hearings; many of the witnesses supplied written statements in addition to their oral testimony. In addition to being voluminous, the public response was thoughtful and thorough. The comments generally were parallel to the arguments that were considered by the committee during the process of meetings, conferences, and subcommittee deliberations that shaped the published proposals. The comments thus in large part reinforced the initial conclusions. At the same time, the comment process brings an element of democracy into the committee's work. There are differing interests in the civil rules, often divided for rough purposes between plaintiffs and defendants. The committee must work to identify the interests, to appraise them, and ultimately to balance them. Hearing from many different points of view advances this process from well-informed speculation to clear articulation of these interests.

Judge Niemeyer introduced the discussion of the discovery rules by observing further that the committee process has been exceptionally good. It should be a model for the way that big projects are handled. The public and Congress should be made aware of the way the process works. Confidence in the product will be enhanced when the underlying work is recognized.

In response to the testimony and comments, the Discovery Subcommittee has proposed resolutions to questions that were published with requests for comment on alternative versions. It also has proposed adjustments in the wording of some rules, and additions to the Notes to address some of the uncertainties suggested. It was agreed that the best mode of deliberation would be to address first all of the issues raised by the Subcommittee report. Once the optimal version of the published package is reached, it will be time to address any fundamental changes that may be moved by committee members.

Special Reporter Marcus led presentation of the Subcommittee package. He began by observing that there were a few policy choices that had been left open by the committee, and that the Subcommittee would present recommendations — often unanimous recommendations — as to most of them. For want of any overriding logic, the package would be presented in numerical order of the rules affected.

Rule 5(d). In its present form, Rule 5(d) provides that a court may order that designated discovery materials not be filed until used in the proceeding or an order to file is entered. This provision has been implemented by many local rules that prohibit filing in general terms that seem inconsistent with the requirement that there be a court order. This committee proposed an amended rule that designated discovery materials "need not" be filed until used in the proceeding or until filing is ordered. At the June, 1998 meeting, the Standing Committee directed that the proposal be amended to provide that the designated materials "must not" be filed until used or until filing is ordered. The materials published in August reflected this history. The Subcommittee, by divided vote, recommends that "need not" be recommended again to the Standing Committee.

It is not entirely clear whether "must not" or "need not" file would have a greater impact on present local-rule practice. It seems likely that most local rules prohibit filing before the discovery materials are used, or filing is ordered. But at least some of the local rules complicate this practice by specifically authorizing nonparty motions for access to discovery materials. Whatever the range of impact, either form of the proposed national rule will supersede local rules.

Under the "must not" version, a party who wishes to file discovery materials must create an occasion for filing. One method would be to move for an order directing filing. Another method would be to somehow "use" the materials.

There is no good way to predict whether the "need not" version would lead to voluminous filings of discovery materials in advance of any use. If the better guess seems to be that courts would not be swamped with discovery filings, there is little way to be confident that this will be the outcome.

The Public Citizen Litigation Group has urged that the "need not" formulation be adopted. It seems likely that other groups interested in public access to litigation materials also will favor that formulation.

It was suggested that the form of the rule may have an impact on the way state-law defamation privileges develop. There is reason to believe that many states will recognize a privilege for published statements that reflect materials filed in court. It is difficult to guess whether a similar privilege would be recognized for statements that reflect discovery materials that have not been filed.

Support for the "must not" version was expressed on the ground that the Standing Committee had acted because many local rules say "must not." The Ninth Circuit Circuit Council urged that the national rule be amended to confirm the legitimacy of this practice. The local rules have worked. "Need not" is odd language, but clearly means that the decision to file is left to the unrestricted discretion of the attorneys and parties. Concerns of public access prove perplexing in many areas. But we must remember that the function of the discovery rules is not to create an expanded Freedom of Information Act that reaches private and public information outside present statutes. And it is not the function of the discovery rules to address state defamation law.

Further support for the "must not" version was expressed on the ground that the "need not" version "would create havoc." When one party wants to go public with information, it will create an excuse to "use" the information, file, and go to the press. The response will be increased protective-order motions. The "must not" version also is "certain and clear." The "need not" version, moreover, will invite local rules saying "must not" no matter how clearly inconsistent with the national rule.

In response, it was suggested that a protective order is needed to ensure confidentiality whether or not discovery materials are filed. Absent a protective order, there is nothing to restrain a party from disclosing discovery materials to anyone it wishes. Protective orders are routinely entered, commonly by agreement of the parties, in "complex" litigation, but often are not sought in more routine litigation. In many courts, employment cases have become a substantial portion of the case load. Depositions and other discovery materials in these cases often deal with intensely personal information involving both parties and nonparties. These materials should not be spread on the public record.

It was asked whether the "must not" version would inhibit the opportunity to avoid wasteful discovery duplication in parallel cases. A response was that in mass torts, there is an information network entirely outside of court filing. The first question is "give me all your other discovery." The "must not" version will not affect this practice. And there are similar networks even apart from mass torts. Discovery sharing is achieved readily now, and will be achieved under a "must not" approach to filing. A "need not" approach, on the other hand, could lead to unproductive wars of filing.

A final argument was that the "must not" version would lead to motions for orders to file, and would encourage parties to invent uses for discovery materials in order to file them. "Need not" is clearer.

Voting on the alternatives, 11 voted for "must not" and 2 voted for "need not."

It was asked whether a sentence should be added to the Committee Note to provide an express reminder that a party who wishes to file discovery materials may move for an order that directs filing. The final paragraph of the Note addresses filing on use; why not also filing on order? The conclusion was that there is no need to point out an opportunity that is clear on the face of the Rule.

As a separate question, it was asked why the package includes provisions deleting the requirement that Rule 26(a)(1) and (a)(2) disclosures be filed, but — in both Rule 5(d) and Rule 26(a)(3) — requires that pretrial disclosures under Rule 26(a)(3) be filed. It was responded that Rule 26(a)(3) requires objections to be filed before trial; it makes sense that the disclosure be filed to provide a coherent record for the objections. Rule 26(a)(3) is a form of final pretrial activity; it is important that these disclosures be readily available to the judge.

It also was asked whether the Committee Note should address retention of discovery materials that are not filed. This question relates to the Rule 30(f)(1) provision directing that an attorney store a deposition transcript in protective conditions. Preservation of other discovery materials is not directly addressed by the rules. Of course any prudent lawyer will retain all discovery requests and the corresponding responses. Possible Note language is suggested at pages 9 to 10 of the Subcommittee memorandum. The question is whether we need adopt the material appearing at lines 279 to 282.

It was asked how long a lawyer is supposed to retain discovery materials. Usual practice is to give the materials back to the client after the litigation is over. Is the comment intended to imply an affirmative duty? Is it a duty of unlimited duration? There is no indication in Rule 30(f)(1) as to the duration of the lawyer's duty to protect a deposition transcript.

It was suggested that the draft language referring to what a "prudent" lawyer does may seem to create a duty of care. An attempt to address preservation of discovery materials through the Committee Note may disrupt practice as it now is.

A motion was made to amend the Committee Note to describe a requirement that discovery materials be kept during the course of the litigation. It was suggested and accepted that the statement at lines 275 to 276 could be changed by substituting "during the course of the litigation" for "by prudent counsel.

It was protested that the draft Note language looks like an effort to amend Rule 30(f)(1) indirectly. The reference to "it is expected" does not say who expects this. The suggestion that the duty to preserve other discovery materials is "similar" to the Rule 30(f)(1) duty seems to imply a time limit that is not now expressed in Rule 30(f)(1).

Another protest was that a lawyer cannot lose or destroy documents during a litigation. The Note, in attempting to address this issue in incomplete terms, will lead to mischief. There is a risk that the Note language will be read to narrow the duty that presently exists. We just do not need this language; both sides have discovery material, and all parties recognize the need and obligation to preserve it.

An alternative suggestion was that the Note could refer to the duty to preserve discovery materials indirectly by stating that the prohibition on filing does not alter the responsibility to preserve.

On the question whether to add lines 271 to 282 of the Subcommittee Memorandum to the Rule 5(d) note, it was decided unanimously not to add this material.

Rule 26(a)(1): "May use" formulation. After extensive discussion at the March, 1998 meeting, it was decided to frame the revised initial disclosure provisions of Rule 26(a)(1) to require a party to disclose witnesses and documents "supporting its claims or defenses, unless solely for impeachment." The alternative formulation called for a party to disclose information it "may use to support its claims or defenses, unless solely for impeachment." In publishing the Rule 26(a)(1) proposal, the alternative formulation was identified for comment. There was little comment.

The choice between "supporting" and "may use to support" divided the committee by a margin of 7 to 4 in 1998. The Subcommittee has reconsidered the question, and concluded to submit the issue to the committee without recommendation. Because there is no Subcommittee recommendation, the question whether to depart from the earlier vote and from the published version was opened without a motion. A motion was then made to change to the "may use" formulation.

The arguments for the competing proposals were set out at some length in summaries by the Reporter and the Special Reporter, appearing at pages 11 to 21 of the Subcommittee Memorandum. The Reporter and Special Reporter presented these arguments in condensed form. The supporting memoranda are set out as Appendix A to these Minutes.

Committee discussion began with an expression of concern about the cost of extensive disclosure. The "supporting" approach requires disclosure of information that the disclosing party has no intention to use, requires investigation to unearth supporting information that the party would not undertake for its own purposes, and may require disclosure of witnesses or documents that in any way involve supporting information even though the balance is heavily unfavorable to the disclosing party. An example was offered of an automobile design developed from 1985, first produced in 1990, and embodied in a vehicle sold in 1995 that was involved in a 1997 accident. Information about all of these matters will be used, and is properly disclosed. Information about events in 1955 that might seem to support the continuing evolution of automobile design would not be sought out or used, and should not be subject to a disclosure requirement.

An alternative view was that the narrower version is better, but that it is not clear whether "supporting" is broader or narrower than "may use." The committee should adopt the language that is narrower, less open-ended. We should focus on material that a party actually intends, at the time of disclosure, to use at trial. It was responded that "may use" is closer to intent, and narrows the obligation in a way that "supporting" does not. The Reporter and Special Reporter agree that "may use" would create a lesser disclosure duty. The proponent of the "intent" approach urged that the Note should say that "may use" means "intends at this time to use."

It was noted that Rule 26(a)(1) already provides that disclosure is to be made "based on information then reasonably available to" a party and is not excused because the disclosing party "has

not fully completed its investigation of the case." This provision is supplemented by the continuing duty to supplement created by Rule 26(e)(1). "May use" is not "will use," but speaks only to current estimates. The duty to supplement means that the disclosure obligation in effect merges with the discovery process: the more thorough the discovery process is, the less occasion there will be to disclose.

It also was suggested that in reality, most parties pay little attention to initial disclosure obligations. Most plaintiffs would rather get on directly to discovery.

Scott Atlas noted that when the ABA Litigation Section selected "supporting" over "may use," it had not particularly focused on the arguments presented to the committee. He suspected that the Section would prefer the narrower version.

When the alternative formulations were put to a vote, 11 votes preferred "may use," and 1 vote preferred "supporting."

It was urged again that the Note should say that the "may use" formulation is narrower than the published proposal to require disclosure of "supporting" information.

Rule 26(a)(1): "High-end exclusion". Proposed Rule 26(a)(1) provides that initial disclosures are to be made within 14 days after the Rule 26(f) conference unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action. This proposal reflects the view that in some circumstances it may be better to proceed directly to discovery and other pretrial management devices. Lines 784 to 795 of the Subcommittee Memorandum propose language that might be added to the Committee Note to provide examples of such circumstances. Many lawyers have advised the committee that initial disclosures are routinely bypassed in complex litigation. The prospect of early disposition for lack of jurisdiction, or failure to state a claim, suggests other circumstances that might justify delay or disregard of initial disclosure procedure.

It was suggested that it would be better not to address this topic in the Committee Note. There is a special risk that suggesting that dispositive motions may toll disclosure will invite more motions.

The committee mustered 3 votes to include the proposed Note language, and 8 votes to omit it.

Rule 26(a)(1)(E): "Low-end exclusion". Proposed Rule 26(a)(1)(E) enumerates eight categories of proceedings that are exempted from the initial disclosure requirement. These exemptions are incorporated as well in proposed Rules 26(d) and 26(f) — in these categories of proceedings there is no Rule 26(f) conference obligation, and no Rule 26(d) discovery moratorium. When the proposals were published, the committee asked for comment on the categories chosen for exemption, and also on the ways to express the exemptions. There were not many comments.

The first exemption, (i), covers "an action for review on an administrative record." Some of the comments suggested that this description is ambiguous because administrative actions are at times "reviewed" in settings that are collateral to the main object of a proceeding. The committee

approved the addition of two new sentences to the Committee Note, following the statement that the descriptions of the exemptions are generic and are to be administered flexibly: "The exclusion of an action for review on an administrative record, for example, is intended to reach a proceeding that is framed as an 'appeal' based solely on an administrative record. The exclusion would not apply to a proceeding in a form that commonly permits admission of new evidence to supplement the record."

The third exemption, (iii), covers "an action brought without counsel by a person in custody of the United States, a state, or a state subdivision." One suggestion was that disclosure should be required of the government when it is involved in such an action, but not of the plaintiff. Another suggestion was that the exemption should cover all pro se actions. Committee discussion noted that pro se employment cases have come to occupy a substantial portion of the docket in some courts, and that there can be problems with disclosure and the Rule 26(f) conference in such cases. But it also was observed that the practice in both the Eastern and Southern Districts of New York is that the defense discloses to a pro se plaintiff, and that this works. Another judge observed that disclosure and the Rule 26(f) conference help to move pro se cases. When the parties come to court, there has been at least an initial discussion, and the plaintiff often has a better idea of what the case is about. The committee concluded that the exemption should not be changed.

The fifth and sixth exemptions, (v) and (vi), cover "an action by the United States to recover benefit payments" and "an action by the United States to collect on a student loan guaranteed by the United States." The Department of Justice urged that these two exemptions be combined into one exemption, and extended to cover all actions by the United States to recover on a loan. Consumer groups urged that the exemptions be deleted, urging that disclosure is important because the United States frequently fails to maintain adequate records and will be forced by disclosure to present a coherent account of the amounts due. Committee discussion suggested that the consumer group concerns do not have much support. These actions are not filed without thought, and usually the information underlying the claim is narrow, straightforward, and clear. The reasons for not requiring disclosure apply at least to all loans. But it also was noted that there are many foreclosure actions, and that foreclosure actions may not be so simple. The committee concluded that these exemptions should not be changed.

A motion was made to drop the student loan exemption on the ground that disclosure and the Rule 26(f) conference will expedite the proceedings. It was further observed that once the defendant "knows the number," there are a lot of quick settlements. If there is not a settlement, disclosure and a Rule 26(f) conference may be the most efficient means to dispose of these cases. But it also was observed that there is disclosure in practice — that the collection process typically is managed by a paralegal or other staff person who calculates the amount due and delivers the calculation to the debtor. Even in cases that do not go by default, the answer typically admits the amount due. The vote was one to drop the exemption, and all others to retain the exemption.

The seventh exemption, (vii), covers "a proceeding ancillary to proceedings in other courts." This exemption was intended to reach such matters as ancillary discovery proceedings, judgment registration, an action to enforce a judgment entered by a state or foreign court, and the like. A group of bankruptcy judges, however, expressed concern that the exemption might apply to an adversary proceeding in bankruptcy. The Reporter for the Bankruptcy Rules Committee agreed that the

exemption should not be read to reach adversary proceedings in bankruptcy, but suggested that the Committee Note might include an express statement on this subject. The Committee determined to add this new sentence at the end of the last full paragraph on page 51 of the published proposals: "Item (vii), excluding a proceeding ancillary to proceedings in other courts, does not refer to bankruptcy proceedings; application of the Civil Rules to bankruptcy proceedings is determined by the Bankruptcy Rules."

In addition to discussion of the exemptions included in proposed Rule 26(a)(1)(E), the comments and testimony suggested another 23 enumerated exemptions. It also was suggested that the rule should authorize further exemptions by local district rule. The committee agreed that it is better not to propose additional exemptions for public comment. It will be time enough to consider additional exemptions after developing experience with the present proposals.

Rule 26(b)(1): Drafting Change. The Discovery Subcommittee offered no recommendations with respect to the substance of the proposal to redefine the scope of discovery in Rule 26(b)(1). It did, however, suggest a one-word change in drafting. Rule 26(b)(1), now and as it would be amended, allows discovery of "any matter" relevant to the litigation. In the present rule, it is any matter relevant to the subject matter of the pending action. In the proposed rule, it is any matter relevant to the claim or defense of any party. The proposed rule then allows the court to expand discovery back to the "subject matter" scope. As published, see line 131 on page 42, the expansion allows the court to order discovery of any "information" relevant to the subject matter. Use of "information" in this setting introduces a potential ambiguity. The intent of this "court-managed" discovery provision is to allow discovery within the full scope of the present rule; the only change is that discovery to this extent requires a showing of good cause and a court order. Unambiguous communication of this intention requires that the court-managed discovery provision be drafted in the language of the present rule. The committee unanimously agreed to change this provision to read: "For good cause shown, the court may order discovery of any ~~information~~ matter relevant to the subject matter involved in the action."

Rule 26(b)(1): "Background" information. Many of the comments on proposed Rule 26(b)(1) expressed doubt whether the change in lawyer-managed discovery from information relevant to the "subject matter" to information relevant to a claim or defense would require a court order to win discovery of various forms of information now commonly discoverable. This doubt was expressed in general terms of "background" information, but also in more focused terms. The most common examples involved impeachment information; "organizational" information identifying the people and documents or things to be subjected to further discovery; and "other incident" information involving such matters as other injuries involving similar products or the treatment of other employees for comparison with an employment-discrimination plaintiff. Additional Committee Note language was proposed to address these concerns, appearing at lines 1110 to 1123 of the agenda materials. This language is rather general. The material at lines 1112 to 1115 dealing with "other incident" information was discussed by the Discovery Subcommittee.

Discussion of the proposed Note language began with the observation that such phrases as "could be" and "might be" are troubling. They imply that the described information also might not be discoverable. The Note material, moreover, "reads like an application note to a Sentencing

Guideline."

It was responded that the proposed language is excellent, making it clear that the committee never intended to close off discovery of such materials.

But it was urged that it would be better to omit the limited examples precisely because they might be seen to be limiting. It is enough to say that the boundaries of discovery should be decided on a case-by-case basis. And it was urged that to the contrary, some concreteness helps. The help is particularly important because the frequent appearance of these questions in the comments shows that lawyers will raise the same questions if the proposed rule is adopted.

A motion was made to add a sentence to the Note stating that the "claim or defense" scope of attorney-managed discovery does not exclude discovery of matter admissible under Evidence Rule 404(b). The motion failed, 4 votes in favor and 7 votes against.

It was suggested that the Note illustrations should be prefaced by "For example." Line 1115 could begin: "For example, information about organizational arrangements * * * could be discoverable." This introduction would treat the following categories also as examples.

It also was suggested that the reference to "incidents" in line 1113 is curious — it is more common to refer to "other event" or "other occurrence" information than to "other incident" information.

A motion to include lines 1110 to 1123 in the Committee Note passed with one dissent.

Rule 26(b)(1): "Relevant" information. Another change that would be made by the proposals for subdivision (b)(1) adds the word "relevant" at the beginning of the sentence allowing discovery of information not admissible at trial. Questions about this addition were raised in the comments. The committee added this reminder about relevance to ensure that the effect of the change that separates lawyer-managed discovery from court-managed discovery would not be swallowed up by misinterpretation of this sentence. The committee unanimously approved the Subcommittee proposal to add a new sentence to the Committee Note to further explain the meaning of "relevant" in this sentence: "As used here, 'relevant' means within the scope of discovery as defined in this subdivision, and it would include information relevant to the subject matter involved in the action if the court has ordered discovery to that limit based on a showing of good cause."

Rule 26(b)(1): Relation of cost-bearing to good-cause expansion. The committee conceived the subdivision (b)(1) scope proposal as a matter entirely independent of the cost-bearing proposal that was published as an amendment to Rule 34(b). Many of the comments, however, have assumed that there is a connection. The supposed connections have run in various directions. Some assume that showing good cause for expanding the scope of discovery automatically means that cost-bearing is not appropriate. Others assume that a party who is willing to bear the costs is automatically entitled to expand the scope of discovery. And still others assumed that an order finding good cause to expand the scope of discovery automatically should order cost bearing. The Discovery Subcommittee discussed a possible addition to the Committee Note that is set out at page 38, note 7, lines 1199 to 1212 of the agenda materials. Different and more expanded Note language is set out

at pages 39 to 40, lines 1223 to 1257; yet another and earlier alternative model is set out at page 40, note 9, lines 1261 to 1285. The Special Reporter remained dissatisfied with each of these versions, and suggested that perhaps further work should be done.

Discussion of these alternatives began with the reassurance that cost bearing is contemplated only within the principles of Rule 26(b)(2) and 26(c), whether the new provision is located in Rule 34(b) as published or is relocated to Rule 26(b)(2) as proposed for later discussion. The relation of cost bearing to expanding the scope of discovery depends, however, on the context of actual administration. A judge, for example, might find good cause for expanded discovery of three specified items; if nothing is said about cost bearing, the ordinary assumption should be that there is no need to consider cost-bearing further. A general order that opens the scope of discovery, however, need not have resolved that everything within the reach of "subject-matter" discovery is discoverable within the limits of Rule 26(b)(2) and the protective power of Rule 26(c). The scope and cost-bearing provisions are conceptually independent, and it may help to emphasize that the risk of confusion arises in actual administration when an initial focus on scope may — or may not — include consideration of (b)(2) principles. Concrete examples could illustrate the risks of confusion and clarify the conceptual independence.

The material at lines 1224 to 1257 was proposed for examination, subject to further work to integrate some of the material in footnote 9.

Lines 1223 to 1227 of the proposed Note language read: "The limitations of subdivision (b)(2) might be particularly pertinent to requests to expand discovery beyond matters relevant to the claims or defenses, and a party opposing such expansion could invoke its limitations." It was suggested that this language suggests a link between cost bearing and the scope of discovery that should not be emphasized. But it was responded that these lines work well with the first part of the paragraph, as published, which emphasizes that (b)(2) principles apply to limit discovery that otherwise is permissible under the general scope provision in (b)(1).

A different concern with the material at lines 1223 to 1227 was that it could become misleading if the cost-bearing provision is relocated to Rule 26(b)(2).

The material in footnote 7, lines 1199 to 1212 was offered as an alternative addition to the Note. It was agreed that the final sentence should be changed to make it clear that application of (b)(2) limits can justify denial of discovery as well as cost bearing: "it could happen that some such proposed discovery might exceed the limitations of subdivision (b)(2) and therefore be <u>denied,</u> or subject to a cost-bearing order."

It was moved that the material at lines 1223 to 1227 be adopted, to be followed by the material at lines 1199 to 1212 as modified. An amendment was proposed, deleting lines 1223 to 1227 and adding only lines 1199 to 1212 as modified. It was repeated that lines 1223 to 1227 seem to work an inappropriate fusion of "good cause" in (b)(1) with (b)(2) principles. And it again was observed that if cost bearing is moved from Rule 34(b) to Rule 26(b)(2), these lines will create still further confusion. Ten votes were cast to delete the material at lines 1223 to 1227.

The committee then voted unanimously to add to the material at lines 1199 to 1212 this sentence from lines 1278 to 1280: "In any event, it is clear that a party cannot automatically expand the scope of discovery by agreeing to pay the reasonable expenses of responding." The location of this sentence in the text will be determined by the Special Reporter and Reporter, with any wording changes that may be required for an appropriate fit.

The new Note language, to appear at the end of the Note material on Rule 26(b)(1) on page 57 of the publication book, will read approximately thus, taking account of the later decision to move the cost-bearing provision to Rule 26(b)(2):

> Rule 26(b)(2), as amended, provides that a court may permit discovery that exceeds the limitations of subdivisions (b)(2)(i), (ii), or (iii) on payment of part or all of the reasonable expenses incurred by the responding party. Should the court expand discovery beyond matters relevant to the claims or defenses on a showing of good cause, that conclusion would normally indicate that the proposed discovery is consistent with the limitations of subdivision (b)(2). Nonetheless, as is true of discovery relevant to the claims or defenses, such broader discovery is subject to the limitations of subdivision (b)(2), and it could happen that some such proposed discovery might exceed the limitations of subdivision (b)(2) and therefore be denied or subject to a cost-bearing order. In any event, it is clear that a party cannot automatically expand the scope of discovery by agreeing to pay the reasonable expenses of responding.

Rule 26(b)(2): The Location of Cost Bearing. The published proposals included amendment of Rule 34(b) to provide for cost bearing in these terms: "On motion under Rule 37(a) or Rule 26(c), or on its own motion, the court shall — if appropriate to implement the limitations of Rule 26(b)(2)(i), (ii), or (iii) — limit the discovery or require the party seeking discovery to pay part or all of the reasonable expenses incurred by the responding party." The letter submitting the proposals for publication, however, solicited comment on an alternative proposal to locate cost-bearing in Rule 26(b)(2) for the reasons described at pages 14 to 15 of the publication book. The choice of location was the subject of mixed comments. The Discovery Subcommittee, although not unanimously, recommended that the provision be relocated to Rule 26(b)(2). Location in Rule 26(b)(2) supports clearer drafting. The committee has believed throughout, moreover, that Rules 26(b)(2) and 26(c) already support cost-bearing orders, and recognizes that courts have in fact exercised this power. Explicit confirmation of the power in Rule 34(b) was suggested in the belief that the most frequent occasions for a cost-bearing order will arise in connection with document discovery. The published Committee Note says as much, and expressly states that courts continue to have authority to order cost bearing with respect to depositions, interrogatories, or requests for admission. The Note, however, may not be effective to defuse the possible negative implication that confirmation of the existing power in Rule 34(b) somehow defeats the same power with respect to other modes of discovery. Relocation to Rule 26(b)(2) ensures the even-handed availability of the cost-bearing power.

It was urged that the committee had it right. The problems arise with document production under Rule 34. If cost bearing is relocated to Rule 26(b)(2), "it will get lost." If this provision is

relocated to Rule 26, at least Rule 34 should be amended to include an explicit reminder of the power. It also was urged that cost bearing "is very controversial. You double the controversy by putting it in Rule 26."

Relocation was supported by urging that greater controversy will arise from the Rule 34 location. The Committee Note says that this is an existing power, and that it will continue to exist across all discovery devices. The arguments summarized at page 15 of the publication book say it well. Location in Rule 34 requires unnecessarily complicated drafting, and will lead to negative implications for those who do not bother to read the Committee Note. Cost bearing is a discovery management tool, and should be located with the Rule 26(b) management provisions.

A motion to move cost bearing to Rule 26(b)(2) passed, 8 for and 3 against. The question of adopting a cross-reference in Rule 34 was postponed for later discussion of Rule 34.

Rule 26(b)(2): Differentiated Case Management; Party Agreements. Proposed Rule 26(b)(2) repeals the authority conferred by the present rule to adopt local rules that alter the national rule limits on the number of interrogatories or the number or length of depositions. Some district judges have expressed concern that this change jeopardizes local rules that establish differentiated case-management plans. Examination of the rules in these districts shows that although the plans describe a number of different discovery "tracks" that include limits on discovery events, assignment to a discovery track is accomplished by specific order in a particular case. These plans are consistent with proposed Rule 26(b)(2), which continues to authorize orders that alter the discovery limits prescribed by the national rules. In order to allay the fears expressed by these districts, additional language is proposed for the Committee Note, as set out at page 46, lines 1463 to 1479 of the Subcommittee memorandum. Discussion of the proposal suggested that the Committee Notes are becoming too long. It was agreed that only lines 1463 to 1465 would be added to the Note: "This change is not intended to interfere with differentiated case management in districts that use this technique by case-specific order as part of their Rule 16 processes."

A concern similar to the differentiated case-management concern was expressed by a group that feared parties would lose sight of the power to modify discovery limits by agreement. The Subcommittee Memorandum suggested language for the Committee Note that would refer to the powers of the parties under Rules 26(f) and 29, and the powers of the court under Rule 16, see page 47, lines 1503 to 1507. No one moved adoption of this language.

Rule 26(d): Early Discovery. Some of the comments urged consideration of the need for early discovery in some circumstances, such as motions for preliminary relief under Rule 65 or challenges to subject-matter jurisdiction. The discovery moratorium established by Rule 26(d) will be made applicable in all courts by deletion of the power to opt out by local rule. It might help win acceptance of the new national scheme to recognize the need for early discovery in the Committee Note; suggested language is set out at page 48, lines 1536 to 1538. It was observed that the published note already says all that need be said: "The parties may agree to disregard the moratorium where it applies, and the court may so order in a case." The motion to add the new language to the Note failed.

Rule 26(f): Expedited Case Management. The proposed amendments to Rule 26(f) set the discovery conference at 21 days before a scheduling conference is held or a scheduling order is due. Judges from the Eastern District of Virginia have been concerned that this time period will interfere with their expedited case management system. The Discovery Subcommittee believes that Rule 26(f) should not interfere with such expedited case-management systems, and has proposed a new sentence for Rule 26(f) to address this problem, set out at page 50, lines 1573 to 1585 of the memorandum. This addition rests on recognition that changes to Rule 16, beginning in 1983, have been designed to prompt speedier pretrial movement of cases. There has not been any expressed desire to slow down pretrial management.

Further expanding on the new provision, the Discovery Subcommittee chair noted that he and the Special Reporter had devoted a lot of time talking to judges in the Eastern District of Virginia. It is important to accommodate their case-management model in the national rule.

It was suggested that the Virginia system serves the spirit of Rule 1 that there be speedy disposition of litigation. A court that has developed a system that accomplishes prompt dispositions should not be thwarted by rules designed to set outer time limits, not to encourage expansion to those outer limits. Even if there is legitimate doubt whether faster disposition always makes for better disposition, it would be untoward to upset a system carefully developed by a court that is proud of the results.

This discussion led to discussion of the published proposal to set the discovery conference at 21 days before the scheduling conference or order, and to require the report to the court within 14 days after the discovery conference. These periods were selected because the former periods of 14 days and 10 days could lead to delivery of the discovery conference report to the court too late to be of use at the scheduling conference, particularly given the method of calculating periods of less than 11 days. It was asked whether the problem could be cured by changing the time for the discovery conference back to 14 days before the scheduling conference and requiring the discovery conference report within 7 days. This approach would not address the needs of the Eastern District of Virginia, where a Rule 16 scheduling conference may be set much sooner after the answer is filed.

It was suggested that the draft Committee Note to accompany the new Rule provision was too long, and that the paraphrasing of the new rule language at lines 1610 to 1626 on page 51 should be deleted. A motion to delete this language passed by unanimous vote. Styling changes were made. The committee then voted unanimously to adopt this new language after the last sentence of proposed Rule 26(f):

> A court may by local rule or order require that the parties or attorneys attend the conference in person. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule (i) require that the conference between the parties under this subdivision occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b), and (ii) require that the written report outlining the discovery plan be filed less than 14 days after the conference between the parties, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

The committee also voted unanimously to add to the Committee Note the provisions appearing at lines 1598 to 1610 and 1626 to 1629 of the Subcommittee Memorandum.

It was noted that this language was not part of the rule published for comment, and agreed that the lack of publication should be pointed out to the Standing Committee. The committee concluded, however, that this is the kind of change in response to public comment that can properly be made without further publication. It would be undesirable to carve this accommodation of a specific need out from the general package of amendments for a separate process of comment and tardy adoption.

Rule 30(d): Deponent Veto. The published proposal to adopt a presumptive 7-hour limit for depositions included a provision to extend the time by stipulation "by the parties and the deponent." Great concern was expressed about the "deponent veto" in the testimony and comments. The Discovery Subcommittee recommended deletion of the deponent veto. The recommendation was unanimously adopted by the committee. The corresponding portion of the Committee Note will be deleted, as indicated at lines 1697 to 1700 of the Subcommittee Memorandum.

Rule 30(d): Calculation of 7-Hour Limit. The public comments and testimony expressed many concerns about the method of calculating the 7-hour presumptive time limit for depositions. Specific concern was addressed to application of the limit to Rule 30(b)(6) depositions of an organization when the organization designates more than one person to testify on its behalf. The Subcommittee proposed two new sentences for the Committee Note. The first, appearing at page 54, lines 1690 to 1693, recognizes that "breaks" do not count as part of the 7 hours, and that the only time to be counted is that occupied by the actual deposition. The Subcommittee made a deliberate decision not to speak more precisely to the "stopwatch" mentality that many comments feared will arise. The second, appearing at lines 1693 to 1696, states that the deposition of each person designated under Rule 30(b)(6) counts as a separate deposition for purposes of the 7-hour limit.

It was asked whether even the discussion of reasonable breaks for lunch and other needs departs too far from the appropriate spirit of "one day without a stopwatch." The new language only shadows the problems feared to arise from disputes over allocation of the 7 hours among multiple parties, cross-examination, objections, and the like. It also seems to approach micromanagement. But it was answered that a surprising number of comments expressed uncertainty over so basic a question as whether a lunch break would count toward the 7 hours. A motion to delete proposed lines 1690 to 1693 failed, 2 for and 10 against.

Turning to the organization deponent, it was noted that for purposes of the Rule 30(a)(2)(A) 10-deposition limit, a deposition of an organization counts as only one deposition no matter how many people are designated to testify on behalf of the organization. The opposite answer is proper for the Rule 30(d)(2) time limit — it would be absurd to limit depositions to an average of 42 minutes if an organization designated 10 people to testify.

Lines 1690-1695 were adopted unanimously.

Rule 30(d)(2): Extending the 7-hour limit. Many, many comments urged changes in the proposed one-day, 7-hour deposition limit. A change to 2 days was often urged. Even more often, it was

argued that depositions of expert witnesses should be exempted. A variety of other exemptions and changes were suggested. The Subcommittee did not think it useful to attempt to capture in the Rule any formula to guide decisions whether to extend the limit. But it thought it might help to list examples of circumstances that may justify expansion. Proposed new Committee Note language is set out at pages 55 to 56 of the Subcommittee Memorandum, lines 1737 to 1778. The initial emphasis is on circumstances the parties may consider in agreeing to extend the time, as a means of underscoring the primacy of party agreement over resort to court order. The draft also notes that it is desirable to deliver documents to be used at the deposition to the deponent before the deposition, and suggests that the deponent's failure to consult the documents in advance is a likely ground for an extended limit.

There was initial debate over the desirability of providing examples. It was suggested that it is a mistake to give examples. But it was urged that examples are helpful, so long as it is made clear that these are only examples. The list should be introduced by "for example."

The first example, at lines 1739 to 1742, suggests that additional time may be warranted if it is expected that the deposition will be presented at trial in lieu of testimony by the deponent as a trial witness. It was argued that this is a bad example — a "trial" deposition should be made shorter, not longer, in order to reduce the burden of editing the transcript for effective trial presentation. The lawyers are not likely to agree to lengthen the time, and a court is not likely to order it. A motion to strike lines 1739 to 1742 passed unanimously.

It was agreed that "For example" would be added on line 1742 before the first illustration: "For example, if the witness needs an interpreter * * *."

Lines 1774 to 1778 refer to the desirability of exploring deposition time questions at the Rule 26(f) conference or a Rule 16(b) scheduling conference. A motion to strike these two sentences as unnecessary was adopted with one dissent.

Lines 1770 to 1774 suggest that additional time may be appropriate for deposition of an expert witness when a challenge to admissibility is expected. It was noted that the need for extra time for expert witness depositions is explored at lines 1766 to 1770, and urged that this additional reference to *Daubert* hearings is unnecessary. A motion to delete lines 1770 to 1774 passed unanimously.

Proposed lines 1764 to 1766 read: "Similarly, should the lawyer for the witness want to examine the witness, that ought ordinarily to be accommodated." Doubts were expressed as to the meaning of "accommodated": does it mean that extra time should be given? Or that the parties have a duty to ensure that part of the original 7 hours is allocated for this purpose? Is the "witness" described in the example only a nonparty witness, or also a party witness? Ordinarily the parties are expected to allocate the time between themselves, whether the witness is a party or is not a party. The problem for the lawyer for the witness, whether the witness is a party or not, is that neither lawyer nor witness knows at the beginning of the deposition what will come up. The thought behind this sentence is that necessary questioning should be permitted even when it goes beyond the 7-hour limit. The "lawyer for the witness" was meant to refer to the lawyer who did not notice the

deposition. But the same problem may be encountered by a lawyer for a party who wants to examine another party witness or a nonparty witness. And a "de bene esse" deposition commonly takes on the character of two separate depositions, with examination first by the party who noticed the deposition and then separately by cross-examination; the dynamic is different from the ordinary discovery deposition. It was suggested that these problems could be fixed by deleting the introductory phrase on line 1760, so that the material on lines 1760 to 1764 would not be limited to multi-party cases, and by deleting lines 1764 to 1766 as unnecessary. But it was argued that it is important to note the distinct time needs of multiparty cases — many comments were addressed to this point. In the end, these problems were resolved by taking "accommodated" out from line 1766, so that the sentence from 1764 to 1766 reads: "Similarly, should the lawyer for the witness want to examine the witness, that may require additional time."

With these changes, the added Note material on pages 55 to 56 was adopted with one dissent.

Rule 30(d)(1): Instructions to Witness. Rule 30(d)(1) now regulates instructions by a party to a deponent not to answer a question. The proposed amendment changes "party" to "person," so as to regulate attempts by nonparties to instruct a deponent not to answer. The magistrate judges' association has expressed the fear that this change may create new implied powers for nonparties. Additional Committee Note language to defeat this possible implication is proposed on page 58, lines 1811 to 1820 of the Subcommittee Memorandum. The Committee first voted unanimously to adopt the opening sentence at lines 1811 to 1814. Then it voted unanimously to delete the sentence at lines 1814 to 1817. The final vote was to adopt this new Note language:

> The amendment is not intended to confer new authority on nonparties to instruct witnesses to refuse to answer deposition questions. The amendment makes it clear that, whatever the legitimacy of giving such instructions, the nonparty is subject to the same limitations as parties.

Rule 30(f): Conformity to Proposed Rule 5(d). By oversight, the published proposals did not include a necessary change to Rule 30(f)(1) to bring it into conformity with the proposed changes in Rule 5(d). Rule 30(f)(1) directs the officer who takes a deposition to file the deposition in the court or to send it to the attorney who arranged for the transcript or recording. Proposed Rule 5(d) prohibits filing until the court orders filing or the deposition is used in the proceeding. The necessary conforming amendment would strike from Rule 30(f) these words: "file it with the court in which the action is pending or." The Committee voted unanimously to recommend this conforming change for adoption without publication. The Committee also voted unanimously to adopt the Committee Note proposed on page 60, lines 1865 to 1873, with a change in line 1869 to conform to the language of the Rule: "directing that the lawyer who arranged for the transcription or recording preserve the deposition."

Rule 34(b): Adjust for Relocating Cost Bearing in Rule 26(b)(2). The discussion of the decision to relocate cost bearing from proposed Rule 34(b) to Rule 26(b)(2) included the suggestion that there should be a reference in Rule 34 to remind users that a cost-bearing order is one option in responding to a dispute about an unnecessarily burdensome Rule 34 request to produce. The Subcommittee Memorandum discussed this question at pages 63 to 66. The Subcommittee observed that it might

be sufficient to provide this reminder in a Committee Note, but further observed that the committee has never acted to adopt Committee Note material when a Rule is not being changed. There was no discussion of the "Note-only" approach.

The Subcommittee Memorandum proposed a new amendment that would add a sentence at the end of the second paragraph of present Rule 34(b), with a single drafting choice indicated by brackets: "Such an order, or an order under Rule 26(c), [is subject to][shall implement] the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii)." In response to questions, the Special Reporter explained that the reference to a Rule 26(c) order was included because these questions often arise by motion for a protective order. The reference to the specific items (i), (ii), and (iii) in Rule 26(b)(2) was used because Rule 26(b)(2) includes provisions that do not relate to these discovery principles.

A preference for the "is subject to" drafting was expressed. This preference was supported by observing that a finding of the court is required to support application of the Rule 26(b)(2) principles. The committee unanimously adopted the "is subject to" alternative.

It was argued that the principles embodied in Rule 26(b)(2) items (i), (ii), and (iii) are principles, not "limitations" on discovery. This distinction could be implemented by simply stating in Rule 34(b) that an order to produce "is subject to Rule 26(b)(2)(i), (ii), and (iii)." This suggestion was not adopted.

The draft Committee Note, set out at pages 64 to 65, lines 1988 to 2008, explains the desire to call attention to the new Rule 26(b)(2) cost-bearing provision in the language of Rule 34(b) by describing the history of the 1998 proposal and the decision to relocate the provision in Rule 26(b)(2). It was suggested that the sentence at lines 1996 to 1999 is an unnecessary emphasis on anecdotal information about the burden imposed by requests to produce. A motion to delete this sentence passed by voice vote, with one dissent. The balance of the proposed Note was retained on the view that there is a lot of history underlying the cost-bearing proposal that should be explained.

The Committee acted unanimously to adopt the proposed Rule 34(b) language and Committee Note as framed by the Committee votes.

Rule 37(c)(1). The Discovery Subcommittee proposed, at page 67 of its memorandum, to correct a drafting oversight in the published proposal to amend Rule 37(c)(1). The proposal was intended to bring within Rule 37(c)(1) a failure to supplement discovery responses. As published, however, the proposal refers only to a failure to "disclose" information required by Rule 26(e)(2). Rule 26(e)(2) is the correct reference to the duty to supplement discovery requests, but is not properly preceded by a reference to failure to disclose. The cure adds words to properly describe the Rule 26(e)(2) duty: "A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), shall not, unless * * *."

This amendment was adopted unanimously, with the observation that the Rule 37(c)(1) proposal seemed to be the most popular proposal in the discovery package.

The Discovery Subcommittee proposals were followed in the agenda materials by several pages that set out "niggling changes" made by the Reporters in the published Committee Notes. No member of the committee moved to discuss any of these changes.

With these actions, the committee finished action on the complete discovery package as published, with the changes adopted by committee vote. Attention turned to motions to amend the package offered by individual committee members.

Motion: Rule 26(b)(1): Professor Rowe made a motion to abandon the "scope of discovery" amendments proposed for Rule 26(b)(1). The motion would delete all of the changes shown on pages 41 to 42, lines 122 to 132 of the publication book. The other changes to Rule 26(b)(1), shown at lines 132 to 138, would not be affected. The motion was presented to the committee before the meeting in written form. Professor Rowe asked that the written motion be incorporated in the minutes, so that he could summarize it briefly for discussion purposes. The written motion is attached as Appendix B.

Professor Rowe observed that if the scope of discovery is to be changed, the present proposal adopts the proper approach. It is better to divide the present scope of discovery as a matter of right between attorney-managed discovery and court-managed discovery. Restriction to "claim-or-defense" discovery without affording the opportunity for expansion to "subject-matter" discovery on showing good cause would be a mistake.

The proposal, however, is unclear. It will spawn satellite litigation. And it will encourage resistance to discovery.

Although there may be a connection between the scope of discovery and the new standard for initial disclosure, as will be argued, it may be better to recognize the dilution of disclosure by maintaining the present scope of discovery unchanged.

The problems with the Rule 26(b)(1) proposal summarized in the motion memorandum have been pointed out by many bar organizations. Several of these organizations are not identified either with plaintiffs or with defendants.

The central effect of the Rule 26(b)(1) scope change will be to narrow private enforcement of our regulatory laws. This effect was described by Judge Patrick Higginbotham at the Boston College discovery conference.

The first response to the motion was an observation that at the beginning it seemed a matter of real concern that some defendants see the reduced scope of discovery as a way to cut off discovery now had. Common examples are product cases, excessive force cases, and employment discrimination cases. But on reflection, the reduction is a common sense approach to a problem of misinterpretation. "Subject matter" in present Rule 26(b)(1) should be interpreted to mean the same thing as "claim or defense." But interpretation has expanded the meaning of "subject matter" beyond its intended meaning. The proposed change will cut back on excesses in practice, but will not cut plaintiffs off from evidence they traditionally have got through discovery. The fear that lawyers will react to the change by "overpleading" their cases, advancing tenuous claims to increase the scope of

discovery, is misplaced — most lawyers already overplead to the limits permitted by Rule 11. Although there is "stonewalling" resistance to legitimate discovery demands now, the proposed change will help to reduce it.

The motion was supported "on behalf of the Department of Justice as a whole." Throughout the process of formulating the present proposals, the Department of Justice has participated and has offered support. But there is a strong division of views within the Department, and the official position supports Professor Rowe's motion. The "enforcement branches" do not believe that there is any problem that will be solved by the (b)(1) proposal. The present rules provide all tools necessary to control discovery excesses. The purpose of the proposal is to bring the district judge or magistrate judge into discovery disputes. The involvement of the court, however, will increase the cost of litigation when, for example, the Department seeks to explore related incidents connected to the event in litigation but not part of the particular gravamen that led to the decision to initiate litigation. The Civil Rights and Environmental divisions have been enabled by discovery to expand their initial complaints. These divisions understand that the proposed rule is intended to enable them to get such information still, but are concerned that some judges will not understand just what the new rule means. The uncertainty will lead to greater litigation costs, and these divisions are skeptical that judges will devote the time required to understand all discovery disputes. Absent a sufficient investment of judicial time, the result will, by default, be no discovery. The present default result is that discovery is allowed, and that is better.

Francis Fox spoke on behalf of the American College of Trial Lawyers. The College Rules Committee has studied this proposal intensely. The Advisory Committee also has worked intensely. The effort has focused on the scope of discovery as never before. The effort is enormously impressive, and has supported an intense learning process. After the Boston College conference, many participants concluded that there indeed is a problem with the scope of discovery. Even though there are no problems in a majority of cases, there are problems in some cases. The standard is a problem in 10% to 15% of all cases filed in federal court. The costs of discovery can get out of hand. The Discovery Subcommittee recommendations were greeted with enthusiasm by the Advisory Committee, but were vigorously reviewed. The Rule 26(b)(1) scope proposal was carefully discussed. The compromise with the initial "claim-or-defense" proposal was to add back the "subject-matter" scope of discovery on showing good cause. It may be argued that the silence of the case law exploring the limits of "subject-matter" discovery shows that there are no problems. But the silence is the silence of resignation, not satisfaction. No one bothers to fight this one any longer. But the hearings and conferences have shown that there are problems. The fear that discovery of similar conduct or incidents will be cut off will be addressed by the judges under Evidence Rule 404(b). If there is a difference, it will be better discovery that focuses on the issues in the case. The fear that waves of satellite litigation will arise from the change will prove as groundless as the fear that the 1993 advent of initial disclosure would lead to frequent satellite litigation. The published proposal is a careful, deliberate compromise. The committee should stand fast by it.

Judge Scheindlin also spoke in support of Professor Rowe's motion. She began by noting that she had carefully read the Boston College conference materials and the statistical studies that came out of it. These extensive materials show that there is no real clamor of lawyers for a scope

change. The 301 written comments break down precisely — defendants champion the scope change, and plaintiffs excoriate it. The change is polarizing. The professors and most of the neutral bar associations also oppose the proposal. There is no widespread support. The "good cause" requirement will lead to ten or twenty years of satellite litigation while its meaning is worked out; the good cause requirement was abandoned from Rule 34 in 1970, and should not now be resurrected. If it be said, as it often is, that there is no change in the scope of discovery, why are we doing this? No plaintiff will accepts less than present discovery. They will make good-cause motions in case after case. The proposal will increase cost and delay. In New York a discovery motion costs from $25,000 to $50,000. The change, further, will lead to overpleading. Careful plaintiffs will plead as broadly as possible. But the judge cannot know the case as well as the lawyers do; in ruling on good cause, the judge "can only make a stab at it." "Claim-or-defense" discovery in fact makes a change. It is narrower than subject-matter discovery. That is why the proposal is being made.

Judge Scheindlin further suggested that the scope of discovery relates to the initial disclosure provisions of Rule 26(a)(1). The committee has adopted the "may use to support" formulation for initial disclosure. No one is left, however, to support initial disclosure in this watered-down form. "May use" disclosure is useless. Initial disclosure, with the discovery moratorium and Rule 26(f) conference, will only cause delay. Plaintiffs do not want it; they would prefer to go directly to discovery. And the judges are upset — they hate automatic disclosure. The watered-down initial disclosure proposal will not buy the judges' support for sacrifice of the opportunity to opt out of disclosure by local rule. Initial disclosure is an experiment that has failed. The failure, however, is the responsibility of the Advisory Committee, which has chosen to abandon disclosure before it has had an opportunity to develop. If we give up meaningful automatic disclosure, we have to have a "give back" to level the playing field. Initially the limitation on the numbers of depositions and interrogatories was part of the package, supported by the theory that initial disclosure would provide information that otherwise would require sacrifice of part of the limited numbers of discovery requests. At least we should delete the numerical limits. It would be better to abandon the scope limitation. Responding to a question, Judge Scheindlin stated that if initial disclosure were dropped from Rule 26(a), there would be no federal rule on disclosure and individual districts would be free to adopt disclosure practices by local rule.

Judge Levi, as chair of the Discovery Subcommittee, supported the scope proposal. Reasonable minds can differ on the value of the proposal. It is a close issue. But the committee should not be misled by a bare count of the comments. When a controversial rule proposal is advanced, the opponents come out in far larger proportion than the supporters. The opposition to the scope proposal is not as strong as the opposition encountered by several of the recent class-action proposals. And support is provided by such neutral bodies as the ABA Litigation Section, the American College of Trial Lawyers, and the Magistrate Judges Association. There has been an attack, especially by academics, asking for a definition of the terms. There will be a lot of debate. But "subject matter" in the present rule is not well defined. Although judges have commented extensively on other proposals in the discovery package, they have not shown any concern that the scope proposal will not work. The proposal will nudge us toward earlier identification of the issues, and will focus discovery. And although there is a tie to initial disclosure, it is a good one —

plaintiffs, knowing that they must disclose the witnesses and documents they may use to support their claims, will be discouraged from overpleading. Although the Department of Justice has expressed skepticism at the prospect that district judges and magistrate judges will universally take the time required to determine good cause to allow subject-matter discovery, the Department has such vast non-discovery means of gathering information that they are not likely to be hurt.

Judge Levi noted that, coming from a district that has opted out of more parts of Rule 26(a) disclosure than it has authority to opt out from, he has been surprised by the support expressed for initial disclosure. Lawyers who use disclosure favor it. The (a)(1) proposal is a modest cut-back that leaves initial disclosure as a useful "jump-start" on discovery. The Rule 26(f) conference is very valuable; the discovery moratorium is a necessary adjunct. We have learned that disclosure is practiced more widely than we had thought. Judges in opt-out districts use it. Disclosure happens in more than 50% of federal cases. Uniformity, moreover, is important. There must be a uniform national procedure to enforce national substantive law. To abandon a national rule and allow local experiment would be untoward. We have heard opposition from many judges, but they have not had the information we have had. This committee cannot lurch back and forth between its proposals. It would be extraordinary to go back to the bar now and abandon disclosure.

Where empirical work can be done, we have had it done. And we have relied on a Discovery Subcommittee to ensure that the details are executed properly. The discovery package is a good one that deserves adoption.

Judge Scheindlin responded that the proposed "low-end" exemptions from initial disclosure in Rule 26(a)(1)(E) will remove disclosure from perhaps 30% of federal cases. And the provision allowing objections to disclosure will encourage many lawyers to object to initial disclosure in all cases, further reducing the number of cases with any disclosure and aggravating the consequences of the discovery moratorium. Returning to the scope proposal, she noted that it is not the number of 301 comments that is impressive, but the stark split between plaintiffs and defendants. It is impressive that the scope proposal is supported by the ABA Litigation Section and the American College of Trial Lawyers, but many major bar associations oppose it, including many that have outstanding reputations for very careful and well-reasoned work.

General discussion of Professor Rowe's motion followed. It was suggested that the scope proposal will not lead to overpleading; everything is overpleaded now. Fraud is pleaded in every product-liability case. The claims available from the transaction or occurrence in suit will all be pleaded from the beginning. The same experience must hold in other areas of litigation as well.

The concern with motion practice will be short-term. To be sure, there will be motions testing the scope of discovery in the beginning. But the bar will quickly adjust to a new reality and carry on. Often, when there is staged discovery, it is possible to begin by producing all the documents the producing party thinks the requesting party needs, offering to supply more if the requesting party asks. Almost always the requesting party is satisfied with the initial production — parties seeking discovery are no more anxious to engage in unnecessary work than are parties making discovery.

In product cases, it is good to force a plaintiff to show that other products are so similar to the product involved in the litigation as to justify discovery as to the other products.

The scope change will make a difference in big, complex cases. The difference will be for the better. And any risk that desirable discovery will be defeated can be met by showing good cause for an expansion.

Frank Hunger, speaking as a former committee member, stated that significant parts of the Department of Justice support the committee scope proposal. They always have found judges willing to hear the arguments for discovery, and have been treated fairly. There is little reason to be skeptical about the willingness of judges to become involved. And one part of the Department, the FBI, has gone on record supporting the scope proposal.

Professor Rowe's motion was supported by observing that the (b)(1) scope proposal is a philosophical shift that will narrow discovery. The Boston College conference materials provide very little data to support the change of philosophy. A system that works 85% to 90% of the time is a great success. The American College arguments advancing the proposal themselves show that there are no data, case law, or groundswell of public sentiment supporting the proposal. All that is offered is opinion. And the support of the ABA Litigation Section must be contrasted with the opposition of the lawyer who is chair-elect of the Section. Support comes only from a very small constituency of clients and lawyers involved in a very small range of cases. The good-cause provision is not a panacea; it is very expensive to go to court, and small parties cannot afford it. The big defendants tell us how much discovery costs — and then tell us that the scope change will make no difference: plaintiffs can get what they need if only they push hard enough. These positions are inconsistent. There are no data at all to tell us how much the change will save any defendant. That is not surprising, since no one can tell us what the change will mean. This is a philosophical shift that has little support. It will prove very divisive. And it will promote discovery motions and impede the efficient resolution of disputes.

The scope proposal was defended by arguing that it will reduce cost and delay. The fact that 85% of cases have no discovery problems now does not argue against the proposal. The proposal is carefully nuanced. It does not cut off discovery at claim or defense; good cause showings allow more. And most of the 85% will continue, as before, with no discovery problems. But in those cases that generate legitimate disputes about the scope of legitimate and needed discovery, the proposal presents a way to get a judge involved when — and only when — a judge is needed. There is skepticism about judges' ability and availability to become involved promptly. This skepticism goes to case management, not the scope of discovery. Many judges are able to do this. This is the very role that district judges and magistrate judges do best; it is not the role of providing "adult supervision" to squabbling juveniles, but the role of setting legitimate bounds of relevance for a specific case. There should not be a problem with satellite litigation.

Further support for the changes in the scope of discovery was voiced on the ground that the proposed language preserves what is in the rule now. The problem with the present rule is that the language is too general to point out what is properly involved. The proposal focuses attention, moving directly to what is the issue. The 85% of cases that present no discovery problems now will

work without any definition of the scope of discovery at all. The problem is the case with antagonistic attorneys, the case with an "unreal claim or defense," the case with some problematic precedent. There are abuse problems in a limited number of cases. The committee should do something. The scope proposal is a fair way of dealing with the subject.

The discussion was concluded with observations about the committee's institutional processes. The committee has worked very well on the discovery proposals. There is a synergy among committee members as competing views fuse into a package that is generally acceptable to most. The discovery project has had a long lead time, and has endured — as most major projects do — through several changes in committee membership. The committee must be careful to follow processes that enable it to develop a "continuing will." Dozens of discovery proposals have been considered, and winnowed down to a very modest and balanced package. Every member must always vote conscientiously, but conscientious voting can include some deference to the long-term view of former committee members who have worked carefully but are no longer present for the final vote.

Professor Rowe's motion failed, with 4 votes in support and 9 votes against.

Professor Rowe expressed satisfaction with the high quality of the debate and the value of the information expressed. Judge Niemeyer responded that the motion was well done, and will be transmitted as part of the record.

Motion: Rule 26(b)(2): Myles Lynk moved that the cost-bearing provision published as an addition to Rule 34(b) and relocated by committee vote to Rule 26(b)(2) be deleted. The relocation to Rule 26(b)(2) compounds the problem created by this measure. There is no need to add an express provision to the rules — the proponents agree that judges already have this authority. Cost-bearing under this proposal will be available only as to discovery that otherwise would be prohibited under items (i), (ii), or (iii) of Rule 26(b)(2), but courts should not be encouraged to permit such discovery on condition that part or all of the costs be paid. Instead, the discovery request should be granted because it is not inconsistent with these principles, or — if it is inconsistent with these principles — it should be denied. Orders granting discovery will be encouraged by emphasizing the alternative to order discovery on condition that part or all of the costs be paid. The consequences are made worse by applying this provision to all forms of discovery by adding it to Rule 26. This measure will not promote better or less expensive discovery. Judges routinely impose cost conditions now in allowing discovery, relying on inherent power. But we encourage use of this power by putting it in the Rule. There is no need to send this signal. Payment, moreover, will be only for some identifiable costs. It is difficult to calculate the real costs to the client in time and disruption, and such costs will seldom be compensated. The result, moreover, will be differential justice: the party who cannot afford to pay will not get the discovery, while the one who can pay — who may be eager to pay — gets the discovery.

The cost-bearing provision, he continued, is different from the major, fundamental change made in the scope-of-discovery provisions in Rule 26(b)(1). That change can be made only by recommendation of this committee and approval throughout the remaining steps of the Enabling Act process. But with cost bearing, we are not really making a change; we are only, and unnecessarily,

encouraging greater use of an existing power. This measure will not contribute to reduce expense and delay. There should be no express amendment either to Rule 34(b), as published, or to Rule 26(b)(2), as now recommended by the committee.

It was stated that the Department of Justice is concerned that judges may tend to "split the difference" by allowing discovery on condition of payment. The statements in the proposed Committee Note do about as much as can be done to address this concern. Still there is a risk that in a significant number of cases, a party who can pay will get discovery. And the United States may find that courts are willing to make it pay to get discovery that other litigants would be allowed to get without paying.

In response, it was observed that "everything in litigation is dollars and cents." Most judges do not think about the power they now have to condition an order to make marginal discovery on payment of the response costs. The willingness of a requesting party to pay is a good measure of the need for discovery. This is a good tool. At times, it may lead to some discovery that now would not be permitted.

It also was noted that there were not many comments addressed to this proposal. It does not seem to have created any special concern with the bar. To the extent that opponents fear differential justice, they must recognize that we have differential justice now. The Department of Justice is wrong to fear that some judges will make the Department pay for discovery that other litigants will get without paying. This proposal is likely to be most relevant in the emerging areas of electronic discovery. A plaintiff, for example, may want to "map" a defendant's email system, a measure that might cost $250,000; the question of responsibility for paying for such discovery is an important one, and it should be made clear that judges have authority to consider the question directly.

Mr. Lynk suggested that lawyers are prepared now to argue about paying the costs of electronic discovery; this explicit rule provision is not needed for that reason.

Another comment observed that the concern about differential justice is real. The Committee Note points out that the court can take account of the parties' resources. Cost-bearing is most likely to be used in big discovery cases between parties of equal, and substantial, means.

Mr. Lynk repeated the question whether it is wise to emphasize cost bearing in the text of the rules in a way that may encourage a judge who should bar discovery by Rule 26(b)(2) principles to order the discovery only because a party is willing to pay for it. There is no need to make every discovery detail explicit in the rules, and no need to add this particular detail to the package of fundamental discovery changes that the committee has approved.

In response it was urged that everyone agrees that the judge has this power. It is better to make it explicit in the rule, so that judges need not continually investigate or reinvent the principle.

Another response was that Rule 26(b)(2) calls for a very speculative judgment about the costs and benefits of discovery requests, a judgment that must be made without knowing what information the discovery will actually yield. The ability to condition an order granting discovery on cost bearing

is a "buffered intermediate" solution that helps. The demanding party can make the judgment whether the discovery is worth the cost.

A final argument in support of the motion was that there are litigants who really want the discovery and who really are unable to pay for it. Employment and civil rights litigation is occupying an ever growing share of the federal docket, and these plaintiffs often cannot pay for discovery that in fact is important to them.

The motion to delete the cost-bearing provision failed by 5 votes in favor and 8 votes against.

Final approval. The committee voted unanimously to recommend approval of the complete discovery package as published, with the changes approved at this meeting.

Future discovery issues. Judge Niemeyer noted that electronic data discovery will be on the committee's agenda, and is likely to present issues more difficult than those presented by the package of changes now recommended to the Standing Committee for approval. Electronic means of storing information are likely to expand the amount of information available for discovery, and the expansion may be great. As significant as the present proposals are, the committee cannot count itself freed from discovery issues.

Agenda Subcommittee

Justice Durham presented the report of the Agenda Subcommittee. The Subcommittee has developed a set of categories to describe agenda items. These categories will be used to summarize recommendations to the committee for regulating the flow of docket items. The categories, in short-hand description, are these:

(1) Matters that should be accumulated for routine revision and periodic updates. Some rules seem to occasion rather frequent suggestions for change, and often it seems desirable to consider these proposals in groups at reasonably separated intervals.

(2) Matters that should be held to determine whether future developments in practice or the emergence of additional information will provide a better basis for action.

(3) Matters that need study. For these items, the Subcommittee will recommend a schedule for undertaking study. When there is a relevant subcommittee, the Agenda Subcommittee may recommend referral for study by that subcommittee.

(4) Matters that are ready for action.

(5) Matters that are not appropriate for consideration by this committee, or that seem ready for rejection without further work.

(6) Matters that are awaiting review.

(7) Matters that are best handled by joint consideration with one or more of the other advisory committees.

Application of these categories was illustrated by two documents appended to the Subcommittee report. The first is a table of all pending agenda items, listed in numerical rule order, with terse statements of the recommended disposition. The second is a memorandum that briefly describes the nature and purpose of each proposal on the agenda, and suggests the reasons for the Subcommittee recommendation.

The Subcommittee is prepared to recommend that the committee remove many of the items that have accumulated on the agenda. It believes that a "consent calendar" approach should be adopted for items that do not seem to warrant discussion at a committee meeting. The consent calendar should be circulated to the full committee before the full agenda book is circulated, to provide an opportunity for any committee member to request that an item be marked for discussion. Advance designation of consent-calendar items for committee discussion will often make it possible to add expanded materials to the committee agenda book. The procedure should remain fluid, however, so that committee members may request that an item be brought up for discussion even as late as the meeting itself. Items not removed from the consent calendar will be acted on by the committee in a single vote. It was agreed that the consent-calendar approach would be implemented for the fall meeting this year.

The agenda subcommittee will follow matters that are not put on the consent calendar. These items will be brought on for committee discussion as the committee chair, reporter, and subcommittee deem appropriate. An report from the subcommittee will be a regular feature of the agenda book for each meeting.

Forms

The Agenda Subcommittee report prompted discussion of one of the several agenda items. Form 17 is a model complaint for copyright infringement. It has not been revised since 1946. The publication this summer of the proposals to abrogate the Copyright Rules of Practice might afford an obvious opportunity for seeking comment on the need to revise Form 17 to conform to the Copyright Act of 1976, and on the need to have any form complaint for copyright actions. But the question seems broader than Form 17 alone. There are several other form complaints for specific federal statutory claims. These forms do have the virtue of suggesting that the complaint asserting a federal statutory claim can indeed be "short and plain." But the examples chosen for the forms may seem an eccentric selection from the vast array of federal statutes. There is little obvious reason for retaining these particular illustrations. Retaining forms of this sort, moreover, imposes on the committee an obligation to remain current in substantive developments in each relevant field of law. Even if the forms are kept current, moreover, it is important that they rely only on substantive principles that are established with indisputable clarity; it will not do to express, even ignorantly, implied judgments about disputable substantive issues.

Rather than act now on Form 17, it was concluded that these issues deserve further study. The chair may appoint an ad hoc subcommittee for this purpose.

Corporate Disclosure Statements

The question whether the committee should propose a new rule to deal with corporate disclosure statements came late to the agenda for the November, 1998 meeting. The Standing Committee has assumed a coordinating role, supervising the efforts of each advisory committee to consider these questions. The Appellate Rules Committee has recently considered corporate disclosure statements, and its revised rule has become the model for revision of the Supreme Court rule. This committee's recommendation that the Standing Committee's ad hoc committee on Federal Rules of Attorney Conduct might undertake the task of coordination has not proved feasible, however, in light of the complexity of the attorney-conduct questions.

It was suggested that these are urgent questions that should be advanced for discussion at the fall meeting. There is a real attraction to adopting the Appellate Rule as a model for a new Civil Rule.

The Standing Committee has asked the Federal Judicial Center to undertake a study of the approaches to disclosure being taken around the country. The Center hopes to have preliminary information available for consideration by the advisory committees at the fall meetings, but its final goal is to complete work in time for consideration at the spring, 2000 advisory committee meetings. The Standing Committee hopes to act on these questions at its June, 2000 meeting.

In light of this schedule for consideration, it was agreed that consideration of corporate disclosure statements would be on the agenda for the fall meeting of this committee.

Rule 53: Special Masters

Judge Vinson reported that the Rule 53 Subcommittee had met, and had conferred with Thomas Willging about a Federal Judicial Center study of current practices in using special masters. The Center has agreed to undertake a study, and hopes to have the first phase proceed on a schedule that will allow the subcommittee to develop some sense of current practices by the time of the fall Advisory Committee meeting. This first phase will involve a docket study to identify a sample of cases in which special masters or similar judicial adjuncts were used. The second phase, which will involve interviews with judges, will take longer. But it is hoped that by the time of the spring, 2000 meeting the subcommittee will be in a good position to make a recommendation whether further work should be done on the draft Rule 53 amendments that last were considered in 1994.

Discussion noted that there seem to be many contemporary uses of special masters that are not clearly contemplated or governed by Rule 53. The questions posed by these practices are potentially complex. There is neither any strong pressure on the committee to explore these issues, nor any apparent resistance to the project. The most important issues to be resolved are whether indeed there are problems, and whether a solid foundation can be built for addressing any problems that may be found.

Electronic Service: Rules 5(b), 6(e), 77(d)

Judge Carroll reported for the Technology Subcommittee. He noted that electronic case filing is being done in some courts in conjunction with a new case-management system. Electronic

case filing allows lawyers to file papers electronically. The Administrative Office intends to expand electronic case filing beyond the present prototype courts to a larger number of pilot courts. Software development is proceeding apace; it remains to be seen whether present projections for completion are optimistic. The Standing Committee's Technology Subcommittee met with representatives from the prototype electronic courts in February. After that meeting, the Subcommittee discussed the issues that had been raised with respect to electronic service, and asked that the Civil Rules Committee take the lead in preparing a draft electronic service rule that might become a model for adoption by other advisory committees, working under the coordinating supervision of the Standing Committee. The draft Rule 5(b) presented for discussion has been reviewed by our Technology Subcommittee and approved as a recommendation for committee discussion.

Discussion began with the observation that the Rule 5(b) draft had been reviewed by the Bankruptcy Rules and Appellate Rules Committees, and would be on the agenda of the Criminal Rules Committee in a few days. Suggestions made by the Bankruptcy Rules Committee had been incorporated in the draft. The Appellate Rules Committee concluded that it would not recommend publication of an Appellate Rule on electronic service this summer, and offered several suggestions and questions that were received during the course of this meeting.

It also was noted that the only comments from the Standing Committee Style Committee were based on the earlier drafts of a restyled set of the Civil Rules. It was thought premature to attempt to work through all of these style revisions in the time available to bring a possible rule to the Standing Committee this spring. As with all of the Civil Rules that have been studied so far, careful study is required to determine whether style changes in fact change meaning. As one example, Rule 5(b) provides at one point for leaving papers with a person "residing" in a house or usual place of abode. The style draft changes this to "living." It is not clear whether "living" means something different from the more traditional "residing," nor whether any difference would be an improvement in the rule. These questions should not be faced in the project to bring a provision for electronic service into Rule 5.

The central question put to the committee then was whether it would prove possible to complete action on a draft that the committee would be prepared to recommend for publication in August if the Standing Committee should find it desirable to proceed at this pace.

The first important characteristic of the Rule 5(b) proposal is that it is clearly limited to service of papers covered by Rule 5(a) and Rule 77(d). It does not reach service of the initial summons under Rule 4, service of other process under Rule 4.1, service of subpoenas under Rule 45(b), or service in condemnation actions under Rule 71A(c)(3). It was agreed at the February meeting that the time has not yet come for electronic service under these rules.

The second important feature of the proposal is that electronic service is authorized only with the consent of the person served. Although those who have practiced electronic filing appear to be enthusiastic about the gains in efficiency and speed, the basis of experience remains limited. Nor has the time come when it is fair to insist that all parties, or even to insist that all lawyers, have

equipment suitable to receive electronic service and be responsible to maintain and monitor the equipment. This feature also was agreed upon at the February meeting.

The consent requirement triggered discussion of the decision to expand the draft to provide for service by "other means" in addition to electronic means. Appellate Rule 25(c) authorizes personal service, and also service "by mail, or by third-party commercial carrier for delivery within 3 calendar days." Draft Rule 5(b) requires consent of the party to service by electronic means or by "other means" beyond mail or personal service. The Appellate Rules Committee asked why consent should be required for service by commercial carrier. It was urged that for the Civil Rules, it is important to rely on consent for "other means." In practice today, parties often consent to service by commercial carrier or facsimile transmission. Not all "commercial carriers" are as reliable as the best-known services. Even the largest express services, moreover, may make it awkward to effect delivery to a home address — the recipient may be obliged to commit to be at home for a specified time, or may be required to travel to the office of the express service to pick up the "delivery." We do not require consent to mail service because "everyone gets mail service." It was concluded that consent should be required for anything but mail or personal service.

The consent requirement also triggered a minor drafting discussion. The Standing Committee's Technology Committee was anxious that the text of the rule refer expressly to "electronic" service — even though it would be sufficient to refer to "other means," pointing out in the Committee Note that electronic means are included, it is better to make the electronic alternative express on the face of the Rule. Given a choice between delivery "by electronic or any other means consented to" and delivery by "any other means, including electronic means, consented to," the committee chose the "any other means, including electronic means" formulation by 9 votes over 2 votes for the "electronic or any means" formulation. This was the choice of other advisory committees as well.

A third important aspect of the proposal is that it makes service by electronic means complete on "transmission." The choice between "transmission" and "receipt" was discussed extensively at the February meeting. The actual word chosen, "transmission," was selected with advice from the automation support staff in the Administrative Office. There would be advantages to making service complete on receipt. Actual receipt of notice is the object. Complete transmission does not ensure actual receipt, either in the sense that the message arrives in the recipient's equipment or in the sense that the recipient actually reads the message. Transmissions do go astray, and senders to not always have notice of the failure. But there also are difficulties in making service complete only on receipt. It would be necessary to define receipt — to decide whether it means registering in the recipient's equipment, actual awareness of the message, or something else. There are no reliable means to ensure that a "return receipt" confirming delivery can be sent across different electronic communications systems. The premise that consent is required was found to be sufficient to put the risk of nondelivery on the person who consents to be served by electronic means.

Some distrust of transmission emerged from the discussion. It is clear that electronic transmission does not always work as intended, whether it be by facsimile transmission or electronic mail. In the district court setting, the result of failed transmission is most likely to be complications in scheduling hearings. The court will, as a practical matter, be at the mercy of the party willing to

say "I did not receive it." But it was urged in response that parties will not consent to service by unreliable means. They will consent only when confident in their own sophistication and when willing to monitor their equipment for receipt of the transmissions.

The Appellate Rules Committee raised a more pointed question. Rule 5(b) now says that service by mail is "complete upon mailing." What happens if the mail is returned to the sender as undeliverable? If the sender can treat it as "complete" service, we should not extend this unfortunate result to service by electronic means that may be less reliable than the Postal Service. This committee agreed that a lawyer who receives actual notice that intended delivery was not accomplished has a professional obligation to correct the failure. It would be appropriate to add a statement to the Committee Note that actual knowledge of nondelivery defeats the presumption of receipt raised by the provision making service complete on transmission.

The committee adopted transmission as the time of completing service by 9 votes for, 2 votes against. It was recognized, however, that it will be appropriate to solicit public comment addressed to this issue if the proposed rule is published for comment.

The final sentence of draft Rule 5(b)(2)(D) read: "If authorized by local rule, the court may make service on behalf of a party under this subparagraph (D)." It was asked what happens if the court undertakes service and gets notice of nondelivery — is it the responsibility of the court, not the party, to correct the failure? How far does service "on behalf of a party" mean that the court takes on the party's obligations? It also was observed that if the process is one by which the court's equipment automatically relays a party's filing to all other parties, it is awkward to conceive of the process as service by the court on behalf of the party. It is better to conceive of the process as service by the party through the court's facilities. The committee agreed unanimously to rephrase the sentence to read: "If authorized by local rule, a party may make service under this subparagraph (D) through the court's transmission facilities."

Several suggestions to expand the Committee Note have been made by other advisory committees and others. The suggestions generally involved illustrations of ways in which local district rules might address specific electronic service questions. The Appellate Rules Advisory Committee, indeed, suggested that the text of the rule should expressly mention "the ability of courts to use local rules to regulate electronic service." The draft Note already suggests that local rules could describe the means of consent, including provisions that would enable a law firm or frequent litigant to file a standing consent for service by specified means in future actions. Other suggestions were to deal with electronic requests for consent, consent by failure to object, and proceedings in which some parties give consent while others do not. In a different direction, it was suggested that the Note and local rules might deal with such issues as allowing service to consist simply of a notice of filing, coupled with a "hyperlink" directly to the filed paper. Committee discussion led to the conclusion that it is too early to attempt to deal with such issues in a Note. The committee voted to strike from the draft rule language praising the virtues of electronic service and suggesting that local rules might deal with some consent issues.

Rule 6(e) now provides that when a paper or notice is served by mail, 3 days are added to the period prescribed for acting in response. This provision might be extended to allow an additional

3 days following service by electronic or other means apart from personal service. Four alternative approaches were set out in the materials. The initial draft was essentially the same as the third alternative — each would allow an additional 3 days if, in the language of the third alternative, service is by mail "or by a means permitted only with the consent of the party served." This phrasing would make it easier for the Bankruptcy Rules Advisory Committee to draft a Bankruptcy Rule incorporating the Civil Rule. This drafting approach was preferred by the subcommittee if this is the approach to be taken. The first alternative was to leave Rule 6(e) as it stands, so that the extra 3 days are available only following mail service. This alternative was favored by the Appellate Rules Committee. The second alternative was to eliminate Rule 6(e), so that no additional time is allowed even for mail service.

The first question asked went to the relationship between Rule 6(e) and service made by a commercial carrier or other agency under the present rule. A party who wishes to make personal service by delivering a copy to the person served may employ any of a number of means of delivery, including commercial carrier. Under present Rule 5, the risk of nondelivery is on the person utilizing these means; service is accomplished only by actual delivery. Because service remains service by actual delivery, Rule 6(e) does not extend the time to respond.

Discussion turned to the question of additional time to respond following service by electronic or other means. The reasons for allowing extra time, by analogy to service by mail, were straight-forward. Actual delivery does not coincide with delivery to a commercial carrier, and even with electronic mail may take a day or more. A party asked to consent to these modes of service will be concerned with reducing the time practically available to respond, and may be encouraged to give consent if the time to respond is extended. The Appellate Rules Committee, on the other hand, expressed concern that a party intending to make service might be discouraged from asking for consent if the result was to concede additional response time. Members of the committee who are practicing lawyers said that there is little need to worry about the effect on consent. They consent to service by commercial carrier or electronic means now. They condition consent on use of a method that is reliable and fast. Under the proposed rule, consent will be given only for service by means that are reliable and fast. There is no need to provide the additional 3 days that Rule 6(e) now provides for service by mail.

An alternative suggestion was that electronic service ordinarily is faster than service by mail or other means, and that the rule might be drafted to distinguish electronic means from other means. This approach would make it more likely that parties would consent to service by other means — otherwise, consent to electronic service ordinarily would mean receipt on the same day, while consent to other means ordinarily would mean receipt a day later and a corresponding reduction of the time to respond.

This discussion led to the suggestion that a different distinction could be made by returning to draft Rule 5(b)(2)(D). Electronic service could be made complete on transmission, as in the draft, while service by other means could be made complete on delivery to the person served.

On putting the alternatives to a vote, 4 votes were cast for Alternative 3, while 6 votes were cast for Alternative 1. The committee accordingly recommends that Rule 6(e) not be changed. But

if additional time is to be allowed, it should be when "the notice of paper is served upon the party by mail or by a means permitted only with the consent of the party served * * *."

The sense of the committee was that if the Standing Committee determines to publish one or more electronic service rules for comment in August 1999, this package is sufficiently developed to be published as the Civil Rules proposals.

Fall Meeting

The dates for the fall meeting were tentatively set for October 14 and 15, at a place to be determined.

Respectfully submitted,

Edward H. Cooper
Reporter

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

Draft Minutes

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

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

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

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

Representing the advisory committees were:

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

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

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

INTRODUCTORY REMARKS

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

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

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

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

APPROVAL OF THE MINUTES OF THE LAST MEETING

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

REPORT OF THE ADMINISTRATIVE OFFICE

Legislative Report

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

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

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

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

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

Administrative Actions

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

REPORT OF THE FEDERAL JUDICIAL CENTER

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

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

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

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

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

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

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

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

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

Action Items

FED. R. BANKR. P. 1017

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

FED. R. BANKR. P. 2002

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

FED. R. BANKR. P. 4003

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

FED. R. BANKR. P. 4004

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

FED. R. BANKR. P. 5003

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

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

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

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

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

Rules for Publication

FED. R. BANKR. P. 1007

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

FED. R. BANKR. P. 2002

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

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

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

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

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

FED. R. BANKR. P. 3016

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

FED. R. BANKR. P. 3017

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

FED. R. BANKR. P. 3020

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

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

FED. R. BANKR. P. 9020

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

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

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

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

Resolution of Appreciation for Professor Resnick

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

The committee unanimously approved the following resolution honoring Professor Resnick:

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

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

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

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

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

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

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

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

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

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

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

Action Items

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

1. Service Package

FED. R. CIV. P. 4 AND 12

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

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

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

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

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

2. Admiralty Package

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

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

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

SUPPLEMENTAL ADMIRALTY RULE B

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

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

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

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

SUPPLEMENTAL ADMIRALTY RULE C

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

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

SUPPLEMENTAL ADMIRALTY RULE E

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

FED. R. CIV. P. 14

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

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

3. Discovery Package

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FED. R. CIV. P. 5

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

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

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

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

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

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

The committee approved the amendment to Rule 5 without objection.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Schreiber later withdrew his motion.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FED. R. CIV. P. 30

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

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

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

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

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

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

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

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

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

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

FED. R. CIV. P. 34

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

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

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

FED. R. CIV. P. 37

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

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

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

Rules for Publication

Electronic Service

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

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

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

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

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

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

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

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

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

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

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

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

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

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

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

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

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

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

FED. R. EVID. 103

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

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

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

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

FED. R. EVID. 404

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

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

FED. R. EVID. 701

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FED. R. EVID. 702

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

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

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

FED. R. EVID. 703

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

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

FED. R. EVID. 803 AND 902

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

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

REPORT OF THE ATTORNEY CONDUCT RULES SUBCOMMITTEE

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

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

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

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

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

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

LOCAL RULES PROJECT

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

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

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

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

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

REPORT OF THE STYLE SUBCOMMITTEE

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

NEXT COMMITTEE MEETING

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

Respectfully submitted,

Peter G. McCabe,
Secretary

Simplified "Small Claims" Procedure

Introduction

Some of the persisting questions about the Federal Rules of Civil Procedure arise from the "one size fits all" character of the Rules. The Committee has struggled regularly with the "transsubstantive" character of the rules, ordinarily reaching the conclusion that serious Enabling Act questions are posed by any effort to create special rules for specific substantive problems. Perhaps the time has come to consider a different aspect of the Rules' unvarying uniformity. As they stand now, and as they have been from the beginning, the Rules apply alike to all cases, no matter how complex or how simple. It has been common to wonder whether the inevitable compromises have produced rules that work well for most litigation in the middle range, but do not work as well for cases at the extremes. One extreme has been frequently studied. The recent discovery proposals are only the most recent in a long line of efforts to adapt the rules to the needs of complex or contentious litigation. Not as much has been done for simple litigation. It is possible to adopt special provisions for simple litigation without in any way departing from the transsubstantive principle. The purpose would not be to establish a second-class set of procedures for second-class litigation, but to provide procedures that provide more efficient, more affordable, and better justice for litigation that cannot reasonably bear the costs of unnecessarily complex procedures.

The simplified rules that follow are very much a first draft. Coverage is limited to actions demanding only money damages, and in relatively small amounts, unless all parties agree to adopt the rules. The central feature is a major transfer of pretrial communication away from discovery and to fact pleading and disclosure. There also is a demand-for-judgment procedure that could accelerate and clarify disposition of many actions that today go by default. Use of Rule 16(b) scheduling orders is made optional. Finally, there is a beguiling proposal to require court permission for presentation of expert testimony under Evidence Rules 702, 703, or 705.

The draft is presented to stimulate thinking at several levels. The first is consideration whether it is sensible to launch a project of this nature. It should be easier to consider this question in light of a model, however crude, of the core topics that are likely to be addressed in any effort to create a simplified procedure track.

A second set of questions goes directly to the topics addressed by the draft. Can we effectively restore fact pleading that achieves the hopes of the Field Code drafters, not the sorry legalisms that lawyers and judges conspired to inflict on the worthy Code provisions? Should we require pleading of law as well as fact — something not done by the draft? Should we at least provide limited law-pleading requirements for special situations? (One possibility would be to require a party to plead the source of the governing law — federal or state, which state or foreign country, and so on.) How far should initial disclosure be expanded beyond the 1993 26(a)(1) model? How far should discovery be restricted — an illustration is provided by the alternatives in Rule 106 that either allow three depositions as a matter of right or require court permission for any deposition?

A third set of questions goes to the questions that might be addressed outside the core. One possibility, for instance, would be to encourage the parties to agree to a partly paper trial, in which witness statements or deposition transcripts are used in place of direct testimony and live trial testimony focuses on cross-examination and, perhaps, rebuttal. Or, as a variation, trial could be integrated with summary judgment in a process by which the court first considers the paper record, then determines what witnesses should be heard in court and shapes the trial accordingly. The following list exemplifies, but does not begin to exhaust, the questions that might be addressed.

Finally, review of questions not addressed suggests a different issue. It is tempting to adopt in the simplified rules provisions that seem to be improvements for all actions but that also seem easier to move through the Enabling Act process if limited to actions that do not have an actively involved constituency. Summary judgment procedure is an illustration. Rule 56 could be substantially improved. A substantially improved Rule 56 failed in the Judicial Conference nearly a decade ago, and it has been difficult to muster enthusiasm for a renewed attempt. But it might be possible to adopt revisions for the simplified rules.

Should permissive Rule 13(b) counterclaims be permitted in a simplified action? Why not make optional counterclaims that arise out of the same transaction or occurrence as the claim, and prohibit others? If counterclaims are permitted, should all claims be aggregated to determine whether the simplified rules apply? Should a counterclaim for injunctive relief automatically oust application of the simplified rules in the cases identified by Rule 102 for mandatory application?

It seems likely that a relatively high proportion of simplified procedure cases will be resolved by default. The Rule 104 demand for judgment is a beginning effort to expedite and clarify this outcome, but — even if something like Rule 104 is adopted — cannot resolve all default cases. Should we adopt an express requirement for proof of the claim by affidavit? Should the requirement be measured differently than the test that would justify summary judgment on the affidavits if there are no opposing affidavits? Is this an illustration of a reform that should be adopted as part of Rule 55 for all cases?

Direct attorney-fee provisions seem outside the scope of Enabling Act rules. But many people believe that the rules can affect implementation of fee statutes. One temptation is to revise the offer-of-judgment procedure so that a Rule 68 offer does not cut off the right of a prevailing plaintiff to recover statutory attorney fees. (An illustration: the rejected offer is for $100,000; the plaintiff wins $90,000. The offer now destroys the right of the plaintiff to recover statutory attorney fees if, but only if, the statute describes the fee recovery as "costs." This wildly improbable result cries out for correction for all cases. But correction quickly becomes bogged down in the dismal swamp of Rule 68.) There may be a special justification for addressing this question in the simplified rules, since they will apply in many actions that will be feasible only if there is a realistic prospect of recovering attorney fees. Fear of the strategic gamesmanship inherent in Rule 68 may deter initial filing, and may easily distort the decision whether to accept an unfair Rule 68 offer.

Now that the rulemaking power includes determinations of appealability, it would be possible to seek out rules that impose particular burdens in small-stakes litigation. The most obvious candidate, official-immunity appeals, is likely to prove untouchable. The sorrily confused discussion in 15A Federal Practice & Procedure: Jurisdiction 2d, § 3914.10 (current supplement) reflects an even deeper confusion in the law. One suspicion, increasingly voiced by the courts of appeals, is that official defendants are using immunity appeals to inflict delay. There may be a substantial number of small-stakes § 1983 actions and potential actions that are deterred by the availability of (potentially multiple) interlocutory appeals. The deterrent effect is likely to be greater in small-stakes cases, affording some excuse to approach these problems in the simplified rules. One easy but partial remedy would be to provide that only one pretrial immunity appeal may be taken. A more

effective remedy would be to expand the scope of the one permitted appeal, permitting direct review of a denial of summary judgment. Official-immunity appeal doctrine, however, derives from the substantive perception that this form of immunity — unlike many other important protections, such as the rules of personal jurisdiction — affords a right to be protected against the burdens of pretrial and trial procedures. Even with the enthusiastic cooperation of the Appellate Rules Committee and staunch support of the Standing Committee, efforts to address these problems could undermine a simplified rules project.

As drafted, the simplified rules model does not address a set of scope problems that likely require consideration. If application of the rules is defined in terms of amount in controversy, what happens when cases are consolidated or claims are severed?

Would it be desirable to consider a majority-verdict rule for jury trials? (There is no possibility of ousting jury trial, and little point in making it more difficult to demand jury trial.)

Should the Rule 53 special masters Subcommittee be asked to consider a provision barring reference to a special master in a simplified rules case?

How about a rule that establishes presumptive time limits for trial — perhaps one day per "side"? (See this again with Rule 109.)

Traditionally the rules have left res judicata to be developed by decisional law. But the nature of simplified procedure raises at least one question. Is it fair to base nonmutual issue preclusion on a simplified-procedure judgment? How far should this question depend on the nature of the simplified rules: is it unwise to belittle the fairness and adequacy of the rules by providing that the results are acceptable to dispose of "small" claims but not to govern something that "really matters"?

If simplified rules are adopted, Rule 81 should be amended to recognize them.

There is another frustrating choice that also must be considered. The draft simply incorporates the Civil Rules for most questions. That approach makes the project much easier. But it also defeats one of the goals of a simplified procedure. A pro se party will not find any of the comfort that might be provided by a self-contained, short, and clearly stated set of rules. This draft does not address directly any of the questions that are raised by the proposal of the Federal Magistrate Judges' Association that a special set of rules should be adopted for pro se actions.

Many other questions are likely to be raised as collective deliberation is brought to bear. The immediate questions are two: Should this project be developed? And if it is to be developed, what forms of support might be sought in developing a more polished model for publication?

A more general question might be added. What sorts of actions are likely to be encouraged by these rules? Will the result be to bring to federal courts actions that otherwise would be brought in state courts — and is that a good use of federal judicial resources? Will the result be to encourage people to bring in federal court actions that otherwise would not be brought in any court? If the ceiling for mandatory application is set at $50,000, is there something awkward about wishing on

civil rights actions, or maintenance-and-cure claims, or proceedings that cannot readily be inflated above $50,000, procedures that are not invoked for any diversity action?

XII. SIMPLIFIED PROCEDURE

Rule 101. Simplified Rules

These simplified rules govern the procedure in actions described in Rule 102. They should be construed and administered to secure the advantages of simplified procedure to serve the just, speedy, and economical determination of these actions.

Committee Note

The Civil Rules have applied a single general form of procedure to all civil actions. Many changes have been made over the years to facilitate individualized adaptation of the general rules to the distinctive needs of complex litigation and to the need to provide increased judicial management when adversary contentiousness threatens to disrupt orderly disposition. Not as much has been done to adapt the rules to the needs of simple litigation that can be managed by the parties with little need for elaborate discovery or pretrial management. Often the parties meet this need on their own. Several studies have shown, for example, that no discovery at all is conducted in a significant portion of federal civil cases. See *Willging, Shapard, Stienstra, & Miletich, Discovery and Disclosure Practice, Problems, and Proposals for Change* (Federal Judicial Center 1997). The lack of discovery, and the limited use of formal discovery in another significant portion of cases, often reflects a low level of fact dispute. In other cases the parties recognize the need to hold the costs of litigation in sensible proportion to the stakes. Yet such restraint is not universal. Whether from excessive zeal, ineptitude, or deliberate motive to increase cost and delay, notice pleading and sweeping discovery practices can entail pretrial practice out of any sensible relationship to the stakes or needs of relatively simple litigation. These rules are designed to provide an improved package of pleading and discovery procedures that will enhance the opportunity to avoid costly discovery. More exacting pleading and disclosure requirements are provided to reduce further the need for formal discovery.

Other changes are made to complement the alternative pleading, disclosure, and discovery practices. These changes, however, are modest. The core of the simplified procedure is the alternative pleading, disclosure, and discovery practice.

Rule 102. Application of Rules

(a) Except as provided in Rule 102(b), these simplified rules apply in an action:

(1) in which the plaintiff seeks only monetary relief and the amount is less than $50,000; or

(2) in which the plaintiff seeks only monetary relief and the amount is less than $250,000, if all plaintiffs elect [in the complaint] to proceed under these rules [and if no defendant objects to application of these rules by notice filed no later than 20 days after service of the summons and complaint {on the objecting defendant}].

(b) These simplified rules do not apply in an action described in Rule 102(a):

(1) for interpleader under Rule 22 or under 28 U.S.C. § 1335;

(2) under Rules 23, 23.1, or 23.2;

(3) under 28 U.S.C. §§ 1602-1611;

(4) for condemnation of real or personal property under Rule 71A;

(5) in which the United States is a party and objects to application of these rules

(A) in the complaint, or

(B) — if a defendant — by notice filed no later than

(i) 30 days after service of the summons and complaint, or

(ii) a motion to substitute the United States as party-defendant; or

(6) if the court, on motion or on its own, finds good cause to proceed under the regular rules.

(c) These simplified rules apply in an action in which:

(1) all plaintiffs offer in the complaint to proceed under these rules,

(2) all defendants named in the complaint accept the offer by notice filed no later than 20 days after the last of these defendants is served, and

(3) no party involuntarily joined after the offer is accepted shows good cause to proceed under the regular rules.

Committee Note

Determination of the actions that the simplified rules govern should be approached conservatively at the outset. Broader application may prove appropriate after experience with the rules determines their success and points the way to improvements.

Subdivision (a) establishes the basic core of application. The simplified rules apply to all actions in which the plaintiff seeks only monetary relief less than $50,000. They apply also to actions for only monetary relief less than $250,000 if the plaintiff elects to invoke them and no defendant makes timely objection. The rules do not apply if the plaintiff seeks specific relief such as a declaratory judgment, an injunction, specific performance, or habeas corpus, unless the parties agree to apply the rules under subdivision (c). The exclusion of actions for specific relief enables a plaintiff to impose the regular civil rules on a defendant who would prefer simplified procedures. The cost of attempting to measure the significance of the stakes in actions that seek more than money, however, seems too great to bear, at least while the simplified rules are new.

Subdivision (b) excludes specific categories of actions that do not seem amenable to simplified procedure because of the dignity of a party or the potential complexities of multiparty proceedings. Paragraph (6) allows the court to exclude any other action for good cause. The court may exercise this power at any time, and may act at the behest of a party or on its own.

Subdivision (c) allows the parties to any action to agree to follow the simplified rules. The agreement is made by the plaintiffs and defendants identified in the initial complaint; a party who is involuntarily joined after the agreement may move to have the action governed by the regular rules for good cause.

Reporter's Comment

The scope of the simplified rules is critical. The choice as to scope is bound up with the actual rules. The more curtailed the simplified rules, the narrower the scope of initial application. The more closely the simplified rules approach the regular rules, the broader the scope of application might be.

The brackets in Rule 102(a)(2) flag one of the issues that deserves attention: Should the plaintiff be given sole choice whether to invoke these rules for an action seeking less than $250,000? Or should the plaintiff be given only the power to invite the defendant to accept the rules? There is a powerful argument that allowing a defendant to opt back into the regular Civil Rules will lead

many defendants to choose the more cumbersome, prolonged, and expensive procedure for wrong reasons — the hope is to harass and wear down the plaintiff, not to achieve a better disposition on the merits. On the other hand, few people would regard stakes between $50,000 and $250,000 as insignificant, and lawsuits are brought against real people as well as institutions that may view the loss of a quarter of a million dollars with equanimity. The issues may have a factual complexity beyond the dollars involved. In the end, the choice may turn on our level of confidence in the rules that emerge. If we believe that they will work well even in more complex cases, we might simply raise the mandatory threshold, or give the plaintiff — but not the defendant — a choice. Giving the plaintiff a unilateral choice may not be unfair — if the action is indeed one that requires resort to the regular rules, the plaintiff may be relied upon to choose them.

All of the exclusions in Rule 102(b) are tentative; perhaps none of them deserve adoption. The exclusion of the United States, for example, may be challenged; an accommodation is made in Rule 109 to allow an additional month before trial when the action involves the United States or a United States agency or employee.

Subdivision (c) is an effort to allow all parties to agree to proceed under the simplified rules, free from any of the limits in (a) or (b). The provision that allows later-added parties to defeat the initial election is limited in two ways. It does not apply to those who voluntarily become parties, as by an amended complaint or intervention. And it requires a showing of good cause. These limitations are suggested because of the risks of disruption that would follow if it were too easy to shift procedural tracks after the initial election. Perhaps it would be better to add a simpler alternative: "These simplified rules apply in an action in which all parties agree to proceed under these rules, or * * *."

If we go down this road, consideration must be given to several complicating factors. Rule 81(c) applies "these rules" to removed actions, but requires repleading only if ordered by the court. Pleading a dollar amount may not be required, or even permitted, by state practice. Must we provide for this in the rule?

Another problem arises from Rule 54(c) — "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." More than $50,000 or $250,000? Injunctive relief? Can we allow curtailed procedure to yield unrestricted judgments? To the extent that we make the simplified rules mandatory, we cannot rely on a waiver theory, unless it is waiver by choosing to go to federal court [and not be removed]. (A much smaller problem arises with respect to declaratory judgments: there is no apparent reason to oust these rules in a "reversed parties" action in which the declaratory plaintiff seeks only to establish nonliability for less than $50,000.)

Rule 103. Pleading

(a) General Rules. Except as provided in Rule 103(b), (c), (d), (e), (f), and (g), pleading in actions governed by these rules is governed by Rules 7 through 15.

(b) Stating a claim. A pleading that asserts a claim for relief must, to the extent reasonably practicable:

(1) state the details of the time, place, participants, and events involved in the claim; and

(2) attach each document the pleader may use to support the claim.

(c) Answering a claim. A pleading that answers a claim for relief must admit or deny the matters pleaded in asserting the claim under Rule 8(b) and also, to the extent reasonably practicable:

(1) state the details of the time, place, participants, and events involved in the claim to the extent those details are not admitted; and

(2) attach each document the pleader may use to support its denials or Rule 103(c)(1) statement.

(d) Avoidances and affirmative defenses. A pleading that asserts an avoidance or affirmative defense must:

(1) identify the avoidance or affirmative defense as an avoidance or affirmative defense; and

(2) plead the avoidance or affirmative defense under the requirements of Rule 103(b) for making a claim for relief[, including attachment of each document the pleader may use to support the avoidance or affirmative defense].

(e) Reply.

(1) A party must reply to an avoidance or affirmative defense identified under Rule 103(d)(1) by admissions, denials, and avoidances or affirmative defenses.

(2) A party must serve a reply no more than twenty days after being served with the pleading

addressed by the reply.

(f) Length. No pleading may exceed a limit of twenty pages, eight and one-half inches by eleven inches, with reasonable spacing, type size, and margins.

(g) Forms. Forms 3 through 22 in the Appendix of Forms do not suffice under Rule 103.

Committee Note

The fact pleading required by Rule 103 is, with the expanded disclosure requirements in Rule 105, the foundation for the Rule 106 discovery limits and the core of the simplified rules. Fact pleading is adopted for these rules to encourage careful preparation before filing. The general system of notice pleading and sweeping discovery works well for most litigation, but can, when misused, impose undue costs. It is hoped that shifting part of the pretrial exchanges between the parties from discovery to more detailed pleading and disclosure can enhance the realistic opportunity of all parties to litigate effectively claims that involve amounts of money that are relatively small in relation to the costs that litigation can entail. Plaintiffs can better afford to pursue worthy claims, and defendants can better afford to resist rather than capitulate to unworthy claims.

Fact pleading cannot be successful if it is approached in a spirit of technicality, much less hypertechnicality. Neither can it be successful if it assumes the mien of detailed witness statements or deposition transcripts. The spirit that has characterized notice pleading should animate Rule 103 fact pleading. What is expected is a clear statement of the pleader's claim, denial, or defense in the detail that might be provided in proposed findings of fact, recognizing that the information available at the pleading stage often is not as detailed or as reliable as the information available at the trial stage.

The test for measuring attachment of a document as one a party "may use" to support a claim, denial, or defense is the same as the test used under Rule 26(a)(1)(A) and (B). The duty to supplement the initial attachments to reflect information gained after filing the pleading is not a matter of pleading but of disclosure under Rule 105.

A reply is required to respond to an avoidance or affirmative defense, but only if the avoidance or affirmative defense is identified under Rule 103(d). To the extent that a reply asserts an avoidance or affirmative defense, a reply to the reply is required, although it is expected that this situation will arise infrequently. The twenty-day period to reply is borrowed from Rule 12(a)(2) because it seems better to have a single period to reply to a pleading that states both an avoidance or affirmative defense and also a counterclaim.

A party who believes that its positions cannot be pleaded adequately in 20 pages may seek leave to amend under Rule 15.

Reporter's Comment

This rule really gets to the heart of the project.

The decision to invoke the general pleading rules has great and obvious advantages. One obvious question is whether to incorporate all of Rule 9, which includes particularity requirements not only in the oft-invoked provisions of Rule 9(b) but also in Rules 9(a) and 9(c). Rule 9(g) on pleading special damage may raise a similar question. On balance, it seems better to retain these familiar provisions. The fact pleading required by this draft should not be equated automatically to the "particularity" requirements attached to specific claims, and most especially should not be equated to the statutory pleading requirements in the securities laws.

Another question is whether to retain the time provisions of Rule 12. The 60-days to answer allowed the United States or its employees seems long, but the reasons for allowing the additional time seem compelling even in this setting. Compare the proposal that the United States be allowed to opt out of the simplified rules, Rule 102(b)(5). There also is a temptation to expedite matters by providing that the time to answer is not suspended by a Rule 12(b) motion. On balance, this temptation seems better resisted.

Perhaps the most important question is whether to retain without change the Rule 15 amendment provisions. A policy of free amendment might undermine the purposes of fact pleading. But easy amendment may be even more important in a system that requires the parties to state relatively detailed positions early in an action; this need may be enhanced by the prospect that expensive prefiling investigation may not make sense in low-stakes actions. The greatest temptation, indeed, is to use the simplified rules as the excuse for a change in Rule 15 that may well be warranted for all cases. There is much to be said for allowing a plaintiff to amend once, as a matter of course, after an answer points out defects in the complaint. The same is true when a reply points out defects in an answer. Present Rule 15(a) allows amendment once as a matter of course if a defect is pointed out by motion but not if it is pointed out by pleading. This question deserves further consideration.

The reply obligation is limited to an avoidance or affirmative defense identified as such. Too much grief would come from requiring a reply to "new matter."

The particularized pleading requirement raises interesting questions about compliance with Rule 11: is more careful investigation required to support more careful pleading? Is that backward — we make it more difficult to bring a small-stakes action, even though the burdens are less, than to bring a more complex action?

Rule 104. Demand for Judgment

(a) Demand for judgment. A party may attach a demand for judgment to a pleading that asserts a contract claim for a sum certain. The demand must be supported by:

(1) a verified copy of any writing that evidences the obligation, and

(2) a sworn statement of

(A) facts establishing any obligation that is not completely evidenced by a writing,

(B) facts establishing total or partial nonperformance of the obligation, and

(C) the amount due.

(b) Response to demand for judgment.

(1) Within the time provided for answering the pleading asserting the claim, a party served with a demand for judgment must admit the amount due stated in the demand or file a response.

(2) The response must be sworn, and must respond specifically by admission, denial, avoidance, or affirmative defense to each matter set forth in the demand for judgment. The answer to the pleading asserting the claim may incorporate the response by reference.

(c) Judgment. Unless the court directs otherwise, the clerk must prepare, sign, and enter judgment for any amount admitted due under Rule 104(b). A judgment that does not completely dispose of the action is not final unless the court directs entry of final judgment under Rule 54(b).

Committee Note

The demand-for-judgment procedure is new. A substantial number of actions in federal court are brought by the United States to collect relatively small sums that are due on unpaid loans or overpaid benefits. The demand procedure is essentially a motion for summary judgment that is made with the pleading that states the claim, paving the way for efficient and inexpensive disposition of

the cases in which the plaintiff sues only for the amount that in fact is due. This procedure also may be useful in other small claims brought under federal law, and in diversity actions that fall under these rules through Rules 102(a)(2) or 102(c).

Reporter's Comment

It may be asked why this procedure is not available to defendants as well as plaintiffs: an opportunity to confess judgment in a stated amount. At least two observations may be offered. Defendants have summary judgment. And a competing offer-of-judgment procedure would be just that: a Rule 68-like device. Probably we do not want to go down that road with a simplified procedure. A defendant always can concede liability even if the plaintiff does not make a demand for judgment.

Rule 105. Disclosure

(a) General. Disclosure requirements are governed by Rule 26(a), 26(e), 26(f), 26(g), [and 37(c)(1)], except as provided in Rule 105(b), (c), (d), and (e).

(b) Plaintiff's disclosure. No later than twenty days after the last pleading due from any present party is filed, each plaintiff must, with respect to its own claims, provide to other parties:

(1) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to facts disputed in the pleadings, identifying the subjects of the information *{, together with a sworn statement of relevant facts made by plaintiff, if the plaintiff has discoverable information, and by any other person whose sworn statement is reasonably available to the plaintiff}*;

(2) a copy of all documents, data compilations, and tangible things in the possession, custody, or control of the party that are known to be relevant to facts disputed in the pleadings; and

(3) the damages computations and insurance information described in Rule 26(a)(1)(C) and (D).

(c) Other Parties' Disclosures. No later than twenty days after a plaintiff's Rule 105(a) disclosures are due, unless the time is extended by stipulation or court order, each other party must provide to all other parties a disclosure that meets the requirements of Rule 105(a)(1), (2), and (3) *{, including a sworn statement made by the disclosing party, if the disclosing party has discoverable information, and by any other person whose sworn statement is reasonably available to the disclosing party and has not already been provided in the action}*.

(d) Disclosure of Expert Testimony. If the court permits expert testimony under Rule 108, Rule 26(a)(2) governs disclosure unless the court limits or excuses the disclosure.

(e) Available Information; Obligation not Excused.

(1) A disclosure under Rule 105(a), (b), (c), or (d) must be based on the information then

reasonably available to the disclosing party.

(2) The disclosure obligation is not excused because the disclosing party:

(A) has not fully completed its investigation of the case,

(B) challenges the sufficiency of another party's disclosure, or

(C) has not been provided another party's disclosures.

Committee Note

The disclosure obligation is expanded beyond Rule 26(a)(1)(A) and (B) obligations to disclose witnesses and documents in the belief that disclosure will prove more efficient than discovery for many of the actions governed by these simplified rules. Disclosure is required, however, only with respect to facts disputed in the pleadings. If a defendant defaults, or concedes liability under Rule 104, a plaintiff need not make any disclosure.

As to witnesses, it is required that a party provide the party's own sworn statement if the party has discoverable information, and also the sworn statement of any other witness that is reasonably available to the disclosing party. The test of reasonable availability is deliberately pragmatic, and is to be administered in the understanding that a party is not always able to secure a statement from a person that seemingly would be willing to cooperate. If a person's sworn statement has already been provided in the action, another disclosing party need provide a supplemental statement by the same person only if the disclosing party wishes to elicit additional evidence from that person. Disclosure of these statements is an important support for the restrictions on deposition practice in Rule 106(d).

Disclosure requires copies of documents, not mere identification, but extends only to documents known to be relevant to facts disputed in the pleadings. A document is "known to be relevant" if a party, an agent of a party, or an attorney responsible for participating in the litigation is consciously aware of the document and its relevance. No duty is imposed to search for documents that a party does not seek out in its own investigation and preparation of the case.

Disclosures are sequenced, with plaintiffs going first, so that the plaintiffs' disclosures will provide a framework for more meaningful disclosures by other parties. Disclosures by other parties are due twenty days after plaintiffs' disclosures are due, whether or not plaintiffs have complied with their disclosure obligations. The parties may stipulate to a later date for disclosures after the first plaintiff's disclosure. The court likewise may order a later date; the best reason for deferring disclosure by other parties is a substantial failure of disclosure by the plaintiffs. A plaintiff who makes Rule 105(b) disclosures with respect to its own claims may make separate disclosures as to the claims of other parties under Rule 105(c), but may elect instead to combine those disclosures with its Rule 105(b) disclosures.

Rule 108 discourages the use of expert testimony in actions governed by these simplified rules. But if expert testimony is to be permitted at trial, Rule 26(a)(2) disclosure may be an important substitute for discovery. In determining whether to direct Rule 26(a)(2) disclosure, the court should consider whether the need for disclosure justifies the expense of securing a written report from the expert.

Reporter's Comment

Rule 105(e)(2) is taken from the final paragraph of Rule 26(a), as a matter of emphasis without cross-reference.

Rule 106. Discovery

(a) General. Discovery is governed by Rules 26 through 37, except as provided in Rule 106(b), (c), (d), (e), (f), and (g).

(b) Discovery Conference. A Rule 26(f) conference must be held only if requested [in writing] by a party. The request may be made before or after disclosures are due under Rule 105.

(c) Timing of Discovery. A party may make discovery requests only after a Rule 26(f) conference, or on stipulation of all parties or court order.

(d) Depositions.

(1) Number. The number of depositions permitted under Rule 30(a)(2)(A) and Rule 31(a)(2)(A) without leave of court is three. *{Alternative: A deposition may be taken under Rule 30 or Rule 31 only on stipulation of all parties or court order.}*

(2) Duration. The presumptive time limit for a deposition under Rule 30(d)(2) is one day of three, not seven, hours.

(e) Interrogatories. The presumptive number of interrogatories permitted under Rule 33 is ten.

(f) Rule 34 Discovery. A request for production or inspection of documents and tangible things under Rule 34 must specifically identify the things requested *{unless the court grants permission to identify the things requested by reasonably particular categories}*.

(g) Requests to Admit. A party may serve more than ten Rule 36 requests to admit on another party only on stipulation of all parties or court order.

Committee Note

The Rule 106 limitations on discovery are made possible by the expanded pleading requirements of Rule 103 and the expanded disclosure requirements of Rule 105. Together, these rules seek to assure plaintiffs that an action for relatively small stakes can be brought without undue expense, and to provide comparable assurance to defendants contemplating the costs of defending rather than defaulting.

The Rule 26(f) discovery conference is made available on request by any party. The discovery is not made mandatory because it is expected that the pleading and disclosure requirements of Rules 103 and 105, supplemented by the Rule 104 demand for judgment, will greatly reduce the need for discovery. But if a party wishes to use any discovery device, it must request a discovery conference or obtain a stipulation or court order allowing discovery without the conference.

Limits on the numbers of depositions and interrogatories are reduced to match the predictable reasonable limits of discovery in cases governed by the simplified rules. Expansion in the numbers may be obtained in the same way as under Rules 30, 31, and 33. A parallel limitation has been created for requests to admit.

Rule 34 requests are subjected to an obligation to specifically identify the documents or tangible things requested. Rule 105 imposes an obligation to produce, as disclosure, copies of all documents known to be relevant to facts disputed in the pleadings. Full and honest compliance with this obligation, including the duty to supplement initial disclosures under Rule 26(e)(1), will meet the reasonable needs of most litigation governed by these simplified rules. *{Although no express limit is built into the provision allowing a court to permit a request that identifies the things requested by reasonably particularized categories, permission should be granted only if there is some reason to suspect that a reasonable further inquiry will produce useful information.}*

Reporter's Comment

Rules 106(d) and (e) are drafted by reference. The intention is to incorporate, for example, all of Rule 30(a)(2)(A), substituting "three" for "ten." That means all plaintiffs get three depositions, all defendants get three, all third-party defendants get three. It may be better to adopt a lengthier, but self-contained version that tracks the language of Rules 30, 31, 33, and 36.

Rule 107. Scheduling Orders

A rule 16(b) scheduling order is not required, but the court may, on its own or on request of a party, make a scheduling order.

Committee Note

Although Rule 16(b) scheduling orders may be useful in an action governed by the simplified rules, it is hoped that the shift in the balance between pleading, disclosure, and discovery will enable the parties to manage most actions without need for judicial administration.

Reporter's Comment

It is tempting to attempt to provide firm a discovery cutoff and a firm trial date by uniform rule. It seems likely, however, that the obstacles that persuaded the Advisory Committee not to adopt that approach for all civil actions will be found even with simplified actions. There may be a significant number of districts where it is not possible to provide a meaningfully firm trial date even for small-claims actions. In addition, it may be wondered whether it is wise to introduce an indirect docket priority for these actions by way of a firm trial date.

Rule 108. Expert Witnesses.

A party who wishes to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence must move for permission no later than the time for serving its initial disclosures under Rule 105, ten days after another party has moved for permission to present such evidence, or a different time set by the court. The court should consider the nature of the disputed issues, the amount in controversy, and the resources of the parties in determining whether to permit expert testimony. The court also may consider appointment of an expert under Rule 706 of the Federal Rules of Evidence as an alternative to hearing testimony from experts retained by the parties.

Committee Note

There is a risk that a party to an action governed by these simplified rules may seek to increase the costs of litigating by offering expert testimony that would not be offered if the only motive were a desire to invest an amount reasonably proportioned to the stakes of the litigation. A party who seeks to offer expert testimony that is reasonably justified in terms of the difficulty of the issues to be tried should be allowed to present the testimony, even though the expense seems great in relation to the money at stake, unless the result may be an unfair advantage in relation to another party who cannot reasonably incur the cost of securing its own expert testimony.

Rule 108 cannot be applied to exclude expert testimony that is required by applicable substantive law. In professional malpractice actions, for example, expert testimony often is required to establish the elements of the claim.

Rule 109. Trial date

(a) Trial Date Set on Filing. At the time an action governed by these rules is filed, the clerk must set a trial date that is [no later than]:

(1) six months from the filing date, or

(2) seven months from the filing date if any party is the United States, an agency of the United States, an officer or employee of the United States sued in an official capacity, or 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.

(b) Serving Notice of Trial Date. Notice of the Rule 109(a) trial date must be served

(1) with the summons and complaint or,

(2) if a defendant has waived service, promptly after the action is {filed} [commenced].

(c) Amending Trial Date. The Rule 109(a) trial date may be extended by order [of the court] to a date later than the period set by Rule 109(a) only on showing that:

(1) the plaintiff had good reason for failing to serve a defendant within 20 days from the filing date, or

(2) extraordinary reasons require a deferred trial date, but it is not sufficient reason **(A)** that the parties have not completed disclosure or discovery, nor **(B)** that the nature of the action requires deferral.

Committee Note

Expeditious disposition is an important element of these simplified rules. Setting a firm trial date when the action is filed will prompt the parties to proceed expeditiously. This effect requires that the date be quite firm. Extensions are allowed only when there is good reason for failing to effect service within 20 days from filing, or when extraordinary reasons require greater time. Failure to complete disclosure and discovery, and pleas that an action is by its nature too complex to prepare in six months (or seven months if the parties include the United States or its agents), do not provide sufficient reason. It is expected that courts will manage their dockets so that only extraordinary docket conditions will require an extension because the court is unable to honor the initial trial date.

Reporter's Note

This provision might well be moved up to lie between Rule 103 and Rule 104.

The draft Committee Note points to the objections that may be advanced to the "speedy trial" requirement. Particularly with individual docket systems, it may prove very difficult to honor a trial date set at the time of filing. On the other hand, the importance of speedy trial cannot be denied, particularly with a procedural system that is designed to achieve economy. These issues are

important, and deserve hard work to craft the best possible rule. A firm six-month trial date could be more easily achieved if districts that have a substantial number of judges would adopt a centralized docket for these cases. If indeed these cases are amenable to simplified procedure, a centralized docket system might work reasonably well.

Because this draft rule was a last-minute addition, it has been created without attempting to work through the many issues that should be considered if it is to be adopted. A six-month trial date could create havoc if the plaintiff is allowed to make service at any time within the 120-day period allowed by Rule 4(m). Many other time periods also need to be considered, including those that suspend the time to answer while a Rule 12 motion is pending, the time to complete disclosure, and so on. Beyond the time periods set in the Rules, it may be necessary to consider time periods set by local rules — a lengthy notice requirement for motions in general, or more specific timing requirements for summary judgment motions, could be incompatible with the 6-month trial date.

Another source of time problems may arise from local ADR practices. Commonly ADR establishes a "time out" from ordinary requirements. Adjustments may be needed on this score as well.

All of these firm timing requirements suggest another problem. If firm deadlines are set for several steps along the way, the result may be more expensive litigation. Forced to "do it now or never," lawyers may feel compelled to do many things that, without this pressure, would never be done. It is not necessarily a good answer to require that all motions be made within X days, or to require that an answer be filed before the court decides a motion to dismiss or for more definite statement, and so on.

A firm trial date provision could be drafted in different terms that might reduce these difficulties. For example, the date might be set by order after the pleadings are closed.

In addition to a firm trial date, it also may be desirable to think about trial time limits. It might be provided, for instance, that good cause must be shown to obtain more than one trial day for all plaintiffs or for all defendants.

MEMORANDUM

To: Advisory Committee on Civil Rules
From: Rick Marcus, Special Reporter
Date: Sept. 21, 1999
Re: Discovery issues for Oct. 1999 meeting

The discovery package on which the Committee has labored for three years has passed into other hands, but the subject of discovery has not vanished from the Committee's docket. To the contrary, at its Oct. 1997 meeting the Committee selected only some of the many possible ideas for change for immediate attention, and it consciously left others for further action later. Since then, some new issues have also come up.

This memorandum outlines the issues that are presently ripe for discussion. On one, indeed, the Standing Committee has directed this Committee to report back in January, 2000. These subjects are presented for discussion purposes rather than for a decision on what specific rule changes (if any) to recommend. On most there is considerable room to argue that no changes should be made, and the question when change should be pursued if it is pursued remains open as well.

Against that background, the memorandum considers the following topics:

(1) Standing Committee concerns about consequences of the proposed change to Rule 5(d) abolishing the filing requirement for certain discovery materials

(2) The possibility of a rule change to address the problem of excessive document review costs due to worries about waiver of privilege (left for further action)

(3) The possibility that some presumptive durational

limitation should be written into Rule 34 to limit a responding party's duty to search through old records (left for further action)

(1) Standing Committee concerns about consequences of the proposed change to Rule 5(d) abolishing the filing requirement for certain discovery materials

During the June 1999 Standing Committee meeting, two sorts of questions were raised about the consequences of deleting the filing requirement for discovery materials from Rule 5(d). The Standing Committee passed a motion directing the Advisory Committee to consider these questions and report back on whether any further action seemed warranted at the Standing Committee's next meeting. See Standing Committee Minutes at 18. A thorough study of all the background for these questions would consume considerable time and space. This memorandum is intended to identify and outline the pertinent issues so that the Committee can decide whether this study seems warranted, and presumably the Standing Committee can be advised of that determination at its next meeting in January, 2000.

Essentially there were two types of concerns raised. One concern was raised at the Oregon meeting of this Committee by a member of the Standing Committee. It is that filed discovery materials have the status of "court records" and therefore that any news report on their contents is privileged. On that point, the concern is that the change in Rule 5(d) might deprive reporters of a privilege that might have applied had the rule not been changed. The suggested remedy for this problem was to add a sentence to the Committee Note saying that unfiled discovery materials should still be regarded as "court records."

The second concern had to do with access to discovery materials. Another member of the Standing Committee noted that if the materials were "court records" they would also be available for public examination. For this reason, there might be a reason to clarify the status of unfiled discovery materials.

This member opined that the clarification should be in the rule itself, not just in the Committee Note.

General background regarding effect of change to Rule 5(d)

Both sets of concerns assume that the currently-proposed change to Rule 5(d) is adopted and goes into effect on Dec. 1, 2000. If that does not happen, it would seem that the Standing Committee's question becomes moot.[1]

There is an ironic counterpoint, however. A major stimulus for the proposed change to Rule 5(d) was the fact that most districts already have local rules that forbid filing of discovery materials, and in that sense the change to the national rule brings it into accord with these pervasive local provisions. Although it identified many of these local rules more than ten years ago and determined that they violate Rule 83, the Local Rules Project also concluded that reconsidering the national rule might be more sensible than invalidating the local rules. In 1997, the Ninth Circuit Judicial Council reached the same conclusion on finding that many districts in that circuit had such local rules, and it made the same recommendation. This change in Rule 5(d) followed.

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[1] As noted below, the questions raised by the Standing Committee really seem almost as applicable to present conditions because no-filing local rules are so prevalent. Accordingly, one could say that some further action may be in order whether or not Rule 5(d) goes into effect at the end of next year.

Although that may be true as an abstract matter, it is difficult to see what this Committee is supposed to do to address the current situation (which will continue unless the amendment to Rule 5(d) is adopted). Those local rules violate Rule 83. Rule 83 has been amended twice in recent years to strengthen its provisions. Although this situation might stimulate further revision of Rule 83, that does not seem to be what the Standing Committee was concerned about. Except for such an amendment, there is little that this Committee can do about local rules that violate Rule 83.

The point of this digression is that the problems identified by the Standing Committee already exist in most districts. As noted below, some of those districts have added provisions affording some means for public access to unfiled discovery materials. But in a real sense the difficulties pointed out at the Standing Committee meeting already exist, and have for years. If the concerns raised by the Standing Committee were pressing problems, one would expect to find evidence of that. As reported below, there doesn't seem to be any such evidence.

Another point about the no-filing rule should also be kept in mind: It doesn't affect some of the potentially more interesting materials produced through discovery. Current Rule 5(d) does require filing of a number of discovery materials, but not all. Most significantly, documents produced pursuant to Rule 34 are not supposed to be filed; only the request and response are to be filed. Indeed, as the discussion below of ways of dealing with the problem of privilege waiver emphasizes, far more documents than are even copied are often made available for inspection by opposing counsel. To say that all these materials are "court records" would have dramatic effects.

It is true that the current rules do call for filing of depositions, but that too must be appreciated in a pragmatic way. The deposition notice is usually filed (although there need not be one should the parties simply set up the deposition without filing a notice). But the deposition transcript itself may not be filed for some time (or not filed at all if the case settles) because the witness still has a right (if requested before the end of the deposition) to review the transcript, and depositions may still (even after adoption -- if it occurs -- of the one day of seven hours provision for depositions that the Committee has proposed) be adjourned for some time before the questioning is completed. So there may be a long time before the filing requirement under the current rules comes into play, and treating

depositions as "court documents" during this time would seem to be a modification of current practice.

What remains, then, are the following types of discovery materials that are to be filed promptly according to current Rule 5(d): deposition notices, document requests and responses thereto, interrogatories and answers thereto, and requests for admissions and responses thereto.[2] (Note that court-ordered examinations pursuant to Rule 35 presumably involve some materials filed in court.) So the major impact of the change (putting aside the actual effect of pervasive local rules directing that discovery materials not be filed) is to relieve parties of the duty to file these sorts of things (and deposition transcripts once they are completed and reviewed).

General background regarding related issues

Although the precise issues raised are different from other topics that have drawn much attention over the past two decades, it is important to have in mind also the broader issues to which these questions somewhat relate. For at least 20 years, there have been debates about discovery confidentiality and public access to court records including materials related to cases pending in court. Many of the early decisions were criminal cases, and they gradually strengthened First Amendment and common law right of access to court proceedings (including preliminary hearings) in criminal cases. Although the Supreme Court has not precisely so held, much of that reasoning applies with force to civil cases, and lower courts have found it applicable to civil cases.

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[2] Rule 26(a) disclosures are presently to be filed also, and the proposed amendments remove the filing requirement for disclosures pursuant to Rule 26(a)(1) and (2). The amendments also limit Rule 26(a) disclosures to material the disclosing party "may use to support" its claims or defenses.

Regarding access to discovery (as opposed to in-court activity), there has been particular controversy about protective orders or other devices by which materials exchanged through discovery are held under wraps. In that connection, the Supreme Court has stated that "pretrial depositions and interrogatories are not public components of a civil trial." Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984). The issues have been discussed at length in the law reviews. See, e.g., Marcus, The Discovery Confidentiality Controversy, 1991 U. Ill. L. Rev. 457, Miller, Confidentiality, Protective Orders, and Public Access to the Courts, 105 Harv. L. Rev. 427 (1991); Marcus, Myth and Reality in Protective Order Litigation, 69 Cornell L. Rev. 1 (1983). There is even an entire book about the subject. See F. Hare, J. Gilbert & W. ReMine, Confidentiality Orders (1988). Proposals for change in the area prompt strong reactions from various quarters. For example, when the Federal Courts Study Committee made recommendations concerning continued use of protective orders in its draft report in 1989, the Council of the ABA Section of Litigation -- including a variety of experienced lawyers -- vigorously urged that confidentiality be respected.[3]

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[3] The precise thrust of these comments was a suggestion in the Federal Courts Study Committee draft report that access for litigants with similar cases be viewed more favorably than general public access. The Council of the Section of Litigation had this to say:

> We strongly believe that discovery should be used *only* for purposes of a given case -- there should be a strong presumption that any materials or information disclosed in discovery would continue to remain the property of the disclosing party and should continue to be confidential.

Those submitting this comment included Michael E. Tigar, Chair of the Section, and Paul J. Bschorr, Theodore R. Tetzlaff, Jamie S. Gorelick, David C. Weiner, Judah Best, Ronald L. Olson, Benjamin R. Civiletti, John R. Tomlinson, Scott J. Atlas, Hon. John C. Coughenour, Paul H. Dawes, Lawrence J. Fox, William C. McClearn, Barry F. McNeil, Dianne M. Nast, William G. Paul, John F.X. Peloso, Nancy Schaefer, Charles M. Shaffer, Jr., Jean Maclean Snyder, Mark H. Tuohey III, Edward M. Waller, Jr., Allen W.

One strand of this debate concerns the idea that discovery should be viewed as a method of providing the public with information about the topics raised in litigation, sometimes called the "public access" view of discovery. There are strong statements of this view, some by courts invoking the provisions of the Civil Rules. E.g., AT&T v. Grady, 594 F.2d 594, 596 (7th Cir. 1978), cert. denied, 440 U.S. 971 (1979) ("pretrial discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings"). There are even court opinions suggesting that it is legitimate to initiate litigation in order to use discovery to obtain information for the public.[4] At least one court has upheld public access to a deposition. Avirgan v. Hull, 118 F.R.D. 257 (D.D.C. 1987).

Obviously views on these topics differ. Indeed, it is interesting that one of the most vigorous critics of protective orders -- lead author of the book mentioned above on this topic -- has recently declared himself opposed to the "public access" view. See F. Hare, Why and How to Oppose Restrictive Protective Orders in Product Liability Litigation 9 (1999) ("The author subscribes to the view that the primary purpose of the law is to assist in the resolution of disputes -- rather than as an instrument of 'public policy.'").

Kimbrough, Cassandra Lewis, Loren Kieve, and Sidney G. Leech. See Marcus, supra, 1991 U. Ill. L. Rev. at 466-67 n.61.

[4] E.g., Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 258 (7th Cir. 1975):

> [M]any important social issues become entangled to some degree in civil litigation. Indeed, certain civil suits may be instigated for the very purpose of gaining information for the public. . . . Civil litigation in general often exposes the need for governmental action or correction. Such revelations should not be kept from the public.

Considerable legislative activity has embraced versions of the "public access" idea. Florida has adopted a "Sunshine in Litigation Act," Fla. Stat. § 69.081, that limits protection for materials disclosed through discovery involving a "public hazard." In 1990 Texas adopted its Rule of Civil Procedure 69(a), providing that "court records are presumed to be open to the general public," and including discovery within the definition of "court record" even if not filed. More legislation may be passed in the future. Similar bills have been introduced in Congress, and there is presently a bill pending in California embodying such views.

The point if this introduction is to sketch the terrain as it currently exists. It may be that the Advisory Committee could contribute importantly to clarifying the area, but it should be appreciated that there is already a good deal of generally relevant material on the subject without any further action by this Committee. The cases may not all be in agreement, but there are quite a lot of them.

Relevant recent actions by the Advisory Committee

In approaching these questions, the Committee does not write on a clean slate. During the 1990s, at least two other episodes of Committee activity have related to these general topics. First, the Committee twice published proposals to amend Rule 26(c) regarding protective orders. One proposed amendment was approved by the Standing Committee but sent back by the Judicial Conference for further study. Eventually, at its March, 1998, meeting the Committee voted not to take any further action on amending Rule 26(c).

In addition, in early 1994 the Committee gave some consideration to whether it should adopt a rule (perhaps to be designated Rule 77.1) to deal with how long a court should retain

files. So far as I am aware, no formal recommendations resulted from this discussion.

With this general background in mind, we can turn to the precise issues raised by the inquiry from the Standing Committee.

A. Privilege Against Defamation Claims

One concern raised by the Standing Committee is whether relaxing filing requirements will undercut defenses of privilege should reports about the cases lead to defamation suits. The solution suggested by one member of the Standing Committee was to add a sentence to the Committee Note saying that unfiled discovery materials are nonetheless "court records" for purposes of such privileges.

A complete canvas of pertinent privilege issues in all states would be a considerable undertaking. A review of some states' practices suggests that, although there are some uncertainties, the proposed change to Rule 5(d) probably would not have a significant effect. There are two privileges to consider.

First, there is a privilege immunizing participants in litigation from defamation liability for what they do in connection with the litigation. See, e.g., Cal. Civ. Code. § 47(b) (defamatory publications or broadcasts made in connection with litigation are privileged). The general idea seems to be that hurtful things are often said in litigation, and to have statements made in litigation no. 1 be the precipitating factor for litigation no. 2 would undesirable. At least in some places, the privilege is absolute. (Note that there may be separate tort claims for malicious prosecution or abuse of process, and that this privilege does not seemingly apply to them.)

To qualify for this privilege, the statement in question must be made to accomplish the purposes of the litigation. Whether that is so may be disputed in given cases, but some research focused on important states (California, Florida, Illinois, New York and Texas) turns up no reason to believe that the fact the statement is in a "court record" plays a crucial role. To the contrary, the privilege may be applied with regard to things that cannot be "court records." See, e.g., Sussman v. Damian, 355 So.2d 809, 811 (Fla.App. 1977) (conversations between opposing counsel); Rosen v. Brandes, 432 N.Y.S.2d 597, 599 (1980) (statements in letters between parties and their attorneys and in an unsolicited offer of settlement). There don't seem to be any requirements of filing. See Shahvar v. Superior Court, 25 Cal.App.4th 653, 657 (1994) ("[a] document is not privileged merely because it has been filed with the court or in an action. The privileged status of a particular statement therein depends upon its relationship to an actual or potential issue in an underlying action.").

The second privilege is a qualified privilege for fair reports of judicial proceedings. This privilege seems focused mainly on the desire to encourage dissemination of information about action by governmental bodies. Thus, reports about legislative proceedings, actions by law enforcement officials and judicial proceedings are privileged so long as they are fair and accurate. Evidently the privilege can be overcome with proof that, even though the report is accurate, it was made solely for the purpose of causing harm to the person defamed.

As an initial matter, the orientation of this privilege suggests difficulties in applying it to unfiled matters. The basic thrust is on allowing the public to be informed about what its officials -- including judges -- are doing. The proposed amendment to Rule 5(d) requires filing once any discovery materials are "used in the proceeding," so that should generally

cover all those that relate to what the judge has done or might do or even consider.

Because the essential focus is on what the court itself has done, there are some differences among states about whether the privilege applies when there is a news report of the contents of pleadings, and there have been some states in which the privilege only attached after the court has taken some action in relation to the pleading. See Stevenson v. Hearst Consolidated Pub., Inc., 214 F.2d 902 (2d Cir.), cert. denied, 348 U.S. 874 (1954) (asserting that filing or service of a complaint without any judicial action is not a judicial proceeding so that a report about it is privileged); Pittsburgh Courier Pub. Co. v. Lubore, 200 F.2d 355 (D.C. Cir. 1952) (publication of contents of a filed affidavit before trial is not privileged).

In jurisdictions in which judicial action is not required for the privilege to attach, filing may nevertheless be a prerequisite. In Green Acres Trust v. London, 688 P.2d 617 (Az. 1984), defendants held a press conference before filing their suit, and the court rejected the privilege because "[a] pleading must be filed with the court before this privilege may apply." Id. at 619; see also Cox v. Lee Ent., Inc., 723 P.2d 238 (Mont. 1986) (indicating that filing of pleading is prerequisite for privilege to report its contents); Mark v. Seattle Times, 635 P.2d 1081 (Wash. 1981) (privilege available for reporting contents of affidavit of probable cause, because such documents are "officially filed court documents open to public inspection"); Costello v. Ocean County Observer, 643 A.2d 1012 (N.J. 1994) (unsigned draft of pleading that was included in court's file for some reason does not qualify). Compare Doe v. Kohn Nast & Graf, 866 F.Supp. 190, 195 (E.D. Pa. 1994) (statements at press conference based on unfiled answer protected; "under Pennsylvania law, the fair comment privilege does apply to reports of leading even in the absence of judicial

action upon the pleadings"). In sum, the law on reporting the contents of pleadings does not seem entirely consistent in all jurisdictions on whether filing is required.

Notably absent from the caselaw thus far found is consideration of discovery materials,[5] making assessment of the significance of the change to Rule 5(d) difficult. But perhaps the absence of such authority indicates there isn't really a problem, whatever the actual resolution of this legal issue would be. Recall that for ten or fifteen years most district courts have directed that discovery not be filed, and some states have also. If that circumstance has caused a problem in protecting reporting about what is in discovery materials, one would think there would be some evidence of that problem in the reported cases. So far as research to date has revealed, there does not seem to be a problem. Under those circumstances, it may not be worth the trouble to try to find more informative authority from other states about these privilege issues.

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[5] There is one exception to this, but it hardly seems pertinent because it has been ordered unpublished under the California practice for thus removing cases from the reporters. In Koenig v. Foote, 21 Cal. Rptr. 2d 820 (1993), plaintiff sued for defamation, claiming that a declaration filed in alleged response to an interrogatory in an earlier case and circulated immediately to the press was defamatory. Presented with a privilege defense, plaintiff argued that "the filing of the declaration was only a ploy to obtain an immunity bath." Id. at 824. The appellate court held that the privilege was not applicable because filing was not proper for interrogatory responses. Even though the privilege conferred by Cal. Civ. Code § 47 seemingly doesn't generally depend on filing, the court felt that filing related to whether the publication of the statement was "required or permitted by law." Since filing was not permitted under California practice, the privilege did not apply. "Although the probable reason for the rule is to alleviate the shortage of storage capacity of court facilities the rule is no less mandatory by its terms." Id. Because the opinion was subsequently ordered depublished and removed from the official reporter, it cannot be cited as authority.

The fact that the authority must come mainly from state law points up yet another difficulty. Essentially the question raised is whether there would be a defense of privilege to a defamation claim. That is governed by state law, and the issue before this Committee is whether the change to Rule 5(d) will have an impact on that state law. It might be (although there is presently almost no evidence of this) that directing that discovery material not be filed could mean in some jurisdictions that a privilege would not apply due to nonfiling where it would apply if discovery were filed. So maybe changing Rule 5(d) back to its current language and forcing districts to rescind their current local rules would restore the protection that may have been lost. But it doesn't seem that anyone is actually proposing rescinding the pending amendment on this ground.

What is proposed instead is to add something to the Committee Note. One problem with that solution is that the Committee has decided that it will not issue Committee Notes without amending a rule. A more significant problem might even be called an *Erie* problem, or at least one going to the Committee's authority. The Rules Enabling Act forbids rules of procedure that "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). The defamation privilege is clearly a substantive right. Changing the actual practice and rule regarding filing in federal court might indirectly have some effect on the application of this privilege, but that indirect effect would not violate the statue. Merely saying in a Committee Note that we wish the states would pretend that these things were still filed in federal court, however, seems close to doing what the Rules Enabling Act forbids. So the suggestion that a rule change would be needed seems persuasive, but the only one that might work is to undo what we just did. And even then, there would remain the fact that in most districts local rules presently forbid filing.

In sum, research thus far indicates that there is no reason to expect that the proposed change to Rule 5(d) will cause a problem with application or availability of privileges in state-law defamation actions. Although the no-filing rule has existed for years in practice in most districts (and some states), there's no indication lack of filing has caused a problem. And if there were, the only readily identifiable solution would be to restore and enforce the filing requirement.

B. Public Access to Unfiled Discovery Materials

This question obviously ties in more closely with the topics covered in the general introductory comments at pp. 6-9 above. It also resembles the consideration of the proposal of a rule regarding retention of court files that the Committee discussed about five years ago.

The starting point is that the public generally can inspect and copy materials in the court's file. But if they're not in the court's file, John Q. Public can't see them this way. So a way of presenting the question is to ask how the Committee would feel about directing that John Q. Public can go to the offices of the lawyers in the case and have a right to see these previously-filed materials there.

Lying in the background (besides the ongoing debate on whether the "public access" idea should apply to discovery) is the question why discovery was filed in court. Certainly it is true that when Rule 5(d) was last amended twenty years ago there was much emphasis on the value of that filing requirement in affording access to discovery materials in some instances. But that doesn't necessarily lead to the conclusion that the filing requirement was designed to accomplish that result. It may be that filing simply seemed the routine thing to do with case-related materials when the rules were drafted in the 1930s.

As one addresses the current question from the Standing Committee, it is important to distinguish it from other issues. For one, the question is not whether the court should enter an order sealing materials that are actually in the court's file. Similarly, it is not whether the court should limit dissemination of discovery materials by a party. Under the proposed amendment, Rule 5(d) would call for filing of all discovery materials used in the proceeding, and the change to the rule would have no bearing on dissemination of discovery materials by the litigants. The question is also different from one discussed at the Committee's meeting in Oregon last April -- whether to add to the Committee Note some observations about whether "prudent" counsel will keep copies of discovery materials. The issue here is nonparty right of access. Finally, it is not a question of nonparty access to the discovery event (as opposed to its fruits).

Local rules in some districts do address the question. Here are some examples:

> During the pendency of any case the custodian of any discovery materials, other than depositions, shall provide to counsel for all other parties reasonable access to the materials and an opportunity to duplicate the materials at the expense of the copying party, and any other person may, with leave of Court, obtain a copy of any discovery material from its custodian upon payment of the expense of the copy. (M.D. Ala. Local Rule 5.1(d))

> Unless an applicable protective order otherwise provides, any person may obtain copies of any discovery document by making a written request therefor to the Clerk and paying the reasonable cost of duplication. The Clerk shall give notice of the request to all parties in the action, and the party holding the original of the requested

> discovery document shall lodge the original with the Clerk within ten days after service of the Clerk's notice. Promptly after duplication, the Clerk shall return the original to the party who provided it. (C.D. Cal. Local Rule 8.4)
>
> Except as provided by this Rule, discovery materials shall not be filed with the court. The party serving the discovery materials or taking the deposition shall retain the original and be the custodian of it. The court, on its own motion, on motion of any party, or on application by a non-party, may require the filing of any discovery materials or may make provisions for a person to obtain a copy at his/her own expense. (N.D. Ill. Local Rule 18 B (1))

No doubt other provisions could be devised, and it is noteworthy that none of the above authorize John Q. Public to present himself at a law office and demand access to the contents of the file room.

Whether the Committee feels it worthwhile to develop such a rule depends in large measure on the resolution of the "public access" debate mentioned in the introduction. Taken to its strongest, this attitude could provide a ground for access to materials that were never filed -- for example, all documents produced in response to Rule 34. At least one district court once adopted a very vigorous view of the importance of providing the public with material on a subject that had given rise to litigation.[6] The strong public access view might also call for

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[6] In Wyeth Laboratories v. U.S. District Court, 851 F.2d 321 (10th Cir. 1988), the district court had presided over a case involving DTP, a whooping cough vaccine manufactured by defendant. After judgment was entered, the district judge directed that a "Wyeth Laboratory DTP Vaccine Litigation Discovery Library" be established at the courthouse to house information developed in the case, and from other sources as

access to unfiled discovery materials even before they would have been filed under the old rule, in part because trying to keep track of when that superseded rule would have called for filing could itself become a wasteful activity. Also of importance would be considering how long materials thus considered part of the "court record" for purposes of public access must be retained by the lawyers, an issue similar to the Rule 77.1 discussion five years ago. (Indeed, in this day of "lateral partners" it might be important to determine whether the responsibility belongs to the individual lawyer who handled the case, or to the lawyer's law firm.)

The resolution of both the "public access" debate and the details of a rule regime for affording such access would call for considerable effort. One approach (hinted at by the N.D. Ill. local rule) is to grant some sort of quasi-intervenor status to nonparties so that they may approach the court asking for a filing order. Other issues have already been suggested. For the present, it seems that the Standing Committee's objective is that this Committee consider whether such efforts would be warranted and inform the Standing Committee in January about whether the project will be undertaken.

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well. The district judge explained his action:

> [B]ecause the trial record of this case will be of interest to researchers, academics, institutions, consumer groups, members of the medical profession or associations, private or governmental, legal associations such as the ATLA and/or Defense Research Institute, and even law students, all in the interest of stimulating scientific and/or public discourse or learning regarding whooping cough vaccinations and their ramifications, they are all welcomed here.

Graham v. Wyeth Laboratories, 118 F.R.D. 511, 514 (D. Kan. 1988). The Court of Appeals evinced sympathy for the district court's objectives, but ruled that the order should be vacated because the district court had no jurisdiction to create such a facility. See 851 F.2d at 324.

(2) Privilege Waiver

This is an issue the Committee has touched on several times before. Accordingly, it seems that some background on this discussion is in order at the outset. The purpose of raising the question again is to determine whether (a) it is time to proceed to draft a proposal for a rule amendment, (b) the Committee feels that the idea of such an amendment should be dropped, or (c) the question should be deferred (perhaps until other discovery proposals emerge).

The problem of wasting time reviewing large quantities of documents to remove all material that could be withheld on grounds of privilege was first raised by some at the conference the Subcommittee held in San Francisco in January, 1997. In June, 1997, David Levi and I attended the mid-year meeting of the ABA Section of Litigation in Aspen, Colorado, and a session of that meeting was devoted to discovery issues, with an open mike for comments and suggestions from the floor. A number of those who used the mikes during that session urged that something be done to reduce the burden of document review to avoid privilege waiver.

Under date of June 2, 1997, I developed a list of possible ideas for rule amendments, and this list was circulated to the various bar groups that were invited to comment on the question of revising the discovery rules during the Boston conference in Sept., 1997. The list included the question whether a rule change should be made to deal with the waiver problem. There was nevertheless not much attention to this question in the written submissions from bar groups about the Boston Conference. Just to provide a context, herewith a recap of the views expressed (and not expressed):

ABA: Despite the interest of some during the Aspen meeting

(noted above), the ABA Section of Litigation did not mention the subject in its submission (which was prepared by the Section's Task Force on Discovery)[7]

ACTL: The American College of Trial Lawyers limited its submission to scope of discovery.

ATLA: ATLA reported on the reactions of lawyers who participated at a session during its 1997 annual convention, saying that it "see[s] nothing prejudicial in a rule that might insulate the producing party from an inadvertent waiver of privileges." (ATLA submission at 4)

DRI: The Defense Research Institute submitted a number of proposals, including a 17-page discussion of document production under Rule 34, but this did not mention privilege waiver. (DRI tab IV) It also submitted an 8-page discussion of problems with privilege logs, but this paper did not focus on waiver either. (DRI tab VI)

TLPJ: The Trial Lawyers for Public Justice urged that a rule change to deal with the problem of privilege waiver was unnecessary because there is already caselaw on the problem that adequately handles it. TLPJ suspected, however, that a change would "protect more information than is currently protected," and would also produce litigation about what is "inadvertent" production of privileged material. (TLPJ submission at 21-22.)

PLAC: The Product Liability Advisory Council submitted

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[7] The question whether such a rule amendment would be desirable is reportedly being discussed at a meeting of a committee of the ABA Section of Litigation in late September, and the insights from that discussion should be available to the Committee at its October meeting.

results of a survey of its members, but there was no substantial attention to privilege waiver problems, although there were some expressed concerns about privilege logs.

During the panel on documents at the Boston Conference, there was little attention to privilege waiver. Magistrate Judge Zachary Karol said that the fear of inadvertent waiver holds up the discovery process, and he suggested that it would be desirable to devise a method to permit initial review without waiving privilege, leaving the question of assertion of privilege until copying is requested. This would, he said, solve the delay problems and reduce the burden of privilege logs for materials that nobody wants anyway. Chilton Varner questioned whether some anti-waiver provision could be applied in diversity cases. Most of the discussion was about other topics.

Although there was not much interest expressed in Boston in addressing this problem, the possibility of reducing the risk of privilege waiver was included in the array of possible reforms brought to the Committee at its Oct. 1997 meeting. (Agenda materials at 25-26) At that meeting, there was some discussion of the problem and the Discovery Subcommittee was asked to consider these questions. (Minutes of Oct., 1997, meeting at 16-17) The agenda materials for the Santa Barbara Subcommittee meeting in January, 1998, included considerable discussion of privilege waiver issues (Santa Barbara agenda materials at 57-65), and yielded some alternative proposals that were submitted to the full Committee during its March, 1998, meeting. (March 1998 agenda materials at 37-39) The subject was again discussed at the Durham meeting, and the conclusion was that the Subcommittee should study these issues further. (Minutes of March, 1998, meeting at 36-37)

Since the Durham meeting, much energy has been invested in considering the amendment proposals that were approved there and

(in June, 1998) approved for publication by the Standing Committee. Besides the public hearings and full Committee consideration of these proposals, the Discovery Subcommittee has conferred about them. The Subcommittee has not had further discussion of privilege waiver during this time. Nonetheless, because there appears to be a significant question about whether a rule amendment to deal with this problem is desirable, it seems useful to raise the matter again with the full Committee.

The purpose of this discussion, then, is to introduce the issue. In large measure, this introduction includes points and suggestions already addressed by the Committee, but unlike those earlier occasions the 1997-99 discovery package is no longer before the Committee. Accordingly, this memorandum introduces the subject by addressing three topics: (a) the specific rule proposal previously discussed; (b) the question whether such a change would be helpful; and (c) the question whether such a change can be made through the rules process without affirmative action by Congress.

(a) The specific rule proposal: Actually two different versions of a rule proposal, both focused on Rule 34(b), were presented to the Committee during the March, 1998, meeting at Durham. They both appear below as alternative final paragraphs to Rule 34(b):

> **(b) Procedure.** The request shall set forth, either by individual item or by category, the items to be inspected and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d).
>
> The party upon whom the request is served shall serve a

written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

On agreement of the parties, a court may order that the party producing documents may preserve all privilege objections despite allowing initial examination of the documents, providing any such objection is interposed as required by Rule 26(b)(5) before copying. When such an order is entered, it may provide that such initial examination is not a waiver of any privilege.

On agreement of the parties, a court may order that a party may respond to a request to produce documents by providing the documents for initial examination. Providing documents for initial examination does not waive any privilege. The party requesting the documents may, after initial examination, designate the documents it wishes produced; this designation operates as the request under

this paragraph (b).

These two alternatives emerged from the Subcommittee's Santa Barbara meeting. Discussion in Kennebunkport could focus on these specifics of these proposals, and the differences between them, but is probably more fruitful first to consider whether such a change would be desirable.

To introduce that general question, it seems helpful to mention some additional points about what this proposal includes, and what it does not include. *First*, it does not focus on the protective order provisions of Rule 26(c). Because documents are the area where the problem reportedly exists (as opposed to depositions, etc.), Rule 34 seems the proper place to deal with it. It is also true that the Committee voted in Durham not to pursue amendments of a different sort to Rule 26(c), so it might be preferable not to propose different changes to that same rule.

Second, this proposal does not deal with a lot of privilege waiver issues that have been addressed in the caselaw. For a general discussion of those issues, see Marcus, The Perils of Privilege: Waiver and the Litigator, 84 Mich. L. Rev. 1605 (1986). Thus, there is no effort here to deal with privilege waiver that results from putting privileged material "in issue," from sharing of privileged materials with other litigants, or from witness preparation using privileged materials.

Most significantly, this proposal does not attempt in any general way to deal with the problem of "inadvertent production." This occurs when a party turns over privileged material without intending to. "The inadvertent production of a privileged document is a specter that haunts every document intensive case." F.D.I.C. v. Marine Midland Realty Credit Corp., 138 F.R.D. 479, 479-80 (E.D. Va. 1991). By reducing the document review burden, this sort of proposal might limit this risk, but it does not

otherwise alter the way in which actual inadvertent production is handled by the courts. And the federal courts have not spoken with entire clarity on this question, for there seem to be three lines of cases. See 8 Federal Practice & Procedure § 2016.2 at 241-46.

During the Santa Barbara meeting, the Subcommittee did not think that trying to deal generally with inadvertent production would be a fruitful subject of rule amendment. For one thing, it might heighten the problems of authority discussed below under heading (c). For another, it seemed likely to immerse the Committee in a thicket of refining the caselaw. The three lines of cases include two that the Committee would probably not embrace. One makes almost all disclosures a waiver, no matter what, so that adopting such a rule would heighten the risk of waiver. Another makes inadvertent disclosure almost never a waiver, which heightens the sense that the rule change alters privilege law. The third (and majority) view of the courts is to make the question of waiver turn on a variety of circumstances. To "codify" this in a rule would involve addressing many of the questions addressed by the courts:

(1) How much effort must the party seeking to "take back" the waiver show that it made to cull privileged documents?

(2) How quickly must the producing party act to undo the mistake, and what it should do?

(3) How should the court deal with further disclosure of the materials in question to others in the interim between the inadvertent disclosure and its discovery?

(4) How, if at all, should the courts apply the "overriding issue of fairness" that courts using this middle view espouse?

Alternatively, the rule could devise a different set of considerations, but undoubtedly this would be something of a challenge. Rather than undertake that challenge, then, the proposal the Subcommittee brought forward in March, 1998, simply affords the parties a chance to get the court's assurance that permitting the other side a "quick look" to determine what it is really interested in copying will not itself work a waiver.

Third, this proposal depends on agreement of the parties. The Subcommittee discussed the alternative of permitting the same thing on motion (i.e., where one party opposes the arrangement). But the situation where there is an agreement between the parties is the most vexing one that has been raised in such comments as the Committee has received about this problem. So far as the party seeking discovery is concerned, to impose such an order might deprive the party of a right to obtain discovery without this concession. More significantly, to impose such an order on the party permitting inspection might imply the court could deny that party the time needed to screen the documents. Some years ago, a panel of the Ninth Circuit suggested that ordering production on a "Herculean" schedule without insulation against waiver might be an abuse of discretion. See Transamerica Computer Co. v. International Bus. Mach. Corp., 573 F.2d 646 (9th Cir. 1978). But it would seem odd for the court to be able to tell an unwilling party that it could not do as thorough a review as it wanted to do because the court was in a hurry. So the consent of both is required under the proposal.

(b) The question whether such a rule change would be useful: The Committee has had some discussion of this question in the past. To begin with, the reality is that this sort of thing is already being done, seemingly without the court's imprimatur. For a recent published example, consider Walsh v. Seaboard Sur. Co., 184 F.R.D. 494, 495 (D. Conn. 1999):

> On October 29, 1998, Seaboard's counsel reviewed thousands of pages of documents from Garcia's files and identified certain documents that it wished to have copied by Garcia's copying service. On November 9, 1998, plaintiffs' counsel directed Garcia's office not to release the copied documents to Seaboard because he first wanted to inspect them to make sure that they did not contain any additional protected materials. Plaintiffs' counsel subsequently took possession of the copies and removed a number of the documents under claim of attorney-client privilege and work-product doctrine. [The court then addressed and resolved the privilege objections raised in this manner, finding that some privilege objections had been waived due to injection of certain issues into the case, but not inadvertent disclosure.]

Given that such arrangements occur already, one might say that a rule change to make them possible is not necessary. But there is considerable uncertainty about whether such arrangements are currently sufficient to guard against waiver, even when embodied in an order. Assuming that the agreement of the party seeking discovery would estop that party from arguing waiver, there remains the question of waiver with regard to others. Ordinarily waiver is "as to the world," and if privileged materials are once turned over to anyone, all others can claim this disclosure waives privileges as to them. So the basic problem is to insulate the parties against having others use inspection done pursuant to such an agreement as an argument for waiver.

The law is presently rather murky on whether such agreements do the job, and whether a court order makes a difference in effectuating such arrangements. Although the Manual for Complex Litigation (Second) seemed to endorse agreements to contain any waiver that might otherwise result, the Manual (Third) cautions

that courts have refused to enforce such agreements, albeit in situations in which there was no court order. See Manual (Third) § 21.431 n.137. Courts have entered orders purporting to insulate such disclosures from waiver consequences. But there is a question about whether those orders will be effective. The Ninth Circuit, in the Transamerica case mentioned above, ruled that an order preserving privilege does insulate disclosure against this effect, at least where it is in the course of very expedited production of large amounts of material under court order. But more recently that decision has been described as the approach of "a small number of courts." Genetech, Inc. v. U.S. International Trade Comm'n, 122 F.3d 1409, 1417 (Fed. Cir. 1997). So the addition of a provision to Rule 34(b) could either make explicit authority that is already thought to exist by some courts, or supply a procedure that has been thought ineffective by some courts. This might also encourage more litigants to use this time-saving method.

The question, then, is whether the proposed procedure would save time. When these issues have been discussed in prior Committee meetings, it has not been clear that much time would be saved. Some feel that no careful lawyer would allow the other side to inspect documents, even subject to such provisions, before reviewing them all to remove privileged materials. To this it may be responded that where a document request sweeps over wide ranges of materials, and the producing party is confident that the other side will quickly see that most of the material is irrelevant, there is no reason to await and pay for such a careful review of the documents. In addition, by focusing the parties on what is actually of interest to the party seeking discovery, this procedure may reduce the burden of preparing a privilege log. Even this modest change may work a significant savings in big document cases. But to date it has been unclear whether these prospects warrant making a change in the rules.

(c) The question of authority: This rule change would be useful only if it effectively insulated the "quick look" procedure proposed against being urged as a waiver. The problem is that in 1988 Congress amended the Rules Enabling Act to include the following in 28 U.S.C. § 2074(b):

> Any such rule [adopted pursuant to the Rules Enabling Act] creating, abolishing or modifying an evidentiary privilege shall have no force or effect unless approved by an Act of Congress.

At least some (including one member of the Advisory Committee on Evidence Rules who attended the Boston conference) have argued that the statute prevents this Committee from doing anything about waiver by rule. There is presently no certain answer to this assertion, but there are reasons to think the statute does not create an insuperable block.

To begin with, even if it applies the statute does not prohibit rule-making but only requires that such a provision be enacted by Congress. Accordingly, the rules process could simply generate the proposal in the hopes that Congress would enact it. That would be consistent with the longstanding view that it is undesirable for Congress to change rules by passing legislation except as a feature of the rulemaking process. Of course, the prospect that affirmative legislation would be required (as opposed to the "pocket approval" that usually attends rule amendments) re-raises the question whether this change is important to call for such an undertaking.

The more pertinent point is that there are reasons to believe that a provision like the one proposed above would not require affirmative enactment. Of course, even if the problem were highlighted throughout the rule amendment process and called to the attention of Congress, that would not prevent a party from

later arguing that the new provision was ineffective because not adopted by Congress. But there are arguments that this proposal does not do what the statute is requiring a statute to accomplish.

The background is the adoption of the Federal Rules of Evidence, which included detailed privilege provisions when they came before Congress for its review in 1972. That was an extremely contentious time regarding certain privileges, particularly the Executive privilege, and the orientation of some of the proposed rules seemed to curtail personal protections and broaden governmental ones. "As the Watergate scandal began to unravel, the notion of expanded privileges of secrecy for government and elimination of privileges for citizens seemed less attractive." 21 Federal Practice & Procedure § 5006 at 104. But those seemed the likely consequences of replacing caselaw on privilege with the provisions of the proposed 500 series of the Federal Rules of Evidence, and Congress eventually replaced all those proposed rules with Fed. R. Evid. 501, which makes privilege a matter of state law as to issues governed by state law, and calls otherwise for the development of a federal common law of privilege. Thus when the provision in the 1988 legislation forbids "creating, abolishing or modifying an evidentiary privilege," it seems directed to something different from the proposal above.

A quick look at the legislative history of the 1988 legislation shows that the source is indeed the 1972-75 dispute over the Rules of Evidence. Thus, the pertinent House Report says that "[s]ubsection (b) of proposed section 2074 carries forward current law." H.R. Rep. 99-422 (99th Cong. 1st Sess.) at 27. (When this legislation was adopted in the next Congress, the legislative history explicitly adopted this provision. See H.R. Rep. 100-889 at 26.) The derivation was 28 U.S.C. § 2076, adopted as part of the legislation by which Congress eventually

passed the Rules of Evidence, which authorized the Supreme Court to prescribe amendments to those rules. Thus, the basic thrust was to give effect the limitation on Rules of Evidence that alter privileges Congress had embraced in substituting Fed. R. Evid. 501 for the proposed 500 series.

The rejected 500 series included a proposed Rule 511 regarding waiver,[8] so there is at least some basis for worrying that waiver rules were included in the prohibition now embodied in § 2074(b). But the objections to this rule (as opposed to the proposed rules creating privileges) don't seem addressed to civil cases, and were about overbroad application of waiver under the proposed rule, not unduly narrow application of waiver.[9] In

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[8] This rejected rule would have provided:

> A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This rule does not apply if the disclosure is itself a privileged communication.

[9] As explained in Federal Practice & Procedure § 5721 at 505-06:

> The proposed rule was noncontroversial, but the Justice Department wanted to amend the rule by adding "under such circumstances that it would be unfair to allow the claims of privilege." It was apparently worried that the proposed rule would make it a waiver for the government to share information from an informer with another government. The Advisory Committee left Rule 511 undisturbed in the Revised Draft, but it amended the proposed rule on the informer privilege to resolve the Justice Department complaint. This failed to mollify the Department, which renewed its proposal to amend the rule, this time with the support of a group of Senators who threatened to revoke the Supreme Court's rulemaking powers if the Advisory Committee did not alter the rules to please the Justice Department. The Advisory Committee held fast . . . . The proposed rule was promulgated by the Supreme Court and sent to Congress, but Congress refused to adopt the proposed privilege rules and left the matter to the courts under Evidence Rule 501.

relation to civil litigation, the proposed rule seems to have been taken as uncontroversial. For that reason, a change like the one above -- allowing the judge to regulate the operation of discovery in a civil case -- seems to present quite different problems from the general regulation of the waiver of privileges in a wide variety of circumstances under rejected Rule 511, although counterarguments can be made.

The view that regulation of pretrial litigation can include some provisions that might affect waiver is confirmed by other rulemaking that has occurred. The Rules of Evidence themselves include Evidence Rule 612, regarding materials shown to witnesses, and this rule has been read to abrogate privilege protection when privileged materials are shown to prospective witnesses. Even while it was refusing to adopt Fed. R. Evid. 511, Congress enacted Rule 612. This Committee addressed itself to similar issues in proposing the expert disclosure provisions of Rule 26(a)(2)(B), which calls for disclosure of "the data or other information considered by the witness in forming the opinions," a point made clearer in the Committee Note.[10] So at least some kinds of privilege waiver issues have been addressed by rule.

More pertinent yet is the 1993 addition of Rule 26(b)(5), which requires that a party withholding materials under claim of privilege provide specifics about the basis for the claim. This is the source of the privilege log requirement that was raised by some in 1997. The Committee Note says that "[t]o withhold materials without such notice . . . may be viewed as a waiver of

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[10] The Committee Note stated: "Given this obligation of disclosure, litigants should not longer be able to argue that materials furnished to their experts to be used in forming their opinions--whether or not ultimately relied upon by the expert--are privileged or otherwise protected from disclosure when such persons are testifying or being deposed."

the privilege," and at least some courts have so treated failure to satisfy this requirement. See 8 Federal Practice & Procedure § 2016.1. But if a rule could not modify privilege protection by treating failure to comply as a waiver, this provision would seem invalid under § 2074(b). Nobody has ever so suggested.

To the contrary, all of these provisions seem to be proper subjects for regulation by rule because they relate to the smooth functioning of the civil litigation process. The Supreme Court has recognized the need for the court to have significant latitude in regulating discovery in particular, e.g., Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984), and the focus of the proposal above is therefore on the authority of the court to accomplish just such a result by avoiding needless delay and expenditure in document production. Whether a more ambitious treatment of inadvertent production (mentioned in sub-section (a) above) would similarly be proper by rule is not clear. Indeed, it cannot be said that even the proposed approach would be immune to challenge, but it does seem that a good case can be made for this change being within the scope of rulemaking for civil cases.

* * * * *

In sum, there appears to be a legitimate basis for authority to proceed down the suggested course if that is one worth pursuing. At the same time, the authority question will have to be raised should we move in that direction, and ultimately an act of Congress might be required to effect this change.

(3) Presumptive Durational Limitation on Document Production

On behalf of the Chemical Manufacturers Association, the Defense Research Institute, the Federation of Insurance and Corporate Counsel, the International Association of Defense Counsel, the Lawyers for Civil Justice, the National Association of Manufacturers and the Product Liability Advisory Council, Alfred W. Cortese has proposed that Rule 34(b) be amended as follows (98-CV-001):

> (b) Procedure. The request shall set forth, either by individual item or by category, the items to be inspected and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d).
>
> The party upon whom the request is served shall serve a written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. <u>In the event of a request for documents, unless otherwise ordered by the court upon a showing of good cause, the response may be limited to production of documents created or dated no more than seven years prior to the date of the transaction or occurrence giving rise to the claims in the action.</u> The party submitting the request may move for an

order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

Mr. Cortese offers the following explanation for this proposal (98-CV-001 at 5):

> Requiring that documents have a reasonable temporal proximity to the event or transaction that is the underlying basis of the lawsuit increases the likelihood that the information sought will be useful, and thus, is more likely to justify the costs of its production. Imposition of a temporal limit in judicial proceedings is extremely common; very much like a statute of limitations. Its purpose is to establish a bright line that limits document production at a reasonable point in time, and puts litigants on notice as to what that limit is.
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> Although the selection of a particular time limit admittedly is somewhat arbitrary, we recommend consideration of a seven year limit. A review of federal and state record-keeping statutes found that the longer recordkeeping requirements frequently were set at five and six years. Requiring production back seven years should not impose a significant new burden on organizations, in light of their recordkeeping obligations under federal and state law, but it would allow a litigant a more generous time period for a discovery search than would many recordkeeping statutes and statutes of limitations that apply in other settings. Imposition of a temporal limit also would provide some

finality and certainty to those who generate large volumes of documents, so that they may confidently develop document management and storage systems. And, of course, since the limitation is presumptive only, it would not preclude discovery of documents covering an earlier time period if the circumstances of the case warrant such discovery.

The question of imposing a presumptive temporal limitation on the obligation to respond to discovery was first raised in the array of possible amendments contained in the agenda materials for the Committee's October, 1997, meeting (pp. 36-37). At that meeting, the Committee did not direct the Discovery Subcommittee to develop a proposal on the question, but the topic was included in the agenda materials for the March, 1998, meeting (pp. 47-49). At that meeting, there was some discussion of the question, and the Committee remanded the question whether it would be a desirable rule amendment. See Minutes of March 1998 meeting at 30-31.

As indicated in the submission, such a temporal limitation could take different forms. In the alternative, Rule 26(b)(1) could be revised to set forth a general temporal limitation on discovery as part of the scope provisions. As another alternative, such a presumption could be added to Rule 26(b)(2) principles for limiting disproportionate or duplicative discovery. The seven-year proposal would not have to be adopted, and a different number of years could be substituted.

In addressing these possibilities, it seems that several questions should be considered: (1) Do the present rules provide sufficient means for dealing with these problems? (2) Do the current proposals for amending the discovery rules hold promise for improving the handling of such problems? (3) Would adopting such a rule create new problems?

(1) Do the present rules provide sufficient means for dealing with these problems? In large measure, this proposal seems to be addressing a problem of proportionality and of defining the proper scope of discovery for a case. Particularly with regard to document discovery, plumbing the past can be very costly. The Committee was repeatedly regaled with examples of document requests going back "to the beginning of time" during the hearings on the present set of proposed changes.

The present rules contain provisions that can be invoked to resolve such problems. As presently written, Rule 26(b)(1) permits discovery only of material "relevant to the subject matter" and only when the discovery is "reasonably calculated to lead to the discovery of admissible evidence." Rule 26(b)(2) directs that even such discovery be limited if (i) it is unreasonably cumulative or obtainable from some other source that is more convenient, (ii) the party seeking discovery has had ample opportunity to obtain the information sought by discovery already, or (iii) the burden or expense of the proposed discovery outweighs its likely benefit. Rule 26(c) authorizes a protective order to protect a party against "undue burden or expense." Rule 26(f) directs the parties to confer before they start formal discovery to develop a discovery plan, which might well be an occasion for addressing temporal issues (cf. Form 35). The discovery plan is to be submitted to the court, and Rule 16(b) directs the court to enter an order concerning certain aspects of discovery.

There are accordingly manifold occasions under the current rules for exploring the proper temporal breadth of discovery in a given case. Although it is not possible to determine how frequently these are used, it is clear that they are used sometimes. Courts have limited discovery to the period covered by the statute of limitations, but have also directed discovery regarding events occurring longer ago. See 8 Federal Practice &

Procedure § 2009 at 129-31. In some cases, courts have limited discovery to matters arising prior to the commencement of the action, but no general rule has emerged to this effect. See id. at 105-06. Indeed, given the existence of these grounds for limiting discovery, and of cases indicating that the authority is sometimes used, it is difficult to be sure how great the problem of searching for useless old records really has been.

Adopting a presumptive limitation could add clarity and certainty to the area. That was part of the Committee's thinking when it proposed the presumptive limitation of one day of seven hours for depositions. To say that going back further than seven years requires a showing of good cause might further constrain overbroad discovery. Whether the good cause requirement would unduly limit the authority of the court acting under Rule 16(b) could be debated. But in any event, adopting such a limitation would not seem to add to the powers of the court to curtail overly expensive or extensive discovery.

(2) Do the current proposals for amending the discovery rules hold promise for improving the handling of such problems? Even if the current rules don't deal adequately with the problems raised by this proposal, one could well say that the pending proposed amendments strengthen the arsenal of methods for solving this problem and that they should be given a chance before further changes are made.

At least one comes to mind. Amended Rule 26(b)(1) would limit attorney-managed discovery to matters "relevant to the claim or defense of any party." Putting aside bright temporal lines, then, the only things we would be talking about under that rule would therefore be those that meet this standard, since going beyond it (to the "subject matter" limit) would call for a showing of good cause, which the proposal treats as sufficient for going back more than seven years. It is at least debatable

whether items that are relevant to the claims or defenses (as opposed to the subject matter) should be presumptively beyond discovery because of their age. Perhaps, again, there is great value to the bright line, but it would seem that the pending proposal may ameliorate some of the problems.

Accordingly, there is at least some reason for waiting to see whether the current set of proposed amendments cure the problems that exist.

(3) Would adopting such a rule create new problems? There are a number of possible problems that should be kept in mind as the Committee considers whether to adopt some sort of presumptive temporal limitation.

First, there is a fundamental problem of deciding how the proposed limitation should work. The specific proposal put before the Committee limits document discovery to items "created or dated no more than seven years prior to the date of the transaction or occurrence giving rise to the claims in the action." Obviously the difficulties that arise from a temporal limitation are also involved in the sort of determination called for in deciding whether to order discovery under the present rules or the rules after the present amendments are adopted (if they are). But putting the problems into rule language might magnify them, so it is worthwhile to reflect on them now.

A fundamental problem is to determine what is the "transaction or occurrence giving rise to the claims in the action." Similar terms appear in various other rules. See Rules 13(a) (compulsory counterclaim is one that "arises out of the transaction or occurrence" that is the basis of plaintiff's claims); 13(g) (cross-claims are allowed when they arise "out of the transaction or occurrence" sued upon); 15(c)(2) (relation back of amendment is allowed if amended claim arises out of "the

conduct, transaction, or occurrence" alleged in the earlier pleading), 20(a) (parties may join or be joined when claims arise out of "the same transaction, occurrence or series of transactions or occurrences"); 24(a)(2) (intervention of right is allowed when an applicant "claims an interest in the property or transaction" involved in the action). In addition, the Restatement of Judgments (Second) uses "transaction" as a key concept for claim preclusion. Despite the plethora of uses of these terms, one cannot say that a clear definition has emerged. "By and large, the courts have refrained from making any serious attempt to define the transaction or occurrence concept in a highly explicit fashion." 6 Federal Practice & Procedure § 1410 at 52.

In the current context, these terms seem to call for referring to whatever the substantive law says gives rise to the claims in the case; for different claims in a given case the durational element might therefore differ. Whether the proposed change would provide succor in the sorts of situations the Committee heard about during the hearings is not immediately clear. Consider, for example, a person injured in an automobile accident in 1999 while driving a car manufactured in 1986. If that injured driver sues the manufacturer of the car claiming that the crash was caused by a defective design of the car, what is the proper date to cut off the search burden? Arguably it is seven years before the accident, but excluding documents created before 1992 seems manifestly wrong for a claim that a product manufactured in 1986 was defectively designed. Should it be 1979 (seven years before this car was manufactured)? Can we answer that question without knowing whether the feature of the car that was allegedly defectively designed was new to the 1986 model? Assuming that it was not new to the 1986 XYZ model put out by the manufacturer, can we say for sure whether the right starting date is 1982, when the manufacturer first put out the XYZ? What if the XYZ was the lineal descendent of a prior model, the ABC, on

which the pertinent steering mechanism was identical? Should the proper date be 1975, when that model was introduced? Or perhaps 1970, when the design of that model (including its steering mechanism) began. This hypothetical does not seem fanciful, but it points up substantial difficulties of application.

Surely other formulations could be used, but the problems might well persist. In short, the bright line is not so bright as it seems. Moreover, this sort of situation can extend the limit fairly far into the past. Courts need to evaluate these issues in making decisions whether to order discovery into the distant past under the existing rules, and the proposed amendment to Rule 26(b)(1) may prompt more rigorous scrutiny. A new rule might not help courts (or the parties) much in making these decisions.

In other types of cases, different or additional problems might arise. Consider, for example, civil rights, employment discrimination, antitrust or other cases wherein plaintiffs allege that defendants' conduct is "continuing." In some instances, at least, this alleged ongoing course of conduct may be considered to be the conduct that gives rise to the claims asserted. For example, plaintiff may need to prove the existence of a municipal policy or practice to support a claim against a municipality for certain types of civil rights violations. Similarly, plaintiffs may challenge a longstanding employment practice. Under these circumstances, the temporal "limitation" may not be much of a limitation at all. Moreover, adopting such a rule might provide a modest incentive to include such allegations in the complaint as a method of assuring discovery further into the past.

Yet another problem is to relate this standard to initial disclosure. Presently Rule 26(a)(1) calls for disclosure of witnesses and documents with information relevant to disputed

facts alleged with particularity. When that standard is satisfied, it does not cut off the disclosure obligation at a certain time. The amendment the Committee has proposed for Rule 26(a)(1) changes the disclosure obligation to documents a party "may use to support its claims or defenses." At a minimum, it would seem that discovery should be allowed as far back as any such materials; it would be odd if a party could use 20-year-old materials to support its case but cut off the other side's discovery at the seven-year mark. Indeed, perhaps amending Rule 34(b) to add such a temporal limit for document discovery might justify adding a provision to Rule 37(c)(1) forbidding a party who invokes the seven-year limitation from using anything older than that to support its case. As proposed by the Committee, Rule 26(a)(1)(B) does not say that it is limited to material that would be discoverable, although it could be changed to say that. At least, some consideration of the relationship between the temporal limitation on discovery and the disclosure obligation should be considered.

Setting the appropriate period might also present something of a problem. As acknowledged in the supporting statement, the seven year proposal is somewhat arbitrary, as is any other number. For some purposes, statutes of limitation might be seen to offer an analogy, but they don't provide a ready solution. To the contrary, there is great variety in the limitations periods used for different types of claims, and for the same type of claim in different places. In 1990, for example, the Federal Courts Study Committee recommended that Congress adopt "fallback limitations provisions" for federal claims lacking explicit limitations periods. See Report of the Federal Courts Study Committee 93 (1990). The idea was that one could survey the various explicit limitations periods and classify them, ending up with a short list of pertinent ones. An effort was made to do that, but it proved very difficult because the periods differed a great deal. Eventually Congress simply adopted 28 U.S.C. § 1658,

setting the fallback period at four years. The point is that any fixed limit is likely to be rather difficult to select. Because many claims presented in federal court are based on state law, moreover, the pertinent state limitations periods would be the proper referents. Without checking, I suspect that they vary considerably, and that many exceed seven years. Indeed, in some states, at least as to some kinds of claims, the "discovery rule" defers the running of limitations until plaintiff is aware of the grounds for the claim.

Another possible unintended consequence of such a provision would be to overcome arguments for a shorter discovery period. In many cases seven years may be far too long a period to search files, but there is at least a possibility that courts would find the "bright line" to be a threshold.

Yet another point is that this provision would probably work to the advantage only of large organizations. Many of those who would support the proposed limit for documents would likely oppose a similar temporal limit on other types of discovery. Defendants in product liability cases, for example, would be unlikely to accept a presumptive prohibition on discovery about the plaintiff's pertinent personal habits or medical condition more than seven years before the accident.

Finally, the proposal might fall far short of achieving another objective hinted for it -- providing certainty for document management systems. In terms of recordkeeping, such a proposal might be pertinent to large organizations. But relying on the rule might be misleading. For one thing (as illustrated above), it is very hard to determine before a claim is made how the rule would apply to a given product, etc. For another, the judge can go beyond the rule on a showing of good cause. So a prospective litigant who treated this provision as a guide in developing document management policies might be courting

difficulties. There is already law on preservation of materials that may be of use in litigation, and many large organizations have adopted document retention policies that take account of such provisions. It is difficult to see how such a provision in the federal discovery rules (and not necessarily in state discovery rules) would shed meaningful additional light on the proper way to handle such problems.

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August 23, 1999

MEMORANDUM TO ADVISORY COMMITTEE ON CIVIL RULES

SUBJECT: *Consent Calendar*

Over the years, the committee has received many suggestions from the bench and bar to amend particular rules. These amendments have been collected, reviewed, and categorized for further action by the Agenda Subcommittee. At the April meeting, the committee approved the recommendation of the Agenda Subcommittee to circulate to the full committee a list of proposed rule amendments that it recommends should be removed from the agenda without further study.

I have attached a memorandum from Professor Cooper that summarizes the proposed rule amendments that the Agenda Subcommittee recommends should be removed from the agenda. Copies of the original suggestions are also attached. In accordance with procedures agreed upon at the April meeting, these items will be removed from the committee's agenda unless a member affirmatively moves **no later than September 10, 1999**, that a particular proposal remain on the committee's active agenda for further study. Any request to move an item from the consent calendar should be directed to my office.

If you have any questions regarding this matter, please call me.

John K. Rabiej

Attachments

Consent Calendar: October 14, 15 1999 Meeting

At the April 1999 meeting the Committee approved a consent calendar procedure. The Agenda Subcommittee designates items that it finds suitable for disposition without taking a place on the discussion agenda. The consent calendar is circulated in advance of the agenda materials for each meeting. Any Committee member can move an item from the consent calendar to the discussion agenda by request to the Committee Chair. For the October 1999 meeting, a request to move an item to the discussion agenda should be made to Judge Niemeyer by September 10.

Most of the items on this consent calendar were discussed in the Agenda Subcommittee report at the April meeting. The summaries of those items that follow are taken from that report. Three new items have been added, each marked in bold as "new." The consent disposition recommendation is firm only as to the "Prisoner forms" item at the end of the calendar. The Rule 5 and Rule 45 items were reviewed by the two remaining Subcommittee members only through a brief round-robin process at the close of the time for dispatching this memorandum; if any member believes one or the other of these two new items should be restored to the regular calendar, they will be reconsidered by the full Subcommittee rather than moved to the October discussion agenda.

Admiralty: Death on the High Seas Act: 97CVO. The proposal is that the language in 46 U.S.C. § 767 making the Death on the High Seas Act applicable to "any navigable waters in the Panama Canal Zone" be removed as moot. The Subcommittee recommends that the proposal be removed from the agenda because it addresses a statutory question outside Advisory Committee authority. The Administrative Office staff can communicate the suggestion to Congress.

NEW: Rule 5: Mailbox Filing: 99CVA. This proposal suggests adoption of Texas RCP 5, which allows timely first-class mail to count as filing if the document is actually received by the clerk "not more than ten days tardily"; a legible postmark affixed by the Postal Service is prima facie evidence of the date of mailing. This question is caught up with the questions of electronic filing that — together with electronic service — continue to occupy Committee attention. It seems better to wrap this question into the electronic filing and service questions, noting it as a possible additional item, and not to assign a separate and continuing docket number. If the question does come on for formal consideration, it will be useful to gather the views of district court clerks.

Rule 11: H.R. 1492. This bill would make Rule 11 sanctions mandatory in a case involving a party who is a prisoner; the sanctions would reach the attorney, law firm, or party

responsible for the Rule 11 violation. The Subcommittee recommends that this item be removed from the agenda. Legislative proposals to amend Rule 11 are common; there is little point in holding each of them indefinitely on the agenda.
Rule 11(?): Lawsuit abuse: 97CVG. This proposal recommends adoption of a rule stating that unreasonable lawyer advertising to solicit litigation is conduct unbecoming an officer of the court and bar of a court of appeals in the United States. The Subcommittee recommends that the proposal be removed from the agenda.
Rule 11: Misuse for discovery: 98CVB. This proposal comes from a doctor who describes at great length his involvement as an unwilling expert witness in malpractice litigation. There is much that indicates that discovery may have been mismanaged in that particular litigation. There is little to indicate the reason for his belief that Rule 11 was misused to support discovery and as a means to test the sufficiency of the pleadings. There are good reasons to believe that discovery may at times be appropriate in disposing of a Rule 11 motion — the most likely occasion would be a claim that a pleading, motion, or other paper was presented for an improper purpose in violation of Rule 11(b)(1). The Subcommittee has recommended preliminary evaluation by the Reporter. The Reporter recommends that this proposal does not deserve a separate place on the Committee agenda; Rule 11 remains so prominent that any general problems will surely come to the Committee's attention.

Rule 12: Invoke Rule 56 procedures on Rule 12(b)(1) motions: 97CVH. This proposal is that summary judgment procedures should be invoked when materials beyond the pleadings are considered on a Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction. The proposal is based on the proponent's dissatisfaction with a particular litigating experience. The Subcommittee recommends that the proposal be removed from the agenda. There is a long tradition of special procedures on motions challenging subject-matter jurisdiction, including factfinding by procedures that go far beyond Rule 56. Determinations as to diversity jurisdiction, for example, may call for difficult inquiries into such facts as domicile, principal place of business, or the like.

NEW: Rule 45: Dispense with Subpoena for Party, 99CVA. This proposal urges emulation of California CCP 1987(b), which provides that a subpoena is not needed to secure attendance of a party at a trial. Instead, written notice served by mail at least 10 days before trial suffices. Presumably the written notice is simply an option; otherwise there would be a substantial impact on the provisions in Rule 45(b)(2) describing the places where a subpoena may be served. There may be some

practical advantages in this proposal, but the proposal simply asserts that this is "a grand idea, so simple, no prejudice to anyone." And there is no discussion of the possible difficulties that might arise from this less formal notice procedure. It seems likely that these questions are often worked out by informal practice or specific agreement. Absent some broader indication that subpoenas impose significant burdens, this suggestion seems to fall into the category of a matter worthy of investigation at some point, but not now.

Rule 68: More effective "sanctions"; 96CVC. The Committee considered Rule 68 over a period of more than four years without reaching consensus. A relatively recent proposal was made by the Federal Magistrate Judges Association in 1996. Prolonged study showed that offer-of-judgment problems are enormously complex, and are tied to deep-seated traditions about financing litigation. In 1997, the Committee determined that the case had not been made for revision. Although bills are regularly introduced in Congress to amend Rule 68 directly, or to provide independent offer-of-judgment rules, the Subcommittee recommends that the topic be removed from the agenda. Should developments in Congress warrant further attention, a new agenda line can be opened.

Rule 73(b): All-party consent to magistrate-judge trial. This item came to the agenda in reaction to a Seventh Circuit rule that a completed trial before a magistrate judge is void if, although all original parties consented to the trial, a later-added party participated without explicitly consenting. There has not been any indication that substantial problems have yet resulted from this ruling. The Subcommittee recommends that the issue be removed from the agenda.

Rule 77(b): Private audiotaping of judicial proceedings, 96CVH. The proposal is made by a pro se litigant who believes a party should be allowed to avoid the cost of official court transcripts by making a private audiotape of the proceedings. The Subcommittee believes that the issues are better considered by Congress than in the Enabling Act process. It recommends that the proposal be removed from the agenda.

NEW: Prisoner Complaint Forms, 99CA : This suggestion seems to be that the Committee should prepare a set of form complaints that can be used by prisoners. There may be values in form complaints, but they should not be pursued through the Enabling Act process — the responsibility for keeping the forms in tune with developing law would be heavy, the risk of trespassing outside Enabling Act limits into substantive principle great, and the hope of acting with a speed to match forms to current principles beyond attainment. The Subcommittee recommends that this proposal be removed from the agenda.

AGENDA DOCKETING

ADVISORY COMMITTEE ON CIVIL RULES

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

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

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

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

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

Proposal	Source, Date, and Doc #	Status
[CV23] — Amend class action rule to accommodate demands of mass tort litigation and other problems	Jud Conf on Ad Hoc Communication for Asbestos Litigation 3/91; William Leighton ltr 7/29/94; H.R. 660 introduced by Canady on CV 23 (f)	5/93 — Considered by cmte 6/93 — Submitted for approval for publication; withdrawn 10/93, 4/94, 10/94, 2/95, 4/95, 11/95; studied at meetings. 4/96 — Forwarded to ST Cmte for submission to Jud Conf 6/96 — Approved for publication by ST Cmte 8/96 — Published for comment 10/96 — Discussed by cmte 5/97 — Approved and forwarded changes to (c)(1), and (f); rejected (b)(3)(A) and (B); and deferred other proposals until next meeting 4/97 — Stotler letter to Congressman Canady 6/97 — Changes to 23(f) were approved by ST Cmte; changes to 23(c)(1) were recommitted to advisory cmte 10/97 — Considered by cmte 3/98 — Considered by cmte deferred pending mass torts working group deliberations 3/99 — Agenda Subc rec. Refer to other comte (3) **PENDING FURTHER ACTION**
[CV23] — Standards and guidelines for litigating and settling consumer class actions	Patricia Sturdevant, for National Association for Consumer Advocates 12/10/97 (97-CV-T)	12/97 — Referred to reporter, chair, and Agenda Subc 3/99 — Agenda Subc rec. Refer to other comte (3) **PENDING FURTHER ACTION**
[CV23(e)] — Amend to include specific factors court should consider when approving settlement for monetary damages under 23(b)(3)	Beverly C. Moore, Jr., for Class Action Reports, Inc. 11/25/97 (97-CV-S)	12/ 97 — Referred to reporter, chair, and Agenda Subc 3/99 — Agenda Subc rec. Refer to other comte (3) **PENDING FURTHER ACTION**
[CV23(f)] — interlocutory appeal	part of class action project	4/98 — Sup Ct approves 12/98 — Effective **COMPLETED**
[CV26] — Interviewing former employees of a party	John Goetz	4/94 — Declined to act **DEFERRED INDEFINITELY**

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

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

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

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

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

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

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

Proposal	Source, Date, and Doc #	Status
[CV81(a)(1)] — Applicability to D.C. mental health proceedings	Joseph Spaniol, 10/96	10/96 — Cmte considered 5/97 — Reporter recommends consideration as part of a technical amendment package 10/98 — Cmte. includes it in package submitted to Stg. Cmte. for publication 1/99 — Stg. Cmte. approves for publication **PENDING FURTHER ACTION**
[CV81(a)(1)] — Applicability to copyright proceedings and substitution of notice of removal for petition for removal	see request on copyright	11/98 — Request for publication 1/99 — Stg. Cmte. approves for publication **PENDING FURTHER ACTION**
[CV81(c)] — Removal of an action from state courts — technical conforming change deleting "petition"	Joseph D. Cohen 8/31/94	4/95 — Accumulate other technical changes and submit eventually to Congress 11/95 — Reiterated April 1995 decision 5/97 — Reporter recommends that it be included in next technical amendment package 3/99 — Agenda Subc rec. Accumulate for periodic revision (1) 4/99 — Cmte considered **PENDING FURTHER ACTION**
[CV83(a)(1)] — Uniform effective date for local rules and transmission to AO		3/98 — Cmte considered 11/98 — Draft language considered 3/99 — Agenda Subc rec. Refer to other comte (3) **PENDING FURTHER ACTION**
[CV83] — Negligent failure to comply with procedural rules; local rule uniform numbering		5/93 — Recommend for publication 6/93 — Approved for publication 10/93 — Published for comment 4/94 — Revised and approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CV84] — Authorize Conference to amend rules		5/93 — Considered by cmte 4/94 — Recommend no change **COMPLETED**
[Recycled Paper and Double-Sided Paper]	Christopher D. Knopf 9/20/95	11/95 — Considered by cmte **DEFERRED INDEFINITELY**

Proposal	Source, Date, and Doc #	Status
[Pro Se Litigants] — To create a committee to consider the promulgation of a specific set of rules governing cases filed by pro se litigants	Judge Anthony J. Battaglia, on behalf of the Federal Magistrate Judge Assn. Rules Cmte, to support proposal by Judge David Piester 7/17/97 (97-CV-I);	7/97 — Mailed to reporter and chair 10/97 — Referred to Agenda Subc 3/99 — Agenda Subc rec. Schedule for further study (3) **PENDING FURTHER ACTION**
[CV Form 1] — Standard form AO 440 should be consistent with with summons Form 1	Joseph W. Skupniewitz, Clerk 10/2/98 (98-CV-F)	10/98 — Referred to chair, reporter, and Agenda Subc 3/99 — Agenda Subc rec. Ready for full comte consideration (4) **PENDING FURTHER ACTION**
[CV Form 17] Complaint form for copyright infringement	Professor Edward Cooper 10/27/97	10/97 — Referred to cmte 3/99 — Agenda Subc rec. Ready for full comte consideration (4) **PENDING FURTHER ACTION**
[Interrogatories on Disk]	Michelle Ritz 5/13/98 (98-CV-C); see also Jeffrey Yencho suggestion re: Rules 3 and 34 (99-CV-E)	5/98 — Referred to reporter, chair, and Agenda Subc 3/99 — Agenda Subc rec. Refer to other comte (3) **PENDING FURTHER ACTION**
[To change standard AO forms 241 and 242 to reflect amendments in the law under the Antiterrorism and Effective Death Penalty Act of 1997]	Judge Harvey E. Schlesinger 8/10/98 (98-CV-D)	8/98 — Referred to reporter, chair, and Agenda Subc 3/99 — Agenda Subc rec. Refer to other comte (3) **PENDING FURTHER ACTION**

VI

Rule 51: Requests Before Trial and More

Rule 51 was considered briefly at the March 1998 meeting, and even more briefly at the April 1999 meeting in response to a memorandum that was substantially the same as the version set out below. The immediate impetus was provided by the Ninth Circuit proposal to legitimate local rules requiring that proposed instructions be filed before trial. The Committee agreed with the suggestion that the question should not be left to disposition by local rules — there should be a uniform national practice, whatever may prove to be the best practice. The Committee also concluded that if the rule is changed to allow a pretrial deadline for requests, there must be provision for supplemental requests to reflect new issues that first appear at trial. Finally, the Committee concluded that further thought should be given to other possible changes in Rule 51. There was no commitment to any change, but the topic was held for further study.

The Criminal Rules Advisory Committee earlier took up the same specific issue and published for comment a revised Criminal Rule 30 that would provide for instruction requests "at the close of the evidence, or at any earlier time that the court reasonably directs." The Committee Note said: "While the amendment falls short of requiring all requests to be made before trial in all cases, the amendment now permits a court to do so in a particular case or as a matter of local practice under local rules promulgated under Rule 57." In an attempt at coordination, a copy of the Civil Rules memorandum was provided to the Criminal Rules Committee. At their October 1998 meeting, they expressed an interest in the broader questions addressed to Civil Rule 51 and suggested that the Civil Rules Committee take the lead in considering these questions. It also was earnestly suggested by several members of the Criminal Rules Committee that it would be desirable to require that instructions always be given before final arguments.

There is no indication that the Criminal Rules Committee feels an urgent need for prompt revision of the rules on jury instructions. But there have been no responses to repeated suggestions that ideas about Rule 51 might be sent to the Reporter or to the Agenda Subcommittee. The time may have come to decide whether to pursue Rule 51 questions at all. The most obvious choices are: (1) Do nothing. (2) Consider only the question whether a district judge should be authorized to direct that instruction requests be filed before trial, as many now do in apparent defiance of Rule 51. (3) Attempt to rewrite the rule so that it more nearly reflects current practices. The draft rule illustrates the kinds of issues that would be considered if the task is attempted. Other issues almost certainly will arise, and of course the best resolutions of the issues remain to be identified.

If time permits, it would be useful to have the substantial discussion that will support a firm direction for any Rule 51 project.

The Ninth Circuit Beginning

In the wake of its review of local rules, the Ninth Circuit Judicial Council has recommended that Civil Rule 51 be amended "to authorize local rules requiring the filing of civil jury instructions before trial." This recommendation raises at least three distinct questions. The most obvious is whether it is good policy to require that requests for instructions be filed before trial in some cases or in all cases. If pretrial request deadlines are desirable, it must be decided whether this matter

should be confided to local rules or instead should be approached in a national rule. On the face of it, there is no apparent reason to relegate this matter to local option. It is difficult to imagine variations in local circumstances that make this policy more desirable in some parts of the country but less desirable in other parts. No more will be said about this second question. The third and least obvious question is whether a general change in the Rule 51 request deadline should be the only change proposed for Rule 51. Rule 51 notoriously "does not say what it means, and does not mean what it says." If some part of the request-objection-review question is to be addressed, perhaps the rule should be approached as an integrated whole.

Pretrial Instruction Requests

The first sentence of Rule 51 now reads:

> At the close of the evidence or at such earlier time during trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests.

This sentence seems to limit the court's authority to directing that requests filed before the close of the evidence be filed "during trial," not before trial. It is difficult to find anything in the generalities of Rule 16 that can be read as an implicit license to direct earlier requests. Local rules that require pretrial requests are at great risk of being held invalid as inconsistent with Rule 51.

Three principal advantages seem to underlie the interest in pretrial jury requests. Pretrial requests will help the court if it wishes to provide preliminary instructions at the beginning of the trial. All parties will have a better idea of the instructions likely to be given, and can shape trial presentations accordingly; this advantage would be enhanced if the court were required to make at least preliminary rulings on the requests before trial. The court will have more time to consider the requests, particularly if it is not required to make final rulings before trial. There may be incidental advantages as well. The competing requests may focus the dispute in ways that support renewed consideration of motions to dismiss or for summary judgment. The better focus may instead suggest that potentially dispositive issues be tried first, cf. Rules 16(c)(14) and 50(a), or be designated for separate trial. Advantages of this sort are most likely to be realized if the instruction requests are made part of the pretrial conference procedure.

The potential disadvantages of pretrial instruction requests arise from inability to predict just what the evidence will reveal. In smaller part, the problem is that wishful parties may request instructions on issues that will not be supported by trial evidence. In larger part, the problem is that even wishful parties may not anticipate all of the issues that will be supported by trial evidence. It will not do to prohibit requests as untimely when there was good reason to fail to anticipate the evidence that supports the request.

The simplest way to accommodate these conflicting concerns would be to strike the limiting language from Rule 51:

> At the close of the evidence or at such earlier time ~~during the trial~~ as the court reasonably directs, any party may file written requests * * * .

The Committee Note could point to the reasons that may justify a direction that requests be filed before trial, particularly in complex cases. The reasons for caution also should be pointed out. One of the cautions might be a reflection on the meaning of Rule 51's fourth sentence: "No party may assign as error the giving or the failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict * * *." This sentence does not mean that it is enough to make a request for the first time, couched as an "objection," before the jury retires. The objection works only if there was a duty to request, and there is a duty to request only if a timely request is made.

The reason for considering Rule 51 in more general terms is suggested by the cautionary observation that might be written to explain the difference between a request and an objection. It is easy for the uninitiated to misread Rule 51. It can be revised to convey its messages more clearly.

General Rule 51 Revision

Rule 51 can be read easily only by those who already know what it means. A party who wants an issue covered by instructions must do both of two things: make a timely request, and then separately object to failure to give the request as made. The cases that explain the need to renew the request by way of objection suggest that repetition is needed in part to ensure that the court has not simply forgotten the request or its intention to give the instruction, and in part to show the court that it has failed in its attempt to give the substance of a requested instruction in better form. An attempt to address an omitted issue by submissions to the court after the request deadline fails because it is not an "objection" but an untimely request. Many circuits, moreover, recognize a "plain," "clear," or "fundamental" error doctrine that allows reversal despite failure to comply with Rule 51. This doctrine is explicit in the general "plain errors" provision of Criminal Rule 52; the contrast between this general provision and Rule 51 has led some circuits to reject the plain error doctrine for civil jury instructions.

Although unlikely, it also is possible that the formal requirements of Rule 51 may discourage the timid from making untimely requests that would be granted if made. Requests framed as objections may well be given, despite the risk that tardy requests will seduce the court into error, confuse the jury, or at least unduly emphasize one issue.

Present Rule 51 is set out as a prelude to a revised draft, adding only numbers to indicate the points at which distinct thoughts emerge in the text:

> [*1: Requests*] At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. [*2: Instructions*] The court, at its election, may instruct the jury before or after argument, or both. [*3: Objections*] No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

The following draft Rule 51 is only an approximation that suggests many of the issues that might be addressed by a comprehensive attempt to adopt a rule that better guides parties and courts:

Rule 51. Instructions to Jury: Objection

(a) Requests. A party may file written requests that the court instruct the jury on the law as set forth in the requests at the close of the evidence or at an earlier reasonable time directed by the court. [Permission must be granted to file supplemental requests at the close of the evidence on issues raised by evidence that could not reasonably be anticipated at the time initial requests were due.] The court must inform the parties of its proposed action on the requests before jury arguments. {The court may, in its discretion, permit an untimely request [to be] made at any time before the jury retires to consider its verdict.}

(b) Objections. A party may object to an instruction or the failure to give an instruction before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity must be given to make the objection out of the jury's hearing.

(c) Instructions. The court may instruct the jury at any time after trial begins. Final instructions must be given to the jury immediately before or after argument, or both.

(d) Forfeiture; plain error

(1) A party may not assign as error a mistake in an instruction actually given unless the party made a proper objection under subdivision (b).

(2) A party may not assign as error a failure to give an instruction unless the party made a proper request under subdivision (a), and — unless the court made it clear that the request had been considered and rejected — also made a proper objection under subdivision (b).

(3) A court may set aside a jury verdict for error in the instructions that has not been preserved as required by paragraphs (1) or (2), taking account of the obviousness of the error, the importance of the error, the costs of correcting the error, and the importance of the action to nonparties.

Committee Note

Rule 51 is revised to capture many of the interpretations that have emerged in practice. The revisions in text will make uniform the conclusions reached by a majority of decisions on each point.

Requests. Subdivision (a) governs requests. Apart from the plain error doctrine recognized in subdivision (d)(3), a court is not obliged to instruct the jury on issues raised by the evidence unless a party requests an instruction. The revised rule recognizes the court's authority to direct that requests be submitted before trial. Particularly in complex cases, pretrial requests can help the parties prepare for trial. In addition, pretrial requests may focus the case in ways that invite reconsideration of motions to dismiss or for summary judgment. Trial also may be shaped by severing some matters for separate trial, or by directing that trial begin with issues that may warrant disposition by judgment as a matter of law; see Rules 16(c)(14) and 50(a). The rule permits the court to further support these purposes by informing the parties of its action on their requests before trial. It seems likely that the deadline for pretrial requests often will be connected to a final pretrial conference.

The risk in directing a pretrial request deadline is that unanticipated trial evidence may raise new issues or reshape issues the parties thought they had understood. The need for a pretrial request deadline may not be great in an action that involves well-settled law that is familiar to the court. Courts should avoid a routine practice of directing pretrial requests.

Untimely requests are often accepted, at times by acting on an objection to the failure to give an instruction on an issue that was not framed by a timely request. The revised rule expressly recognizes the court's discretion to act on an untimely request. The most important consideration in exercising discretion is the importance of the issue to the case — the closer the issue lies to the "plain error" that would be recognized under subdivision (d)(3), the better the reason to give an instruction. The cogency of the reason for failing to make a timely request also should be considered — the earlier the request deadline, the more likely it is that good reason will appear for failing to recognize an important issue. Courts also must remain wary, however, of the risks posed by tardy requests. Hurried action in the closing minutes of trial may invite error. A jury may be confused by a tardy instruction made after the main body of instructions, and in any event may be misled to focus undue attention on the issues isolated and emphasized by a tardy instruction.

Objections. No change is intended in the requirements for making objections.

Instructions. Subdivision (c) expressly authorizes preliminary instructions at the beginning of the trial, a device that may be a helpful aid to the jury. In cases of unusual length or complexity, interim instructions also may be made during the course of trial.

Forfeiture and plain error. Many cases hold that a proper request for a jury instruction is not alone enough to preserve the right to appeal failure to give the instruction. The request must be renewed by objection. An objection, on the other hand, is sufficient only if it renews a request or addresses matters actually stated in the instructions. Even if framed as an objection, a request to include matter omitted from the instructions is just that, a request, and is untimely if made for the first time after the close of the evidence or an earlier deadline set by the court. The requirement that

a rejected request be renewed by objection is appropriate when the court may not have sufficiently focused on the request, or may believe that the request has been granted in substance although in different words. But the renewal requirement may also prove a trap for the unwary who fail to add an objection after the court has made it clear that the request has been considered and rejected on the merits. The authority to act on an untimely request is established in subdivision (a). Subdivision (d)(2) establishes authority to review the failure to grant a timely request, despite a failure to add an objection, when the court has made clear its consideration and rejection of the request.

Many circuits have recognized the power to review errors not preserved under Rule 51 in exceptional cases. The foundation of these decisions is that a district court owes a duty to the parties, to the law, and to the jury to give correct instructions on the fundamental elements of an action. This duty is shaped by at least the four factors enumerated in subdivision (d)(3).

The obviousness of the error reduces the need to rely on the parties to help the court with the law, and also bears on society's obligation to provide a reasonably learned judge. Obviousness turns not only on how well the law is settled, but also on how familiar the particular area of law should be to most judges. Clearly settled but exotic law often does not generate obvious error.

The importance of the error must be measured by the role the issue plays in the specific case; what is fundamental to one case may be peripheral in another. Importance is independent of obviousness. The most obvious example involves law that was clearly settled at the time of the instructions, only to be overruled by the time of appeal. The matter may be so important as to justify reversal, even though the "error" could not be known at the time the instructions were delivered.

The costs of correcting an error are affected by a variety of factors. If a complete new trial must be had for other reasons, ordinarily an instruction error at the first trial can be corrected for the second trial without significant cost. A Rule 49 verdict may enable correction without further proceedings.

In a case that seems close to the fundamental error line, account also may be taken of the impact a verdict may have on nonparties. Common examples are provided by actions that attack government actions or private discrimination.

Other Possible Revisions

The revisions set out above reflect issues frequently encountered in present practice. At least in large part, they reflect what most courts do. Other possible changes can also be noted:

Serve Requests: Rule 51 does not require that instruction requests be served on all parties. It seems likely that exchange is routine, and that courts will require exchange if the parties fail to do it. It might be helpful to adopt an express requirement that all requests be served on all parties, particularly if the requests are filed before trial.

Make Objections on the Record: It has been held that specific objections made during "extensive discussions off the record in chambers concerning the jury instructions" are not sufficient — that "to preserve an argument concerning a jury instruction for appellate review, a party must state distinctly the matter objected to and the grounds for the objection on the record." Dupre v. Fru-Con

Engineering Inc., 8th Cir.1997, 112 F.3d 329, 333-334. Is this a trap for the unwary that should be set out on the face of Rule 51?

Who Must Object: Rule 51 says that a party may not assign as error the giving or the refusing to give an instruction "unless *that* party objects thereto * * *." This requirement is preserved in the draft revision. But why should it not be enough that any party has complied with Rule 51? Particularly when there are coparties, should it not be enough that the matter urged on appeal was properly raised by any party?

Direction to Request: Illinois Supreme Court Rule 239(b) provides: "At any time before or during the trial, the court may direct counsel to prepare designated instructions. * * * Counsel may object at the conference on instructions to any instruction prepared at the court's direction, regardless of who prepared it * * *." Is there any reason to adopt a similar provision for Rule 51?

Written Instructions: Is there any reason to write into Rule 51 the authority to give written instructions to the jury?

Anything Else: ?

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

September 22, 1999

MEMORANDUM TO ADVISORY COMMITTEE ON CIVIL RULES

SUBJECT: *Financial Disclosure*

At the request of the Judicial Conference's Committee on Codes of Conduct in late 1998, the Standing Committee asked each of the advisory rules committees to examine the need for uniform rules requiring disclosure of financial interests patterned on Appellate Rule 26.1. It was decided that additional information on the experiences of courts was needed, and the Federal Judicial Center undertook a survey of the courts' practices. The Center plans to submit a final report on its study in January 2000. An interim report is attached.

If a consensus to adopt a uniform rule requiring financial disclosure develops, we plan to publish proposed amendments in August 2000. Under this timeframe, the advisory rules committees would need to approve the proposal at their respective spring 2000 meetings. During the January 2000 Standing Committee meeting, the advisory committees' reporters will undertake a coordinated effort to put forward a proposed uniform rule acceptable to all advisory rules committees. The preliminary views of the advisory committees at their respective fall 1999 meetings would help guide the reporters in their discussion at the Standing Committee meeting. As a starting point, it would be useful to know whether any advisory committee objects to or has reservations to adopting a rule identical or very similar to Appellate Rule 26.1.

The following materials are attached: (1) background information on the Appellate Rules Committee's drafting of Appellate Rule 26.1, (2) the actions of the Committee on Codes of Conduct addressing recusal problems and recommending solutions, (3) a series of newspaper articles criticizing the federal bench for recusal lapses, and (4) an interim FJC report.

John K. Rabiej

Attachments

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

ANTHONY J. SCIRICA
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

WILL L. GARWOOD
APPELLATE RULES

ADRIAN G. DUPLANTIER
BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

W. EUGENE DAVIS
CRIMINAL RULES

MILTON I. SHADUR
EVIDENCE RULES

September 15, 1999

Honorable Carol Bagley Amon
Chair, Committee on Codes of Conduct
225 Cadman Plaza East
Brooklyn, New York 11201

Dear Judge Amon:

Thank you for your September 9th letter describing your committee's work on financial disclosure issues. Let me briefly describe what the rules committees are doing now and what they plan to do at upcoming meetings. Our advisory rules committees will consider the preliminary results of the Federal Judicial Center's survey of courts' practices at their respective fall meetings. I understand that the Center found a growing number of local rules and standing orders requiring parties to disclose particular financial information. It seems that these new practices, however, have generated unforeseen problems, and we are keenly interested in reviewing the courts' experiences.

Much of our schedules is dictated by statutory deadlines. We expect that the advisory rules committees will finish their work at their respective spring 2000 meetings and will submit proposed uniform financial disclosure rules for consideration by the Standing Rules Committee at its June 2000 meeting. Under this timetable proposed rule amendments would be published for public comment in August 2000. As noted in your letter, the rulemaking process is time consuming. Assuming that the public comments do not uncover any major problems with the proposed rule amendments, the proposals would be reviewed again by the rules committees, and transmitted for approval to the Judicial Conference and the Supreme Court in late 2001. The rules would take effect in December 2002, unless Congress intervenes.

The time required in prescribing a national financial disclosure rule certainly suggests that interim measures should be implemented now to address the problems. Recent adverse news coverage underscores the need for swift action, and your initiative will provide immediate assistance to judges. Although the rules committees generally disfavor local rules or standing orders, I agree with you that in this case interim local rules or standing orders may be prudent. Accordingly, I endorse the recommendations made in your suggested letter.

I very much appreciate the opportunity to comment on the draft letter. I will keep you and your committee's staff advised of the rules committees' progress as we proceed in the rulemaking process.

Sincerely,

Anthony J. Scirica

cc: Chairs and Reporters,
Advisory Rules Committees
Marilyn J. Holmes

COMMITTEE ON CODES OF CONDUCT
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
UNITED STATES DISTRICT COURT
225 CADMAN PLAZA EAST
BROOKLYN, N.Y. 11201

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September 9, 1999

Honorable Anthony J. Scirica
Chair, Committee on Rules of Practice
and Procedure of the Judicial Conference
of the United States
22614 U.S. Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106

Re: Disclosure of Corporate Parents

Dear Judge Scirica:

Last year, my predecessor as chairman of the Codes of Conduct Committee, Judge A. Raymond Randolph, wrote to your predecessor, Judge Alicemarie Stotler, soliciting the assistance of your Committee in an initiative to help judges meet their recusal obligations. Judge Randolph asked your Committee to consider promulgating a national rule applicable in district and bankruptcy courts corresponding to Rule 26.1 of the Federal Rules of Appellate Procedure, which requires disclosure of corporate parents. I understand that the Committee on Rules of Practice and Procedure and the Advisory Committees on Bankruptcy Rules, Civil Rules, and Criminal Rules considered this request at recent meetings and have begun exploring the issue.

My colleagues and I on the Codes of Conduct Committee very much appreciate the attention you have given to this request. We recognize that the process of adopting new federal rules involves weighty considerations and requires extended analysis and consultation. I am writing to reiterate my Committee's continued interest in and support for your efforts. In addition, I want to take this opportunity to advise you of a complementary step the

Codes Committee is considering that relates closely to the Rules Committee's ongoing efforts.

During the last year, the Codes of Conduct Committee has been exploring various ways to assist judges in meeting their recusal obligations. We are offering enhanced education and training at the Federal Judicial Center's national judges' workshops, and we are working to develop automated conflicts screening software and conflicts checklists, which should help judges identify potential conflicts of interest. These efforts are particularly important in light of recent and continuing press coverage criticizing judges who failed to recuse themselves when they or their spouses owned stock in a party. In most of those situations, it appears that the judge's failure to recuse was inadvertent and was occasioned by a breakdown of the system for identifying conflicts of interest in the judge's chambers or the clerk's office.

Identification of all potential conflicts of interest is a difficult endeavor under the best of circumstances, but it presents special challenges in situations involving corporate parents. As you know, Canon 3C(1)(c) of the Code of Conduct for United States Judges and Advisory Opinion No. 57 advise that judges should recuse when they own stock in a parent company whose subsidiary appears as a party before the judge. Disclosure of corporate parents by the parties presents a simple way for judges to determine whether a subsidiary of a company in which they own stock is a party to a case, necessitating recusal. The alternative — attempting to identify and keep track of all subsidiaries of the companies in which a judge owns stock — can be a difficult, time-consuming exercise, complicated further by the daily vicissitudes of the modern corporate world.

For these reasons, the Codes of Conduct Committee strongly supports a federal rule requiring parties to disclose their corporate parents (and to update this disclosure as necessary). This approach holds substantial promise as a means of identifying proceedings in which judges may be disqualified. Indeed, we believe this approach is sufficiently beneficial that individual judges ought to consider adopting similar local procedures as an interim measure. We believe it may be useful, on an interim basis, for judges to consider requesting information from parties about their corporate parents, pending adoption of a national rule. This could be accomplished by adoption of local rules or standing orders. My Committee is interested in providing guidance along these lines to circuit councils and chief judges. I am hopeful that our two Committees can coordinate this effort, and I want to ensure that you have no concerns or objections before we proceed.

I have drafted the attached sample letter setting out the Codes of Conduct Committee's views on this subject. We are considering communicating these views to circuit councils and to district and bankruptcy chief judges. I would appreciate your comments on this initiative. Please feel free to call me at (718) 260-2410 if you believe it would be useful for us to discuss these issues. Thank you for your counsel and for your ongoing efforts to devise a national disclosure rule.

Sincerely,

Carol Bagley Amon
Chairman

Attachment

cc: Honorable W. Eugene Davis
Honorable Adrian G. Duplantier
Honorable Paul V. Niemeyer
John K. Rabiej

(Attached sample letter has not been finalized and is omitted.)

TO: Honorable James K. Logan, Chair
Members of the Advisory Committee on Appellate Rules

FROM: Carol Ann Mooney, Reporter

DATE: October 13, 1994

SUBJECT: 93-5, amendment of Rule 26.1 re: use of the term affiliates, and
93-10, application of Rule 26.1 to trade associations

I. Item 93-5, Use of the Term Affiliates

At the Committee's April 1993 meeting it reviewed Fed. R. App. P. 26.1 and an amendment to it which had been published earlier in the year; the amendment dealt with the number of copies problem. During the discussion, Mr. Spaniol noted that although the language of Rule 26.1 had been patterned after the Supreme Court Rule, the Supreme Court had recently amended its rule to omit references to "affiliates."

The first sentence of Fed. R. App. P. 26.1 provides:

> Any non-governmental corporate party to a civil or bankruptcy case or agency review proceeding and any non-governmental corporate defendant in a criminal case shall file a statement identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public.

The Committee briefly discussed the meaning of the term "affiliates." Judge Boggs stated that he thought the term encompassed "brother" and "sister" corporations; *i.e.*, those owned in whole or in part by the same parent. Judge Williams noted that the term "affiliate" is used in virtually every antitrust consent decree.

Nine circuits have local rules supplementing Fed. R. App. P. 26.1. (The local rules are appended to this memorandum.) Of those nine, six use the term affiliate in their rules. Two of the six define "affiliate" for purposes of the rule.

The D.C. rule states: "For the purposes of this rule, 'affiliate' shall be a person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, the specified entity . . .."[1] The Sixth Circuit's

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[1] D.C. Cir. R. 26.1(a). This definition appears to be drawn from the definition of an "affiliate" in the regulations promulgated under the Securities Exchange Act of 1934. The regulations define an "affiliate as:

> [A] person "affiliated" with, a specified person, is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.

definition is similar; it states: "A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation."[2]

Because Fed. R. App. P. 26.1 explicitly requires disclosure of parent and subsidiary corporations, it is the "under common control" provisions of the definitions that is helpful, and it appears to require disclosure of "brother" and "sister" corporations. Disclosure of their existence is required under the rule, however, only if they have issued shares to the public. The disclosure, therefore, of the existence of "full brother" or "sister" corporations, those wholly owned by an entity's parent, would not be required. Disclosure of the existence of affiliates that have issued shares to the public would seem appropriate.

The Seventh Circuit's rule does not require the disclosure of subsidiaries or of "brother" or "sister" corporations. It requires the disclosure only of parent corporations and of publicly held companies owning 10% or more of the stock of the party. The underlying assumption apparently is that a decision adverse to the party would harm significantly only those corporations owning at least 10% of the stock of the party and that an adverse decision would not have sufficient impact upon a subsidiary or sister corporation to require recusal of a judge who owned stock in the subsidiary or sister.

If the Committee wishes to retain the term affiliate, but clarify its meaning, Rule 26.1 could be amended to include a definition like that in the D.C. or Sixth Circuit rules.

Rule 26.1. Corporate Disclosure Statement

Any non-governmental corporate party to a civil or bankruptcy case or agency review proceeding and any non-governmental corporate defendant in a criminal case must file a statement identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates

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17 C.F.R. § 240.12b-2 (1994).

The same regulation defines "control" as:

> the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.
> 17 C.F.R. § 240.12b-2 (1994).

[2] 6th Cir. R. 25.

that have issued shares to the public. For purposes of this rule, an affiliate is a corporation that directly, or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, the corporate party. The statement must be filed with a party's principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever first occurs, unless a local rule requires earlier filing. Whenever the statement is filed before a party's principal brief, an original and three copies of the statement must be filed unless the court requires the filing of a different number by local rule or by order in a particular case. The statement must be included in front of the table of contents in a party's principal brief even if the statement was previously filed.

II. Item 93-10, Applicability of 26.1 to Trade Associations

At one of the Advisory Committee's recent meetings, the question of the applicability of Rule 26.1 to trade associations was raised. The question of whether the rule does, or should, require a trade association to disclose all of its members was deferred for later discussion.

As the local rules attached to this memorandum disclose, most of the circuits rules are silent about the applicability of Rule 26.1 to trade associations. Two circuits, however, directly address the question and take opposite positions.

The D.C. circuit rule by its terms applies not only to corporations but also to an "association, joint venture, partnership, syndicate, or other similar entity." D.C. Cir. R. 26.1(a). As to unincorporated associations, the disclosure statement generally must include the "names of any members of the entity that have issued shares or debt securities to the public." The rule further provides, however, that a trade association need not list the names of its members. D.C. Cir. R. 26.1(b). For purposes of the rule, a trade association is defined as "a continuing association of numerous organizations or individuals, operated for the purpose of promoting the general commercial, professional, legislative, or other interests of the membership." Id.

In contrast, the fourth circuit rule states: "A trade association shall identify in the disclosure statement all members of the association and their parents, subsidiaries (other than wholly owned subsidiaries), and affiliates that have issued shares to the public." Note that in addition to disclosing each member of the association, the fourth circuit requires disclosure of each member's affiliates.

The Advisory Committee worked for several years to develop Rule 26.1. One of the drafts prepared for the Committee's consideration required disclosure of a trade association's publicly owned members, whenever a trade association is a party or an intervenor. That approach was thought to be a middle of the road approach requiring disclosure of members (which while possibly lengthy, should not be burdensome to produce) but not of their affiliates. The Committee ultimately approved a less detailed rule that had been modeled after Supreme Court Rule 28.1. Because there had been a lack of consensus among the circuits on the approach that should be taken (an earlier draft had been circulated to the circuits for comment), the Committee approved a rule that established minimum requirements that all circuits should meet. As the Committee Note to the rule indicates, a court of appeals is free to require additional information by local rule.

The language of Fed. R. App. P. 26.1 does not address the trade association question. The rule requires a "corporate" party to disclose "parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates." Even if a trade association is incorporated, its members are not subsidiaries or affiliates in the ordinary sense of those words.

Although the Committee in 1988 rejected a provision addressing the trade association issue, is it time to reverse that decision? If so, should the Committee reconsider a more global reversal of the rule's bare bones approach? Section 455 requires a judge to disqualify himself or herself from hearing a case whenever the judge's impartiality might reasonably be questioned. The statute addresses a much broader range of interests than simply stock ownership. One of the early drafts considered by the Committee would have required all parties (not just corporate parties) to list "all attorneys involved in the case, and all persons, associations of persons, firms, partnerships, or corporations having an interest in the outcome of the case, including subsidiaries, conglomerates, affiliates, and parent corporations, and other identifiable legal entities related to a party."

The Local Rules Project had suggested that Rule 26.1 should be broadened in an effort to eliminate the diverse circuit rules. The Advisory Committee voted to take no further action on that suggestion in light of the difficulty the Committee previously had encountered when trying to develop a rule that would be acceptable to most of the circuits.

D.C. Cir. R. 26.1. Disclosure Statement

(a) A corporation, association, joint venture, partnership, syndicate, or other similar entity appearing as a party or *amicus* in any proceeding shall file a disclosure statement, at the time specified in FRAP 26.1, or as otherwise ordered by the court, identifying all parent companies, subsidiaries, and affiliates that have issued shares or debt securities to the public. For the purposes of this rule, "affiliate" shall be a person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, the specified entity; "parent" shall be an affiliate controlling such entity directly, or indirectly through intermediaries; and "subsidiary" shall be an affiliate controlled by such entity directly, or indirectly through one or more intermediaries.

(b) The statement shall identify the represented entity's general nature and purpose, insofar as relevant to the litigation, and if the entity is unincorporated, the statement shall include the names of any members of the entity that have issued shares or debt securities to the public. No such listing need be made, however, of the names of members of a trade association or professional association. For purposes of this rule, a "trade association" is a continuing association of numerous organizations or individuals operated for the purpose of promoting the general commercial, professional, legislative, or other interests of the membership.

* * * * *

Third Cir. R. 26.1.1. Disclosure of Corporate Affiliations and Financial Interest.

(a) Promptly after the notice of appeal is filed, each corporation that is a party to an appeal, whether in a civil, bankruptcy, or criminal case, shall file a corporate affiliate/financial interest disclosure statement on a form provided by the Clerk that identifies every publicly owned corporation not named in the appeal with which it is affiliated. The form shall be completed whether or not the corporation has anything to report.

(b) Every party to an appeal shall identify on the disclosure statement required by FRAP 26.1 every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. The form shall be completed only if a party has something to report under this section.

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Fourth Cir. R. 26.1 Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation.

(a) All parties to a civil or bankruptcy case, and all corporate defendants in a criminal case, whether or not they are covered by the terms of Federal Rule of Appellate Procedure 26.1, shall file a corporate affiliate/financial interest disclosure statement. This rule does not apply to the United States, to state and local governments in cases in which the opposing party is proceeding without counsel, or to parties proceeding in forma pauperis.

(b) The statement shall set forth the information required by Federal Rule of Appellate Procedure 26.1 and the following:

(1) A trade association shall identify in the disclosure statement all members of the association and their parents, subsidiaries (other than wholly owned subsidiaries), and affiliates that have issued shares to the public.

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Fifth Cir. R. 28.2.1. ***Certificate of Interested Persons***

A certificate will be furnished by counsel for all private (non-governmental) parties, both appellants and appellees, which shall be incorporated on the first page of each brief before the table of contents or index, and which shall certify a complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent corporations or other legal entities who or which are financially interested in the outcome of the litigation. If a large group of persons or firms can be specified by a generic description, individual listing is not necessary. . . .

Sixth Cir. R. 25. Disclosure of Corporate Affiliations and Financial Interest.

(a) Parties Required to Make Disclosure. With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is also required.

(b) Financial Interest to Be Disclosed.

(1) Whenever a corporation which is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation which is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation which is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it

controls, is controlled by, or is under common control with a publicly owned corporation.

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Seventh Cir. R. 26.1. Certificate of Interest

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or *amicus curiae*, or a private attorney representing a governmental party, must furnish a certificate of interest stating the following information:

* * * * *

(2) If such a party or *amicus* is a corporation:
(i) its parent corporation, if any; and
(ii) a list of stockholders which are publicly held companies owning 10% or more of the stock of the party or *amicus*.

* * * * *

Eighth Cir. R. 26.1A. Certificate of Interested Persons.

Within ten days after receipt of notice that the appeal has been docketed in this court, each nongovernmental party shall certify a complete list of all persons, associations, firms, partnerships, or corporations with a pecuniary interest in the outcome of the case. This certificate enables judges of the court to evaluate possible bases for disqualification or recusal. . . .

Eleventh Cir. R. 26.1-1. Certificate of Interested Persons and Corporate Disclosure Statement; Contents.

A certificate shall be furnished by appellants, appellees, intervenors and amicus curiae, including governmental parties, which contains a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case, including subsidiaries, conglomerates, affiliates and parent corporations, and other identifiable legal entities related to a party. In criminal and criminal-related cases, the certificate shall also disclose the identity of the victim(s).

Federal Cir. R. 47.4. Certificate of Interest.

(a) *Contents.* To determine whether recusal is necessary or appropriate, an attorney for a party or amicus curiae other than the United States must furnish a certificate of interest (in the form set forth in the appendix of these rules) stating:

(1) The full name of every party or amicus represented by the attorney in

the case;

(2) The name of the real party in interest if the party named in the caption is not the real party in interest;

(3) The corporate disclosure statement prescribed in Rule 26.1 of the Federal Rules of Appellate Procedure; and

(4) The names of all law firms whose partners of associates have appeared for the party in the lower tribunal or are expected to appear for the party in this court. . . .

A member of the Advisory Committee indicated that he reads the statutory language as requiring the Judicial Conference to either "modify or abrogate" a circuit rule, once the Conference determines that the rule is inconsistent with federal law. Another member disagreed; that member believes that the statutory language permits the Judicial Conference to abstain from acting. He noted that the Judicial Conference is not a court and that if it abrogates a circuit rule there is no review by the Supreme Court. Because the Judicial Conference is not a court before which parties appear, it is not presented with the sort of in depth research and argument that is typical of the adversary process. He believes that the questions can and should be litigated and in that context the issues can be presented to the Supreme Court.

Professor Coquillette invited the members of the Advisory Committee to write to him with their recommendations for the Standing Committee.

Item 93-5, Rule 26.1

Fed. R. App. P. 26.1 requires a corporate party to file a statement "identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public." At the Committee's April meeting, Mr. Spaniol noted that although the language of Rule 26.1 had been patterned after the Supreme Court Rule, the Supreme Court had recently amended its rule to omit references to "affiliates." As a result of Mr. Spaniol's observation, the Committee determined that it would reconsider the propriety of requiring disclosure of "affiliates."

As a preliminary matter, one of the Committee members asked whether the scope of the rule should be broader; it does not require disclosure of all matters that are cause for recusal under the statute. Some of the circuit rules require disclosure of anyone who has a financial interest in the case. The Reporter indicated that during the process of developing Rule 26.1, the Advisory Committee approved a rather broad draft and circulated it to the circuits. Several circuits had strongly negative reactions to the broad rule. As a result, the Advisory Committee promulgated a rule that requires bare-bones disclosure. The Committee Note indicates that the Advisory Committee realizes that some circuits may wish to require more complete disclosure.

Another member spoke in support of the limited disclosure required by Rule 26.1. It would impose a serious burden to require a party to certify that it has identified all persons who may have a financial interest in the outcome of the case. A corporate party, however, is in a position to know who it controls and by whom it is controlled and it is reasonable to require the party to disclose that information.

Another member spoke in support of an even narrower rule than current Rule 26.1; in his opinion the seventh circuit provision dealing with corporate affiliates is narrower but sufficient. The rule need only require disclosure of corporations that may be adversely affected by a decision in the case. The seventh circuit rule requires a corporate party or amicus to disclose its parent corporation and a list of stockholders which are publicly held companies owning 10% or more of the stock of the party or amicus. That disclosure is appropriate; if a judge owns stock in a parent corporation of the litigant, the judge has an interest in the litigant. The other disclosures required by the current federal rule and many of the circuit rules, however, seem unnecessary. For example, disclosure of subsidiaries may be unnecessary. If the litigant is a part parent of a corporation in which the judge may own stock, the possibility is quite remote that the judge might be biased by the fact that the judge and the litigant are co-owners of a corporation. Similarly, that a judge owns stock in a brother or sister corporation of the litigant is unlikely to create any bias. In short, it may be appropriate to eliminate not only the term affiliate but also the term subsidiaries.

Another member posed a hypothetical that illustrated the possibility of an ethical problem arising from participation of a judge in a case if the judge owns stock in a corporation which is under common control with a party to the case. A judge owns 20% of Joe's Barber Shop; the other 80% is owned by Barber Shops Inc.. Barber Shops Inc. also owns 80% of Mary's Barber Shop. If Mary's Barber Shop is the litigant and is awarded judgment, 80% of that will accrue to the benefit of Barber Shops Inc. Although Barber Shops Inc. does not owe Joe's Barber Shop any of that money, does the fact the Barber Shops Inc. is wealthier effect Joe's Barber Shop and its shareholders (one of whom is the judge in the case)? Does the fact that the judge's co-owner could be richer as the result of the litigation mean that the judge should recuse himself or herself? It might because if Joe's Barber Shop needs cash at some point in the future, Barber Shops Inc. may be in a better position to provide the cash if Mary's Barber Shop is awarded a substantial judgment.

Another member pointed out that what is striking about the hypothetical is that the ownership interests are large and in such cases the judge is likely to be aware of the ownership interests and the disclosure statement would not be necessary to make the judge aware of his or her potential interest. In the typical case the ownership interests of shareholders are minuscule and the impact of a judgment for or against a brother or sister corporation would be negligible upon a judge shareholder.

Another member indicated that the purpose of the rule is to address clear-cut interests. The party's certificate cannot address all possible problems such as persons who are contemplating purchases of interests, etc.

A motion was made and seconded to weave the seventh circuit solution into the rule and to eliminate disclosure of subsidiaries and affiliates. It was pointed out that there may be political reaction to what may be perceived as a narrowing of the disclosure. In response, it was suggested that the Committee Note should explain the change, indicating that a person who owns stock in a subsidiary or an affiliate is not affected by judgment for or against the parent. The publication period provides an opportunity to gauge the public reaction to the proposal.

Specifically the motion was to amend Rule 26.1 to read as follows:

> Any non-governmental corporate party in a civil or bankruptcy case, or agency review proceeding and any non-governmental corporate defendant in a criminal case must file a statement identifying its parent corporation, if any, and a list of stockholders which are publicly held companies owning 10% or more of the stock of the party.

The motion passed by a vote of 6 to 2.

Although the seventh circuit rule requires an amicus that is a corporation to file a similar statement, the Committee decided to treat the amicus question in Rule 29. Specifically, a motion was made to amend draft Rule 29(d) to indicate that "an amicus brief must comply with Rule 32 and, if a non-governmental corporation, file a disclosure statement like that required of a party in Rule 26.1." The motion was seconded and passed unanimously.

Item 93-10, Rule 26.1

At one of the Advisory Committee's recent meetings, the question of the applicability of Rule 26.1 to trade associations was raised. The language of Fed. R. App. P. 26.1 does not address the trade association question. The current rule requires only that a "corporate" party disclose its parent, subsidiaries and affiliates. Under the current rule, a trade association would be required to make disclosure only if it is incorporated and even then it typically would not have anything to disclose; a trade association does not have a parent and the association's members are not subsidiaries or affiliates in the ordinary sense of those words.

Given the decisions just approved under item 93-5, that the only disclosures required are those involving financial interest and, more specifically, only disclosure of parent corporations, the consensus was that no change is needed.

Item 94-1, Rule 26(c)

Fed. R. App. P. 26(c) provides that when the time for action is measured from the date of service and service is accomplished by mailing, three days are

TO: Honorable James K. Logan, Chair
Members of the Advisory Committee on Appellate Rules &
Liaison Members

FROM: Carol Ann Mooney, Reporter

DATE: March 27, 1996

SUBJECT: Gap Report concerning the proposed amendments to the Federal Rules of Appellate Procedure published September 1995

In September 1995 the Standing Committee published a packet of proposed amendments to the Federal Rules of Appellate Procedure. The period for public comment closed on March 1, 1996. At the Advisory Committee's meeting on April 15 and 16 the Committee must consider all the comments and decide whether to amend the published rules. If the Committee decides to make amendments, the Committee has the further task of deciding whether the amendments are substantial. If substantial amendments are made, it is necessary to republish the rule(s). If only minor amendments are made, republication is not necessary.

Each rule, as published, is set forth below and is followed by a summary of the comments submitted concerning that specific rule. Following the summary is a segment labeled "Issues and Changes." In that segment, I discuss the issues raised by the commentators and outline the changes that are made in the new draft prepared for your consideration. The new draft concludes the treatment of each rule.

General comments, applicable to all of the rules are summarized first.

COMMENTS ON PROPOSED AMENDMENTS OF FED. R. APP. P. 26.1

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

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

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

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

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

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

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

a. One committee says that the amendments appear reasonable.

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

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

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

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

Attorney Horsley makes two comments:

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

b. He suggests amending lines 23-28 to state: "If the statement is filed before the principal brief, the party shall file an original and <u>at least</u>

three copies, unless the court requires the filing of a ~~different~~ reasonable number by local rule or by order in a particular case."

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

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

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

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

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

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

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

it may be and the judges should have that information as well.

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

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

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

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

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

Approves the proposed changes.

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

interest that would create a conflict for a judge. A copy of Judge Parker's letter follows this page.

One part of Judge Parker's example is probably not much different than the relationship between a party and its subsidiary or affiliates, a relationship that the Committee believes does not require disclosure. When a corporate party is a limited partner and there is the potential that the judge may also be a limited partner in the same partnership, a judgment for or against the corporate party should have no effect upon the judge. The point remains, however, that Rule 26.1 is narrow. The Advisory Committee has long been aware that Rule 26.1 is not as broad as may be desirable. However, the Committee consulted with the circuits during the development of Rule 26.1 and there was no consensus for a broader rule. The Committee has agreed with Mr. Lacovara's comment that the difficulty of defining a broader category of investments and in tracking the identity of investors makes the focus on stock reasonable.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO
POST OFFICE BOX 566
ALBUQUERQUE, NEW MEXICO 87103

JAMES A. PARKER
Judge

July 31, 1995

Honorable James K. Logan
United States Circuit Judge
P.O. Box 790
Olathe, Kansas 66061

Professor Carol Ann Mooney
University of Notre Dame
Law School
Notre Dame, Indiana 46556

Re: Proposed Appellate Rule 26.1 - Corporate Disclosure Statement

Dear Judge Logan and Professor Mooney:

I begin with an apology for not earlier having commented on proposed Rule 26.1. Obviously your Advisory Committee has devoted considerable time and thought to this rule. Unfortunately, I did not focus attention on the substance of Rule 26.1 until the Standing Committee meeting on July 6.

My concern is that proposed Rule 26.1 is worded too narrowly to accomplish its objective of requiring parties to provide information that will help judges identify potential conflicts of interest. The proposed rule covers only corporations. A corporation, of course, is only one form of organizations that have numerous, diverse owners. Another is a limited partnership. Limited partnerships that have been widely sold often have been parties in many lawsuits. As presently worded, proposed Rule 26.1(a) would not require a corporation that is either a general or a limited partner to disclose its interest in a limited partnership in which a judge may also be a limited partner.

I recommend broadening the language of proposed Rule 26.1(a) to require identification of all types of organizations, not just corporations, in which a party may have an interest that would create a conflict for a judge. Having said that, I apologize, again, for not proposing alternative language. I would suggest, however, deleting "corporate" from the title of Rule 26.1.

Sincerely,

James A. Parker

cc: Honorable Alicemarie H. Stotler
Standing Committee Chairperson

ISSUES AND CHANGES - RULE 26.1

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

1. Support

The opinion of the Judicial Conference Committee on Codes of Conduct was specifically solicited. The Committee supports the amendments. The Committee believes that disclosure only of parent companies and public companies owning more than 10 percent of the party's stock should be adequate to ensure that a judge is made aware of a party's corporate affiliations and that a judge is able to make an informed decision about recusal.

2. Suggested Revisions

All of the commentators who suggest revisions focus on the extent of the disclosure that should be required. Unfortunately, they are not in agreement about what should be done.

a. Two commentators urge the Committee to continue to require disclosure of subsidiaries and affiliates, although they apparently would also retain the new 10% rule. These commentators stress that although it would be rare that recusal would be required because a judge owns stock in a litigant's subsidiary or affiliate, "rarely" does not mean "never."

b. Three other commentators specifically approve the deletions but would make changes in that portion of the amendments that require disclosure of all publicly traded companies that own 10% or more of the party's stock:

   i. one commentator recommends dropping the requirement because the judge's interest may be extremely minimal — some stock in a company that owns 10% of the party's stock (would this preclude the use of mutual funds?) — and it would be a burden for the party to comply with the requirement;

   ii. another commentator would require disclosure of all stockholders that are publicly owned; he thinks it would be easier to list them all;

   iii. a third commentator would amend the language to make it clear that the rule does not call for identifying public companies that collectively might own a total of 10% of the party's stock; he would amendment the language as follows:

"listing any stockholders that is a ~~are~~ publicly held company ~~ies~~ and that owns ~~ing~~ 10% or more of the party's stock."

c. Another commentator suggests that it is not always clear whether a company is publicly held and suggests that the rule refer to companies "that have issued shares that are traded on exchanges or markets that are regulated by the Securities and Exchange Commission."

d. Another commentator believes that the rule should be expanded to include publicly held joint venture partners and grandparent or great grandparent companies.

3. The New Draft

The Advisory Committee specifically requested that the Committee on Codes of Conduct review the proposed amendments. Given the approval of the Committee on Codes of Conduct, the new draft does not reinstate the requirement that a party disclose "subsidiaries" and "affiliates." Both of the commentators who urged retention of the rule admitted that it would be rare that a judge should recuse himself or herself because of the judge's ownership of stock in a subsidiary or affiliate.

The new draft does continue to require disclosure of a stockholder that owns 10% or more of the party's stock if the stockholder is publicly held. Although one commentator believes that this provision "over-extends" the assumption of disqualification because a judge's interest may be extremely minimal, the disqualification statute is quite demanding. The statute requires a judge to disqualify himself or herself if the judge has a "financial interest" in a party "however small" the interest may be, if the interest could be "substantially affected by the outcome of the proceeding." 28 U.S.C. § 455(b)(4), (d)(4). Note, the statute does not require that the judge be substantially affected by the outcome, but that the judge's interest (however small) could be substantially affected. Although it could be argued that the judge does not have a financial interest in the party, but only in the stockholder, the commentator's focus upon the "minimal" nature of the judge's interest is inappropriate. As to the mutual fund question, the statute specifically says:

> Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund. 28 U.S.C. § 455(d)(4)(i).[2]

The draft, however, does not require the party to disclose all of the party's stockholders that are publicly held (as one commentator suggested) but continues

[2] That the statute creates a specific exception for mutual fund ownership may suggest that the statute is otherwise concerned about the sort of indirect ownership at issue in the proposed amendment.

only to require disclosure of those corporations that own 10% of the party's stock. The ten percent threshold makes the judge's interest in the stockholder a financial interest in the party. If a judge owns stock in a corporation which in turn owns a very small percentage of the party's stock, the argument that the judge does not have a financial interest in the party is quite strong.

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

At line 27 the words "the filing of" are deleted as suggested in the "style" version being prepared for publication.

COMMITTEE ON CODES OF CONDUCT
ADVISORY OPINION NO. 57

Disqualification in a Case When Controlled Subsidiary of a Corporation in Which Judge Owns Stock Is a Party.

Two judges have requested an opinion from the Committee as to whether a judge is disqualified when a controlled subsidiary of a corporation in which the judge owns stock is a party.

A complete answer to these inquiries would involve an interpretation of both Canon 3C of the Code of Conduct for United States Judges and 28 U.S.C. § 455. The provisions of the canon and statute are similar, but our opinion is limited to an interpretation of the canon.

Canon 3C(1) provides that:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:
>
> * * *
>
> (c) the judge knows that . . . [he or she] has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding.

Canon 3C(3)(c) defines a "financial interest" as "ownership of a legal or equitable interest, however small," with enumerated exceptions, including ownership in a mutual or common investment fund, the proprietary interest of a policy holder in a mutual insurance company, or a similar proprietary interest, where the outcome of the proceeding could not substantially affect the value of the interest.

The Reporter's Notes to Code of Judicial Conduct, in explaining the meaning of financial interest, reads in part:

> The "financial interest" of a judge that will disqualify him is his direct legal or equitable ownership interest, no matter how small, in a party or in the subject matter in a proceeding before him.
>
> * * *
>
> When a judge deposits money in a mutual savings association or takes out a policy of insurance in a mutual insurance company, he has a technical legal interest in the association or

> company. The Committee was of the opinion that these technical interests, and other similar ones, should not be a basis for disqualifying a judge even though the association or company is a party to a proceeding before him, unless the value of his interest could be substantially affected by the outcome of the proceeding or the broad test of Canon 3C(1) is applicable.

Thode, Reporter's Notes to Code of Judicial Conduct 69-71 (ABA 1973).

We are concerned accordingly with the question of whether an owner of stock in the parent corporation has a direct legal or equitable interest in the controlled subsidiary or merely a "technical legal interest" within the recognized exceptions.

It is the opinion of the Committee that the owner of stock in a parent corporation has a direct legal or equitable interest in a controlled subsidiary, and where a judge knows that a party is controlled by a corporation in which the judge owns stock, the judge should disqualify in the proceeding.

August 9, 1978
Revised July 10, 1998

Judges Ruled on Firms in Their Portfolios

Appeals Jurists Attribute Participation to Innocent Mistakes

By Joe Stephens
Washington Post Staff Writer
Monday, September 13, 1999; Page A01

A number of federal appellate judges have ruled on cases involving companies in which they own stock, despite a federal law designed to prevent judges from taking part in any case in which they have a financial interest.

An examination of financial disclosure reports and federal court records shows that in 1997 eight appeals court judges took part in at least 18 cases in which they, their spouses or trusts they helped manage held stock in one of the parties. The stock ownership ranged from a few thousand dollars to as much as $250,000.

In interviews, the judges acknowledged that they should not have participated in the cases but stressed that their stock interests did not affect their rulings. The judges, who include some of the nation's best-known jurists, attributed their participation in the cases to innocent mistakes or memory lapses about their financial portfolios.

"It's embarrassing; I should have been more alert," said Judge Alex Kozinski of the 9th U.S. Circuit Court of Appeals in California. "I certainly am going to try to be more careful."

Some of those involved in the cases also were upset to learn about the stock. Judge Alice Batchelder of the 6th Circuit in Ohio improperly sat on a case involving Wal-Mart Stores Inc. even though her husband held up to $50,000 worth of stock in the company. Batchelder and two other judges ruled the discount-store chain could not be held responsible for selling Wayne Brashear's 19-year-old son a .357 Magnum revolver, which he later used to commit suicide.

"It leaves a pretty bitter taste," Brashear said of the judge's actions.

Batchelder explained that, until contacted by a reporter, she did not realize her husband's retirement account owned stock in Wal-Mart and other companies. She said she should have withdrawn from Brashear's appeal and four other cases.

"I'm extremely chagrined to discover it," she said. "The error is mine."

The conflicts were uncovered by Community Rights Counsel, a public-interest law firm that concentrates on land-use issues. The group reviewed 1997 personal financial disclosure reports, the most recent available at the time, filed by the approximately 150 active federal appeals court judges, and checked the holdings against computerized records of cases in which the judges participated. It provided the material to The Washington Post.

"Our findings represent the tip of the iceberg, and there are likely hundreds of similar cases to be found throughout the federal judiciary," said the group's executive director, Doug Kendall.

But David Sellers, a spokesman for the Administrative Office of the U.S. Courts, said the conflicts involved a surprisingly small percentage of the roughly 52,000 cases that passed through the nation's appeals courts in 1997. He also questioned why seven of the eight judges cited by the group were named by Republican presidents.

Kendall said he scrutinized all judges equally. He said his study understated the probable number of conflicts because it did not include cases handled by judges who have taken retired status and did not include an exhaustive search of corporate subsidiaries.

In interviews, the judges said their rulings in the cases were unlikely to affect their stock values. In some cases, in fact, the judges ruled against the companies' interests. Even so, they acknowledged that they should have withdrawn from the lawsuits to prevent a conflict.

"I accept the responsibility. I shouldn't have sat on those cases," said Judge Morris Arnold of the 8th U.S. Circuit in Arkansas. "I regret the mistake happened and I'm going to work to see it doesn't happen again."

Arnold took part in one lawsuit involving General Electric and another involving a General Electric subsidiary while his wife owned company stock worth up to $50,000. He said he overlooked one conflict because the case had dozens of litigants. In the other, he said, he did not recognize that General Electric Capital Corp. was a subsidiary of General Electric.

Some judges said their spouses or investment managers bought the stocks without immediately notifying them. Others said the companies' names became lost in a long list of litigants or that they were confused by the names of subsidiaries and affiliated corporations.

Federal appeals court rules require corporations to provide a list of all parent companies and related entities in order to prohibit precisely such conflicts.

Federal law requires that judges remove themselves from any case in which they know they or their spouses have a financial interest, no matter how small. Even a $1 investment violates the statute. Federal law also directs judges to keep abreast of what they own so that they may immediately resolve any conflicts that arise.

Evidence of the conflicts was not news to one judge, Laurence Silberman of the U.S. Circuit Court of Appeals for the District of Columbia.

Silberman said he identified a series of conflicts in early 1998 and sent letters reporting the problem to the lawyers in three cases. At the same time, Silberman withdrew from hearing an appeal in one of the most closely watched cases in recent years -- the U.S. Justice Department's antitrust lawsuit against Microsoft Corp.

Silberman said he had no ownership in Microsoft or the companies involved in the other cases. But after his brother-in-law died suddenly in 1997, Silberman explained, he became a trustee of the Gaull Marital Trust, which owned a variety of stocks, including up to $100,000 in Microsoft.

In his letters, Silberman noted that his "participation was in violation" of federal ethics laws.

In 1997, Silberman received $15,000 for teaching at Georgetown University Law Center and was one of three judges who ruled in Georgetown's favor in a case accusing the university hospital of medical malpractice. Silberman said it was "absurd" to think he should remove himself in that situation, noting the hospital and law school are separate entities. Legal ethics experts said he was not required to disqualify himself.

In cases handled by the other judges, lawyers and litigants were not warned about the conflicts. For example, attorney Paul Bennett of San Francisco said he was surprised to learn that Judge Kozinski owned General Motors stock.

Bennett represented eight railroad workers who claimed their hearing was damaged by noise from locomotive engines manufactured by General Motors. Kozinski led a three-judge panel that rejected his argument, which Bennett said could have led to a national class-action suit against General Motors if it had been successful.

"It's disturbing that people say they don't know what they own," Bennett said. "If I had a different panel of judges, who knows if I would have won?"

Kozinski explained that midway through the case his wife bought 95

shares of stock, worth less than $15,000. The judge learned of the purchase later, he said, and never connected it to the lawsuit.

"We will try harder from now on," Kozinski said. "We do take this very seriously."

Some members of Congress argue that, to help the public quickly identify such conflicts, lists of stocks held by federal judges should be easily available to the public. In March the Judicial Conference rejected a plan to have judges post "recusal lists" at local courthouses, citing security and privacy concerns. Judges also said that such lists already are available to anyone willing to fill out a request and wait several weeks.

Kendall and other critics point out, however, that each request results in a warning to the judge about who is examining his finances. They said few lawyers and litigants would risk angering the judge who will decide the outcome of their case.

The Environmental Working Group, an environmental watchdog organization, wrote to Chief Justice William H. Rehnquist last week urging him to improve the disclosure process, including posting the forms on the Internet. "Litigants and citizens' faith in the judicial process is severely eroded by these conflicts," said the letter by vice president Mike Casey.

Judge Arnold called it a good idea to make judges' financial disclosures more readily available to the public.

"I understand why some people would be reluctant" to check the reports if they know their inquiries will be reported to the judge, Arnold said. "If it's a matter of public record, it's a matter of public record, and people ought to be able to look at it."

Taking Stock on the Bench

Federal appeals court judges with conflicts of interest:

Morris Arnold of the 8th Circuit in Arkansas

* Took part in one lawsuit involving General Electric, and another involving a General Electric subsidiary, while his wife owned company stock worth up to $50,000.

Alice Batchelder of the 6th Circuit in Ohio

* Took part in five lawsuits involving Wal-Mart Stores Inc. and Bristol-Myers Squibb Co. while her husband's retirement account held up to $50,000 stock in those companies.

Edward Becker of the 3rd Circuit in Pennsylvania

* Said his clerk overlooked his stock ownership in one case involving Hercules Inc. In a second, said he mistakenly believed he had already sold the stock, worth up to $15,000.

Alex Kozinski of the 9th Circuit in California

* Ruled for General Motors in a case brought by railroad workers who claimed hearing damage from GM engines. Said his wife bought GM shares midway through the case and that he only learned of the purchase later.

Sandra Lynch of the 1st Circuit in Massachusetts

* Married a man who owned up to $100,000 in Monsanto Co. stock a few weeks before joining a ruling in a case involving Monsanto. Said she did not learn of her husband's stock until later, and did not realize the problem with the case until called by a reporter.

Daniel Manion of the 7th Circuit in Indiana

* Participated in a lawsuit involving Lucent Technologies while holding company stock worth up to $15,000. Manion pointed out that early in the appeal the litigant's name was listed as AT&T. Later, it was changed to Lucent.

Bruce Selya of the 1st Circuit in Rhode Island

* Participated in three cases while owning stock worth up to $15,000 in a litigant's or a litigant's parent company. Said the problems arose because his investment manager bought stocks for his portfolio and only later supplied him with the names of the companies.

Laurence Silberman of the D.C. Circuit

* Participated in three cases involving companies in which a trust he administered held stock. Wrote letters to the parties saying his involvement violated federal ethics rules.

"On Their Honor: Judges and their Assets."

Published by the Kansas City Star

These stories and any additional articles the paper publishes on this topic can be accessed through the paper's web site at *www.kcstar.com/judges*

Administrative Office of the United States Courts

Office of Public Affairs
(202) 273-0107

On their honor Judges and their assets

Stocks and ethics collide in courtroom

By JOE STEPHENS - Staff Writer
Date: 04/04/98 23:00

Federal judges here and elsewhere repeatedly have presided over lawsuits against companies in which they own stock.

That's not supposed to happen. U.S. law requires judges to withdraw from any lawsuit in which they know they have a financial interest, however small. So does the judicial Code of Conduct.

Yet a study by *The Kansas City Star* discovered federal judges from the Kansas City area issued more than 200 court orders while holding an interest in a litigant. They set hearings, granted motions, threw out legal claims and even conducted a jury trial.

For comparison, *The Star* examined courthouses in Oregon and Pennsylvania -- and found identical problems.

In all, *The Star's* investigation identified 57 legal actions in which a district judge entered one or more such orders. In the Kansas City area alone, nine district judges, or two-thirds of those in the local courthouses, entered orders in 33 problem cases.

At the same time, the judges owned anywhere from a few thousand dollars to as much as $250,000 in stock in companies involved in a suit, or in the companies' parent corporations.

"I'm shocked," said Jeffrey Shaman, a

To review the investments of federal district judges in the Kansas City area, click the judges' names below.

G. Thomas Van Bebber District of Kansas	John W. Lungstrum District of Kansas
Earl E. O'Connor District of Kansas	Kathryn H. Vratil District of Kansas
D. Brook Bartlett Western District of Missouri	Gary A. Fenner Western District of Missouri
Elmo B. Hunter Western District of Missouri	Fernando J. Gaitan Jr. Western District of Missouri
Nanette K. Laughrey Western District of Missouri	Howard F. Sachs Western District of Missouri
Ortrie D. Smith Western District of Missouri	Joseph E. Stevens Jr. Western District of Missouri
Dean Whipple Western District of Missouri	Scott O. Wright Western District of Missouri

judicial ethicist and a law professor at DePaul University in Chicago. "It's such a clear violation."

The newspaper's study found no evidence any judge benefited personally or let his stock holdings influence his rulings.

But many litigants and lawyers said the findings raised questions about how judges, who are appointed for life to ensure others follow the letter of the law, police themselves.

David Barrett, an attorney in one of the lawsuits, called the findings "a little scary."

"People assume," he said, "that judges are all honest and fair -- and avoid conflicts."

Most judges said in explaining the lapses that they made innocent mistakes or forgot what they owned. Some said their staffs were supposed to spot the conflicts. Others blamed the crush of paperwork.

Many orders were routine and had little effect on the lawsuits, which often were settled out of court. Some orders simply appointed legal couriers or set filing schedules. And in at least seven of the 57 cases, judges recognized their stock conflict and stepped out of the lawsuits before *The Star* began its study.

Yet experts said that, in each instance, judges should have monitored their investments and withdrawn before entering a single order.

"This kind of sloppiness is more than unseemly; it is destructive of the public's confidence in an impartial judiciary," said James C. Turner, a Washington lawyer and consumer advocate.

Many judges acknowledged they may have broken ethics laws, at least technically.

"I take it very seriously," Judge John W. Lungstrum of Kansas City, Kan., said of the lapses. He inadvertently presided over two recent lawsuits while his family owned up to $65,000 in stock in the defendants.

"I want to make sure," he added, "that it doesn't happen again."

For some litigants, the judges' stock ownership already has sullied the image of the court system.

Two years ago a Kansas City man sued cigarette manufacturers, accusing them of deliberately addicting smokers to nicotine. Seven weeks later, a judge threw out the lawsuit as frivolous.

Until told by *The Star,* the plaintiff had no idea the judge owned stock in one of the companies.

In another lawsuit, Dana DeSuza of Independence charged that the Sprint Corp. violated discrimination laws when it fired her. A judge threw out part of her $1.9 million claim, and presided over a trial in which a jury rejected the remainder of her case.

Two years passed before DeSuza learned the judge owned stock in Sprint. Her reaction: "I'm disgusted."

The Star's findings already are leading to change here and around the country.

For example, at least one judge sold his stock within days of being interviewed. "I don't want any question," said Judge Dean Whipple, "about whether I had any ulterior motive on those cases."

Two weeks after court officials sent her notice that the newspaper was reviewing her investments, Judge Kathryn H. Vratil mailed letters to litigants in at least six lawsuits. She told them they might have grounds to vacate her judgments and

reopen their cases. Vratil called the timing a coincidence.

In Pittsburgh, a judge withdrew from a $9 million lawsuit shortly after *The Star* notified him that his wife owned stock in three separate defendants, eight years into the legal action.

A factory worker in northern Pennsylvania, alerted to his judge's stock by *The Star's* study, two weeks ago filed a motion accusing the judge of violating ethics laws. He requested a new trial in the age-discrimination case, which had been closed for two years.

Other litigants said they also were looking into resurrecting their long-closed cases.

Authorities in Washington are taking notice, too.

Three days after being contacted by *The Star*, the Administrative Office of the U.S. Courts faxed a memo marked "URGENT" to more than 100 chief judges across the nation. It suggested they review and update their methods for identifying conflicts of interest. That is something several judges said they were doing already.

"What we're really talking about is the integrity of the judicial system," explained Leslie W. Abramson, a law professor at the University of Louisville and an expert on judicial ethics.

"In the worst-case scenario, judgments could be affected."

The honor system

Congress was worried about such conflicts 24 years ago. That's when legislators beefed up ethics laws to bolster confidence in the courts.

They considered financial conflicts so serious, in fact, that they made them illegal even when

the judge's investment is tiny and when lawyers waive any objections.

The idea was to prevent quibbling over the extent of the judge's legal role or the size of his financial stake. As a practical matter, experts said, it would be impossible to determine the purity of a judge's thoughts when he renders a particular decision.

To help ensure compliance, judges must list their investments annually on reports filed in Washington.

But strict rules make the reports difficult to get and alert the judges they are under scrutiny. That ensures few people review them.

Short of Congress impeaching a judge, no one outside the judiciary is authorized to enforce the ethics statutes. Judges are on the honor system, trusted to police their own conflicts. The law sets no penalty for crossing the line.

Until now, experts said, no one has taken an in-depth look at how scrupulous trial-level judges have been about avoiding such problems.

For its study, the newspaper analyzed financial disclosure reports filed since 1991 by district judges based in parts of four of the 13 federal appellate circuits.

The courthouses were chosen because of their size and because each represents a different judicial district: Kansas City (Western Missouri District); Kansas City, Kan. (Kansas); Pittsburgh (Western Pennsylvania) and Portland (Oregon).

The Star then compared the judges' stock holdings with thousands of civil lawsuits.

Although the study found problems at each courthouse, on average judges in the Kansas City area issued more court orders in more questionable cases.

Among the lawsuits identified locally, 19

involved judges who owned stock in a litigant; one suit involved a judge whose wife owned the problem stock. In 11 other lawsuits, judges owned stock in the parent corporation of one or more litigants.

The final two cases involved a different sort of problem. A judge who sat on the Board of Governors at Truman Medical Center presided over two lawsuits against the center -- and threw both out of court.

Under ethics statutes and judicial canons, experts said, judges should have no role in any of those cases.

"Some people might say it's surprising," Abramson said of *The Star's* findings. "Other people might say it's disappointing."

`Slap in the face'

Some litigants grew furious when told of the judges' investments.

"It makes me feel like I've been violated," litigant Ed Wallace said moments after hearing that the judge in his lawsuit against the Chrysler Corp. bought Chrysler stock in the midst of the case.

"I really feel that I got the raw end of the deal."

Nancy Powell is stinging, too. The judge who handled Powell's lawsuit against her former employer revealed her stock ownership just 11 days before trial, bringing the case to a halt.

"The sheer emotion of the whole thing was horrendous," Powell said.

Darrell Taylor suffered severe injuries in a traffic accident, then pursued a $1 million lawsuit against an insurance company. He had no idea his judge owned stock in the company's holding corporation.

"There should be a law against that," he said.

Even in cases where a judge's involvement was brief and cursory, some litigants grew indignant.

For example, the first judge assigned to handle Linda Zimmerman's lawsuit against General Motors issued one order, scheduling a conference. Because of a conflict unrelated to stock ownership, the judge withdrew nine days later.

Even so, Zimmerman erupted when a reporter told her the judge owned up to $30,000 in General Motors stock.

"I did not know about any of this," Zimmerman said. "That's a conflict."

Rightly or wrongly, the findings also fed a pervasive skepticism about the fairness of American courts.

"I am not a fan of the justice system," explained one litigant, Harvey Bruce. "You cannot get a fair shake in this country."

Among the lawyers involved, Randy James' reaction mirrored that of many.

James of Overland Park praised the integrity of federal judges. He is confident stock investments did not sway the judge's rulings in his case.

Yet James responded to *The Star's* overall findings with exclamations of "Wow!" and "My goodness!" And he found the picture they painted disturbing.

"It's so obvious it slaps you in the face," James said. "If you've got a conflict, you've got to get out."

Unlike James, many lawyers refused to discuss the conflicts unless promised anonymity.

"You've got to understand my position," one attorney said, repeatedly asking that his name not appear in the newspaper. "This judge

determines my ability to make a living."

Several lawyers said they never considered looking for financial conflicts. They assumed judges were conscientious and would reveal any stock interests.

Some also pointed out that if an attorney had a financial conflict, he would face serious trouble for himself and his case.

"It's more than a little ironic," one lawyer said, "that a judge got caught in this situation."

Hollow warnings

Each spring, judges take part in a ritual designed to remind them of conflicts and their duty to avoid them.

Every judge lists his assets on a detailed form, then signs an attached certification declaring that he did not break any ethics laws.

The certification requires each judge to attest that:

"To the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I ... had a financial interest. ..."

The judge's signature is followed by a pre-printed warning:

"Any individual who knowingly and wilfully falsifies ... this report may be subject to civil and criminal sanctions."

But the warning is hollow. Court officials in Washington could not identify a single instance in which a judge was disciplined. And the certification clearly did not stop judges from handling cases in which they owned stock.

For example, Whipple presided over two 1996 lawsuits against the Philip Morris Cos. Whipple threw out both.

Then, Whipple filed a financial report last spring that disclosed he owned up to $15,000 worth of stock in Philip Morris. (The form only shows ranges of stock value, not precise amounts.)

Whipple said in an interview he believed that, in some cases, he could legally own stock in litigants, although he concedes his opinion is in the minority.

Whipple was far from alone in signing the statement. *The Star* reviewed more than 200 of the certifications filed over six years by judges in four states. None of the judges disclosed a single conflict.

That's the case even for judges who presided over part of a lawsuit, discovered and acknowledged their stock ownership, then belatedly withdrew. Each later signed the statement without elaboration.

For example, Judge Elmo B. Hunter presided over a lawsuit filed in 1990 by the General Motors Acceptance Corp. Ten months and seven court orders into the suit, he notified lawyers that he owned General Motors stock; his disclosure reports show it was worth $100,000 to $250,000.

Hunter announced he would preside over the case unless the lawyers objected. They did not, and Hunter continued on the case until the parties reached a negotiated settlement six months later.

Federal law requires a judge with an interest in a litigant to withdraw even if the lawyers beg him to stay. That applies even when the judge's interest is in the litigant's parent company, experts said. Yet Hunter signed the certification.

Hunter, who has been ill, could not be reached for comment.

The lapses are especially striking in instances where a judge issued orders in a lawsuit just

before signing the certification.

Two years ago, for example, Judge Fernando J. Gaitan Jr. issued an order in a lawsuit against AT&T Communications, a common name for AT&T Corp. The very next day, Gaitan signed the certification and sent a list of his investments to Washington.

The list included up to $15,000 in AT&T stock.

Gaitan declined repeated requests for an interview. In a letter, he called his AT&T holdings insubstantial and his role in the case minimal.

About the same time, Judge Lungstrum signed a 108-page consent decree in a lawsuit against a string of corporations, including Western Resources Inc. and General Motors.

The same day, Lungstrum signed the certification and mailed a list of his family's 1995 holdings to Washington. They included Western Resources stock and a special class of General Motors securities, worth up to $100,000.

Lungstrum acknowledged he probably did not compare his assets with his caseload before signing the form. Instead, he assumed he already would have discovered and resolved any conflicts.

"I just did not think about that," he said. "But I signed it with an absolute certainty that I did not have a conflict.

"I probably had a little bit of hubris there that I was not going to miss it."

In one case, the disclosure ritual failed to prevent stock problems from cropping up twice in a single lawsuit.

Jerald Heintzelman filed suit in 1995 after losing his job at AT&T Microelectronics, a division of AT&T with offices in Lee's Summit.

http://www.kcstar.com/item/pages/judges.pat,local/30da0058.404,.html

The case was assigned to Judge Howard F. Sachs, who owned AT&T stock worth $15,000 to $50,000. Sachs issued two orders.

Seven months into the suit, Sachs disclosed his stock and withdrew. Three days later, a magistrate withdrew before taking any action because he also was an AT&T stockholder.

The case then passed to Gaitan, who issued five orders. Ultimately, Gaitan agreed to requests by both sides and dismissed the lawsuit.

Five weeks later, Gaitan signed a form disclosing his assets.

The only stock listed: AT&T.

The Star

On their honor judges and their assets

Judicial ethics law contains few loopholes

By JOE STEPHENS - Staff Writer
Date: 04/04/98 22:30

Congress had a simple idea in mind two decades ago when it enacted strict new ethics laws:

No one should be a judge in his own dispute.

So Congress set an exacting standard. A judge, it said, must pull out of a lawsuit when he knows he has a financial interest "in the subject matter in controversy or in a party to the proceeding."

In 1988, the U.S. Supreme Court weighed in. It ruled that a judge must step aside even when no reasonable person would conclude that the investment could affect his judgment.

Federal law, the court said, "requires disqualification no matter how insubstantial the financial interest and regardless of whether or not the interest actually creates an appearance of impropriety."

Appeals courts and ethics committees have ruled the same way in case after case, noting that judges must withdraw even when no one objects and when doing so "would involve great inconvenience."

The only other option: Sell the stock.

In one often-cited case, a judge was presiding over a complex class-action lawsuit involving thousands of companies

To review the investments of federal district judges in the Kansas City area, click the judges' names below.

G. Thomas Van Bebber District of Kansas	John W. Lungstrum District of Kansas
Earl E. O'Connor District of Kansas	Kathryn H. Vratil District of Kansas
D. Brook Bartlett Western District of Missouri	Gary A. Fenner Western District of Missouri
Elmo B. Hunter Western District of Missouri	Fernando J. Gaitan Jr. Western District of Missouri
Nanette K. Laughrey Western District of Missouri	Howard F. Sachs Western District of Missouri
Ortrie D. Smith Western District of Missouri	Joseph E. Stevens Jr. Western District of Missouri
Dean Whipple Western District of Missouri	Scott O. Wright Western District of Missouri

when he discovered that his wife had an interest in the dispute worth less than $30. A federal appeals court ruled that the judge had to withdraw.

"Thus," the court wrote, "after five years of litigation, a multimillion-dollar lawsuit of major national importance, with over 200,000 class plaintiffs, grinds to a halt over ... $29.70."

And just in case a judge claims ignorance of what he owns, the law flatly states: "A judge should inform himself about his personal and fiduciary interests." Failure to do so, the Supreme Court has held, may constitute a separate violation of ethics laws.

Peter W. Rodino Jr. was chairman of the House Judiciary Committee in 1974 and helped craft the ethics statutes. He describes them as common sense.

"Public service is a public trust," Rodino explained in an interview last month. "We've got to have *full* trust."

That is why Rodino and his colleagues provided judges with a clear formula for determining when they must disqualify themselves. The legislators did not want anyone questioning when the rule applied.

"So there is no argument upon which reasonable people could differ, Congress chose to draw a bright line," explained Stephen Gillers, a judicial ethicist at New York University who has worked as a White House consultant.

"What the Congress did was simply not leave room for discretion. Congress decided it's better to err on the side of recusal when a judge has a financial interest in a party, rather than split hairs about whether the judge's financial interest is likely to be decreased or increased, depending on the result of the case."

And if the rule seems severe, that's as it should be, said Steven Lubet, a judicial ethicist at Northwestern University in Chicago.

"It's supposed to be picky," he said, "because judging is important."

The rules also recognize the uncommon influence commanded by members of the bench.

Judicial authority is not hamstrung by politics or limited by the need to reach consensus. The clout wielded by Kansas City Mayor Emanuel Cleaver pales beside that of U.S. District Judge Russell G. Clark, who took control of Kansas City public schools and ordered a property tax increase. Or that of Judge Dean Whipple, who seized the Kansas City Housing Authority.

Unlike senators and presidents, federal judges are guaranteed their jobs for life. Even if they retire or are convicted of a felony, federal law gives them the right to receive their full salary until death.

"A federal district court judge in many ways is the most powerful individual in our governmental system, excepting the president," said James C. Turner, a Washington lawyer and legal reformer.

In return for that power, ethics canons demand that the nation's 585 district judges be not only incorruptible but also above even the appearance of impropriety. Actions and conflicts common among elected officials are expressly illegal for federal judges.

Congress enacted those prohibitions in a flood of post-Watergate reforms. And in particular, Rodino recalled, they were prompted by Clement Haynsworth.

Richard Nixon nominated the appellate judge to the U.S. Supreme Court in 1969.

Soon, scandal erupted over Haynsworth's business dealings.

Two civil cases in which Haynsworth took part, it turned out, involved subsidiaries of companies in which he owned a few thousands dollars in stock. One of the cases was a personal injury lawsuit that resulted in an award of just $50.

Although no one charged Haynsworth with making money off his rulings, U.S. senators cited the conflicts as the reason for his rejection. Some critics even called for him to resign from the federal appeals court.

Tom Eagleton, then a senator from Missouri, lambasted Haynsworth in a nationally televised debate.

"It's fundamental that a judge is prohibited from sitting on a case when he has stock ownership in one of the parties," Eagleton said. "That in itself disqualifies him from being considered for the court."

Most area federal judges have owned stock in litigants

NAME: Kathryn H. Vratil
COURTHOUSE: Kansas City, Kan.
APPOINTED: In 1992 by President Bush
PROBLEM CASES: 14

Vratil

Vratil owned stock in more companies than did any other local federal judge. She also issued orders in more lawsuits involving those companies.

And she offered by far the most extensive explanation of any judge.

The cases involved General Electric, Travelers Group Inc., Sprint Corp., General Motors, Transamerica Corp. and their subsidiaries. Vratil owned no more than $30,000 in stock in any of the corporations.

Vratil acknowledged that her stock ownership may have created the appearance of impropriety. "It's a bad situation," she said.

In fact, last year Vratil wrote to litigants in six of the lawsuits and offered to consider vacating her judgment and reopening their cases. (None has accepted.) She told them her stock holdings resulted in an "actual or apparent" conflict of interest.

In interviews and a detailed letter

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Elmo B. Hunter Western District of Missouri	Fernando J. Gaitan Jr. Western District of Missouri
Nanette K. Laughrey Western District of Missouri	Howard F. Sachs Western District of Missouri
Ortrie D. Smith Western District of Missouri	Joseph E. Stevens Jr. Western District of Missouri
Dean Whipple Western District of Missouri	Scott O. Wright Western District of Missouri

complete with footnotes, she offered a series of explanations:

- She gave an investment manager discretion to buy and sell some stocks in her portfolio. She said she mistakenly thought her staff was tracking the purchases and comparing them with her caseload.

- Although she signed annual disclosure reports that listed her stocks, Vratil said she lacked "conscious knowledge" that she had a financial interest in any of the companies while signing court orders.

That, she said, meant the stock ownership did not bias her rulings and did not create what she considered a true conflict of interest.

- Vratil said she told her staff to scour her mail and remove information about her investments, such as brokerage statements, annual reports and letters to shareholders. The judge said she did not want to know details of her portfolio.

However, federal law states: "A judge should inform himself about his ... financial interests." Ethicists said Congress enacted that rule to prevent judges from claiming ignorance of their investments.

- Finally, the judge said, the investment manager who bought stocks for her also bought stocks on behalf of other investors in a "managed money" program. That, she said, means her portfolio shared some, but not all, the attributes of a mutual fund.

Investments made through a mutual fund are exempt from ethics laws. Judges are not required to disclose the underlying stocks.

But Vratil's disclosure reports list her stocks as individual assets. The reports do not identify the securities as part of a

fund and do not indicate they were under independent management.

And Vratil acknowledged that, unlike mutual fund investors, she took direct ownership of the stock and was notified about all trades.

"I considered the ownership to be sort of technical in nature," Vratil said. "I don't know if I made the right call."

Vratil said she discovered her stock ownership last spring while in the midst of two of the lawsuits. She disclosed the investments, withdrew from the cases, then told her staff to search for similar problems in older, closed lawsuits.

Vratil eventually notified litigants in at least six of those legal actions about her stock. She mailed letters to them about two weeks after *The Star* began reviewing her finances. The timing, she said, had nothing to do with the newspaper's inv estigation.

In some other lawsuits, Vratil said, she was unaware she had owned stock in a litigant or in a litigant's parent company until questioned by *The Star.*

Vratil says she has moved her savings into mutual funds to avoid similar problems in the future.

"I'm sorry this happened," she said. "And this is not going to happen again."

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NAME: Elmo B. Hunter
COURTHOUSE: Kansas City
APPOINTED: In 1965 by President Johnson
PROBLEM CASES: 5


Hunter

Hunter's financial disclosure reports show he owned General Motors stock worth as much as $250,000 while presiding over all or part of four legal actions involving the car company or one of its wholly owned subsidiaries.

Midway through one lawsuit against a General Motors subsidiary, Hunter notified lawyers for both sides that he owned General Motors stock. The lawyers waived any objection, and Hunter remained on the case until its conclusion seven months later.

Federal law requires judges to withdraw when they know they have an interest in a litigant, even when no one objects.

In a fifth case, Hunter's wife owned stock in General Electric while he appointed a legal courier in a lawsuit involving the company.

Hunter, who has been ill, could not be reached for comment. Lawyers in the cases, like those in the other lawsuits identified by *The Kansas City Star's* study, said they saw no evidence of bias in the judge's rulings.

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NAME: Fernando J. Gaitan Jr.
COURTHOUSE: Kansas City
APPOINTED: In 1991 by President Bush
PROBLEM CASES: 3

Gaitan owned stock in AT&T while presiding over all or part of three cases involving the company or one of its wholly owned subsidiaries. Gaitan declined repeated requests for an interview.

Gaitan

In a brief letter, however, he described his handling of the lawsuits as minimal and called his investment in the company insubstantial. Federal records show his stock was worth $15,000 or less.

Gaitan said he acquired the stock during the six years he worked for a subsidiary of AT&T.

"Obviously, I would not intentionally violate a code of conduct," Gaitan wrote. "I have scrupulously avoided conflicts during my nearly 18 years as a judicial officer.

"Two of the three cases were dismissed by agreement of the parties at a very early stage. The third was dismissed for plaintiff's failure to comply with procedures necessary to prosecute the case, again at an early stage of the case."

.....

NAME: Howard F. Sachs
COURTHOUSE: Kansas City
APPOINTED: In 1979 by President Carter
PROBLEM CASES: 3

Sachs owned up to $50,000 worth of stock in AT&T while entering orders in three cases against AT&T or one of its wholly owned subsidiaries.

Sachs

In one lawsuit, Sachs issued two orders, then disclosed his stock ownership and withdrew.

In another, Sachs said a clerk stamped his signature on an order appointing a legal courier; Sachs later disclosed his stock and passed the case to another judge. That order, like many identified by the study, was routine and had little effect on the c ase.

None of the litigants in Sachs' cases contested any of the orders, and Sachs estimated he spent no more than a minute working on each lawsuit.

He acknowledged that "conceivably, somebody could say it's an illegal situation." But he called any violation a technicality and said he would be inclined to do the same thing in the future.

"Maybe," he joked, "I will be impeached."

.....

NAME: Dean Whipple
COURTHOUSE: Kansas City
APPOINTED: In 1987 by President Reagan
PROBLEM CASES: 2

Whipple presided over two lawsuits against the Philip Morris Cos. and other cigarette manufacturers. The suits, each filed by a state inmate, accused the tobacco companies of manipulating nicotine levels to addict smokers.

Whipple

Whipple declared both cases "frivolous" and threw them out of court. He said he believed he could lawfully handle the lawsuits, despite owning up to $15,000 worth of stock in Philip Morris.

"I take the position that whatever I rule will not affect the bottom line of Philip Morris," he said.

After researching the issue, however, Whipple agreed his position was not supported by most legal ethicists or by case law.

"I'm in the minority in my opinion," he acknowledged. "Although I think that I have a valid argument, I'm not going to fight it. And so, from now on, if I have a case where I own any stock, I'll just disqualify (withdraw)."

Shortly after being questioned by a reporter, Whipple sold all his shares in Philip Morris.

"I don't want any question," he said, "about whether I had any ulterior motive on those cases."

.....

NAME: John W. Lungstrum
COURTHOUSE: Kansas City, Kan.
APPOINTED: In 1991 by President Bush
PROBLEM CASES: 2

Lungstrum

Lungstrum presided over two lawsuits against companies in which he and his family owned stock. In each instance, he acknowledged, his actions appeared contrary to ethics laws.

Lungstrum entered several orders in a $2 million lawsuit against the Chrysler Corp. that the litigants ultimately settled out of court. He said the case slipped by because he bought stock in the car company -- up to $15,000, according to his disclosure form -- after the case was assigned to his courtroom.

"I forgot I had the case at the time the stock was bought," he said. "By the time the case came back to my attention, I had forgotten I had the stock."

Lungstrum also filed one order and approved a consent decree in a lawsuit over the multimillion-dollar cost of cleaning up a Superfund hazardous waste site in Johnson County. Lungstrum and his family owned up to $50,000 in stock in one of the many comp anies named in the lawsuit.

"I may not have even checked who the parties were," he said. "I probably just got lazy."

Lungstrum said he made no contested rulings in that case. Still, he says he plans to tighten his procedures for identifying financial conflicts.

"We should be concerned about these things," he said. "I'm glad to have my attention called to it, and to redouble my efforts to make sure things don't fall through the cracks."

NAME: D. Brook Bartlett
COURTHOUSE: Kansas City
APPOINTED: In 1981 by President Reagan
PROBLEM CASES: 2

Bartlett

Bartlett, chief judge for the Western District of Missouri, presided over two lawsuits against McDonald's restaurants while he owned up to $50,000 in stock in McDonald's Corp.

In one case, Bartlett issued two orders, then disclosed his stock ownership and withdrew. In the other, he issued one order, then granted the plaintiff's request that he dismiss the lawsuit.

"I should not have done that," Bartlett said. "It probably was a technical violation (of ethics laws).

"It's below the standards I set for myself. It just means I have to be more careful."

Upon checking, Bartlett said he was relieved to discover that "all orders entered were either routine or not opposed by plaintiff."

.....

NAME: Ortrie D. Smith
COURTHOUSE: Kansas City
APPOINTED: In 1995 by President Clinton
PROBLEM CASES: 1

Smith issued a single order setting deadlines in an employment discrimination lawsuit against Wal-Mart Stores Inc. Two months later, Smith withdrew because he owned up to $15,000 worth of stock in the company.


Smith

"It probably was a technical violation (of the law)," Smith said. "I regret that it happened, but it did."

Smith said he did not read the routine order, which was issued by a clerk using a signature stamp. The order did not affect the outcome of the lawsuit, he said.

"There should have been a procedure in place to avoid it ever coming to me to begin with," he said of the case. "That is now in place."

• Joseph E. Stevens Jr.:
Position held at hospital poses different problem

.....

No problems

District judges from the Kansas City area who did not issue any court orders in cases involving companies in which they owned stock:

WESTERN DISTRICT OF MISSOURI

Gary A. Fenner
Nanette K. Laughrey
Scott O. Wright

DISTRICT OF KANSAS

Earl E. O'Connor
G. Thomas Van Bebber

Position held at hospital poses different problem

NAME: Joseph E. Stevens Jr.
COURTHOUSE: Kansas City
APPOINTED: In 1981 by President Reagan
PROBLEM CASES: 2


Stevens

For many years, Judge Stevens was a powerful figure at Truman Medical Center, where he sat on the board of governors.

But during that time he also had a hand in the hospital's affairs while sitting on the bench.

That's where, in May 1995, Stevens threw out a legal claim against Truman. Eleven months later, he threw out another.

He ultimately dismissed both lawsuits "with prejudice," meaning the plaintiffs can never refile them.

Yet federal law is clear: Judges must withdraw from any lawsuit in which they know they are a "director, adviser or other active participant in the affairs of a party."

Stevens did not dispute that he should not have handled cases against Truman. In fact, he said he was surprised to learn that he had presided over the lawsuits. Each was filed by an inmate at the Jackson County Jail, alleging he received substandard medical care.

To review the investments of federal district judges in the Kansas City area, click the judges' names below.

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Nanette K. Laughrey Western District of Missouri	Howard F. Sachs Western District of Missouri
Ortrie D. Smith Western District of Missouri	Joseph E. Stevens Jr. Western District of Missouri
Dean Whipple Western District of Missouri	Scott O. Wright Western District of Missouri

"If I had known Truman was on the pleading," Stevens said, "I would not have signed the orders."

Each order emanating from Stevens' chambers bears his signature. But in many routine lawsuits, he said, law clerks draft orders for him to review and sign.

If they failed to point out Truman was a defendant, he argued, the conflict was due to "administrative error" by the clerks -- not to his own lapse.

Both of the court orders that dismissed the claims against Truman referred to the medical center four times by name. One of those orders mentions Truman in both its first and last sentence. Directly below the last sentence, the judge signed his name.

Yet Stevens said that does not mean he realized Truman was a defendant. "I just barely see them," he explained of the orders, which did not list Truman in the headings.

Stevens said *The Star's* discovery might lead him to resign from Truman -- and nine days later he did.

At Truman, Stevens said, he and his fellow governors acted as advisers to the hospital's board of directors.

Governors attend but have no vote at the hospital's monthly business meetings. That power is reserved for directors, a position Stevens held for nine years before becoming a governor.

But governors also serve on policy committees with the directors. Governors may vote at committee meetings, officials said, and their duties can include guiding litigation.

The hospital listed Stevens in its corporate filings as part of the medical center's controlling board. And it listed

Stevens on its federal tax return as among its "directors, trustees and key employees."

Still, Stevens said, determining whether his actions broke ethics laws remains "a hard question."

"There isn't any black and white," he said.

But the judge agreed that his actions may have created the appearance of impropriety.

"I now think it would have been better," he said, "to have recused."

Federal Judicial Center
Research Division

tel. 202-502-4068
fax 202-502-4199

memorandum

DATE: September 22, 1999

TO: Honorable Paul V. Niemeyer

FROM: Carol Krafka

SUBJECT: Rules Governing Party Disclosure of Financial Interests Information

---

I understand from Judge Scirica of the Standing Committee that the Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules will soon evaluate whether a national rule on disclosure of corporate affiliations and other interested parties is necessary, and if so, how the rule should be structured. In anticipation of the Advisory Committees' work, Judge Scirica asked the FJC to report on local rules currently used to collect financial information from parties, and to make preliminary materials available for the advisory committees' Fall 1999 meetings. To that end, I have attached summary tables of the local rules and general orders that are in use in federal bankruptcy and district courts. I include information from the district courts because only four bankruptcy courts have rules on point, and three of the four follow the disclosure rule in effect in the district court. A brief description of the project, the tables, and findings precedes the tables.

The tables provide information on all of the bankruptcy and district courts that we have so far identified as having local rules. I do not expect to learn of additional courts with rules, but the possibility exists that the final report to the Standing Committee will contain information from more courts. The final report will be submitted in January 2000.

Please call on me if you have questions about the materials or if I can be of assistance. My phone number is 202-502-4068.

Attachment

cc: Honorable Frank W. Bullock, Jr.
Project Liaison from the Standing Committee

Interim Report

Informing Judicial Recusal Decisions: Party Disclosure of Information Concerning Entities With a Financial Interest In the Outcome of Litigation

An Analysis of Local Rules and General Orders in the United States District and Bankruptcy Courts

Prepared for the Meeting of the Advisory Committee on Civil Rules

Federal Judicial Center
September 1999

An Analysis of Local Rules and General Orders in the United States District and Bankruptcy Courts

Introduction

Judge Scirica of the Standing Committee on Rules of Practice and Procedure advised the Federal Judicial Center (FJC) that the Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules will soon evaluate whether a national rule on party disclosure of corporate affiliations and other interested parties is necessary, and if so, how the rule should be structured. Federal Rule of Appellate Procedure 26.1 already provides for party disclosure of corporate affiliations to assist *appellate* judges in identifying financial conflicts of interest for recusal purposes. No corresponding provisions exist in the federal rules governing civil, criminal, and bankruptcy proceedings at the *trial* level.

In anticipation of the Advisory Committees' work, Judge Scirica asked the FJC to report on local rules and other procedures the district and bankruptcy courts use to collect financial information from parties. He asked, additionally, that we provide interim materials to the Advisory Committees for their Fall 1999 meetings.

To that end, we have prepared summary tables of the local rules and general orders that are in use in federal district and bankruptcy courts for you to consider. We have also included tables with information about circuit local rules governing bankruptcy appellate panels.

We searched published and electronic database collections, and surveyed clerks of courts in the courts of appeals, district courts, and bankruptcy courts to compile the local rules. Our survey additionally sought information about court-wide standing orders or standing orders in use by individual judges. The enclosed tables permit comparative analyses of the range of disclosure requirements in existence.

This report has 4 parts. The first reproduces FRAP Rule 26.1 for reference. The second summarizes major findings. The third contains summary tables in alphabetical order by district for each district and bankruptcy court with a rule akin to FRAP Rule 26.1. The fourth contains summary tables of the relevant BAP rules. The tables are preceded by a set of notes regarding their content and organization.

Part I. FRAP Rule 26.1

FRAP Rule 26.1 requires non-governmental corporate parties to identify their parents and affiliates. The rule reads as follows:

> Rule 26.1 Corporate Disclosure Statement
>
> (a) Who Must File. Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement identifying all its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.
>
> (b) Time for Filing. A party must file the statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents.
>
> (c) Number of Copies. If the statement is filed before the principal brief, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.

The purpose of the rule is to assist judges in determining whether they have financial interests in a case that should result in a decision to recuse from the case. The most recent amendments to the rule (1998 amendments) deleted a requirement that corporate parties identify subsidiaries and affiliates that have issued shares to the public. The amendment, however, added a requirement that corporate parties list all stockholders that are publicly held companies owning 10% or more of the stock of the party.

FRAP Rule 26.1 represents minimum disclosure requirements in the federal courts of appeals. Eleven of the thirteen courts of appeals have broader requirements by local rule. Most of the courts have either extended the group to which the rule applies or they require more disclosure information, or both.

Part II. Findings: District and Bankruptcy Courts

As noted, no *national* rule requires parties to disclose financial interests information in federal district and bankruptcy courts. We located nineteen district courts with relevant *local* rules controlling disclosure, however. The list includes the U.S. District Courts for the:

Central District of California;
District of Columbia;
District of Nevada;
District of New Hampshire;

Northern District of Georgia;
Southern District of Georgia;
Northern District of Illinois;
Southern District of Illinois;
Central District of Illinois;
District of Maine;
District of Maryland;
Eastern District of Missouri;
Southern and Eastern Districts of New York (uniform local rules);
Western District of Pennsylvania;
District of South Carolina;
District of Vermont;
Eastern District of Wisconsin; and the
Western District of Wisconsin.

Our search for local rules revealed noteworthy activity in a few other district courts as well. In the Middle District of Florida, two judges have fashioned alternative means for collecting financial information from parties. Judges in the Northern and Southern Districts of Mississippi have proposed a local disclosure rule that is awaiting court action (these districts operate under a uniform local rules provision). The judges in the District of Kansas recently enacted, and then repealed, a disclosure rule because of the administrative burden that its enforcement provisions imposed upon court staff.

The search for rules and procedures in bankruptcy courts revealed disclosure rules in only the U.S. Bankruptcy Courts for the:

District of Columbia;
Southern District of Georgia;
Central District of Illinois; and the
District of Maine.

With the exception of the bankruptcy court in Maine, these bankruptcy courts follow the disclosure rule in effect in the district court.[1] We found no bankruptcy courts or judges collecting relevant information through alternative means.

Rules and procedures associated with each of the district and bankruptcy courts are summarized in the tables included herein. The local rules in the courts differ from each other and from the national rule on a number of dimensions, the most significant being: (1) who must file the information, (2) the scope of applicability to various types of cases, and (3) what type of information is required.

Who Must File. Among the district court local rules, there is considerable variation in the requirements for who must disclose information. At one end of the range

[1] Local Rule 5004-1 of the U.S. Bankruptcy Court for the District of Columbia states that the applicable rule from the district court applies to adversary proceedings and contested matters in the bankruptcy court. The Uniformity of Practice Statement in the local rules of the U.S. Bankruptcy Court for the Southern District of Georgia directs that the relevant rule of the district court applies by incorporation to bankruptcy cases and proceedings. General Rule 1.1 of the District Court for the Central District of Illinois directs that the general and civil rules of the court apply in all of the courts in the district, including the U.S. Bankruptcy Court for the Central District of Illinois.

is the narrow requirement borrowed from FRAP 26.1 which obliges "non-governmental corporate parties" to file disclosure statements (see, e.g., ME, MO, VT). The requirement expands slightly to encompass a broader group of "corporate parties and corporate intervenors" in another court (DC).

The type of party required to file disclosure statements is more widely drawn in other courts. Several apply the requirement to other parties with an obvious business connection (see, e.g., PA-W ["a corporation, association, joint venture, partnership, syndicate, or other similar entity appearing as a party or amicus in any proceeding"], SC ["any party (plaintiff or defendant) that is either a publicly owned entity, or is a partner, parent, subsidiary or affiliate of a publicly owned entity"]).

The broadest rules require disclosure in civil cases from "all parties" (see, e.g., CA-C, KS, N/S MS), "all non-governmental parties and amicus curiae" (IL-C), "all non-governmental parties and amicus curiae, unless the party is a pro se litigant", "all private non-governmental parties" (see, e.g., GA-N, IL-S, S/E NY), and so on.

In a few instances, courts have specified particular exemptions or inclusions in the party types expected to disclose information. Pro se litigants, individuals filing habeas corpus petitions, and parties in bankruptcy are three exemptions seen in a few of the collected local rules. Amicus curiae parties and intervenors are two party types specifically noted as inclusions in a few of the courts' requirements to file.

Types of Cases. Some district courts limit the disclosure to civil litigants only. Some require disclosure in criminal cases, from either corporate defendants or the government. Bankruptcy proceedings are explicitly covered by the disclosure requirement in some of the district courts; applicability to bankruptcy proceedings in other district courts is ambiguous. Bankruptcy cases filed in bankruptcy courts are subject to this type of disclosure requirement only in the four bankruptcy courts identified earlier. The local rules in a few of the district courts note applicability to special case categories involving agency review and maritime proceedings.

Types of Information. The scope of information that parties are required to disclose is quite variable among the district courts. Essentially, however, each court requires parties to identify one or both of the following: (1) entities having specific financial connections with the party and (2) entities with a financial interest in the outcome of the litigation (and, additionally, the nature of the interest).

Information on financial connections typically involves a listing of parent corporations, subsidiaries not wholly-owned, and corporate stockholders that are publicly held (see, e.g., MO-E, ME, NH, VT). A second level of reporting exists in courts that require parties to identify affiliates (see, e.g., IL-N, PA-W). These affiliates may specifically include trade associations, partnerships, conglomerates, or other business entities related to the party.

Information on financial interests involves listing entities with "a substantial financial interest", or simply "an interest" in the outcome of the litigation. These clauses provide for the identification of insurers (see, e.g., CA-C) but are broadly defined in many courts to additionally include subgroups of such entities as associations of persons, firms, partnerships and corporations, unincorporated associations, and officers, directors, or trustees of parties. One of the broadest local rules simply requires parties to identify all public corporations with a financial interest in the outcome of the case (IL-S).

In addition to requiring information on financial connections and interests, local rules in several of the district courts require parties to identify past and present attorneys and law firms representing a party to a proceeding.

Part III. Summary Tables for Bankruptcy and District Courts

We have organized the bankruptcy and district court local rules into tables in alphabetical order by state. The tables summarize:

(1) the types of parties required to file (Who Must File);
(2) the type of information required (Required Information);
(3) the time for filing the information (Time of Initial Filing);
(4) the existence of a requirement that parties with nothing to disclose submit a negative report (Negative Report);
(5) the form of the disclosure (Disclosure Form);
(6) the number of copies required to be filed (Number of Copies);
(7) the applicability of the rule to various case types and proceedings (Scope of Applicability);
(8) the existence of a stated duty for parties to update disclosed information (Obligation to Update); and
(9) additional relevant information (Note).

Notes on table entries:

(a) Where a table entry is blank, the local rule is silent.

(b) Where a local rule refers to "counsel for the parties" or uses a similar phrase to identify who must file disclosure, we have substituted "parties" for the sake of brevity (see Who Must File).

(c) We use the phrase "identification of [e.g., parent companies, subsidiaries, and affiliates]" to summarize the type of information required of parties (see Required Information). Local rules may use more precise phrasing; counsel may be required, for example, to "certify" a list of the names of interested parties.

(d) Some courts require identification of law firms, partners, etc., that currently or previously represented the party in the issue before the court. These requirements are noted in the tables even though they are not directly related to the report (see Required Information).

U.S. District Court for the Central District of California

Local Civil Rule 4.6	Certification as to Interested Parties
Rule 2.2. of Ch.VI	Local Rules Governing Bankruptcy Appeals, Cases and Proceedings
Rule 6.1 of Ch.VI	Local Rules Governing Bankruptcy Appeals, Cases and Proceedings

Local Civil Rule 4.6

Who Must File	all parties
Required Information	identification of all persons, association of persons, firms, partnerships and corporations (including parent corporations) which have a direct, pecuniary interest in the outcome of the case, including any insurance carrier which may be liable in whole or in part (directly or indirectly) for a judgment that may be entered in the action or for the cost of defense
Time of Initial Filing	party's first appearance
Negative Report	
Disclosure Form	Notice of Interested Parties; (form prescribed in the local rule)
Number of Copies	original and 2 copies
Scope of Applicability	all civil actions and proceedings in the district court [by Local Rule 1.1] or matters of a civil nature [by Local Rule 1.3(c)]
Obligation to Update	
Note	

U.S. District Court for the Central District of California (continued)

Rule 2.2 of Chapter VI (applicable to bankruptcy appeals to the district court)

Who Must File	parties appealing to the district court from the bankruptcy court
Required Information	identification of interested parties (to be provided to the bankruptcy court clerk)
Time of Initial Filing	at the time the notice of appeal is filed
Negative Report	
Disclosure Form	
Number of Copies	
Scope of Applicability	bankruptcy appeals to the district court
Obligation to Update	
Note	

U.S. District Court for the Central District of California (continued)

Rule 6.1 of Chapter VI (applicable to pending bankruptcy cases and proceedings where a motion has been made to withdraw reference from the bankruptcy court to the district court)

Who Must File	parties moving to withdraw reference of matters pending in the bankruptcy court and parties opposing such a motion
Required Information	identification of interested parties (to be provided to the district court clerk and to the presiding bankruptcy judge)
Time of Initial Filing	with the motion to withdraw or with reply papers in opposition
Negative Report	
Disclosure Form	
Number of Copies	
Scope of Applicability	pending bankruptcy cases and proceedings
Obligation to Update	
Note	

U.S. District Court for the District of Columbia

Local Civil Rule 26.1 Disclosure of Corporate Affiliations and Financial Interests

Who Must File	corporate parties and corporate intervenors
Required Information	identification of any parent, subsidiary or affiliate of the party or intervenor which has any outstanding securities in the hands of the public
Time of Initial Filing	at the time the party's first pleading is filed
Negative Report	
Disclosure Form	form prescribed in the local rule
Number of Copies	
Scope of Applicability	civil, agency, and criminal cases [General Rule 109]; all other proceedings in the district court [General Rule 101(a)] (including, by inference, bankruptcy cases and other proceedings in the district court)
Obligation to Update	stated
Note	

U.S. Bankruptcy Court for the District of Columbia

Local Bankruptcy Rule 5004-1	Disclosure of Corporate Affiliations and Financial Matters

The rule reads:
Local District Rule 109 applies to adversary proceedings and contested matters in the Bankruptcy Court, with the required certificate to be filed in contested matters with a party's paper commencing the contested matter or a party's paper opposing the relief sought in the contested matter.

Who Must File	corporate parties and corporate intervenors to adversary proceedings and contested matters in the bankruptcy court
Required Information	in conformance with General Rule 109 of the Local District Court, a party or intervenor must identify any parent, subsidiary, or affiliate of that party or intervenor which has any outstanding securities in the hands of the public
Time of Initial Filing	with a party's paper commencing the contested matter or a party's paper opposing the relief sought in the contested matter
Negative Report	
Disclosure Form	form prescribed is the same as for the district court
Number of Copies	
Scope of Applicability	bankruptcy cases
Obligation to Update	stated in the district court local rule, so applicable in bankruptcy matters as well
Note	Local Bankruptcy Rule 5004-1 applies the district court local rule on disclosure of corporate affiliations to apply to require application to bankruptcy proceedings and contested matters

U.S. District Court for the Middle District of Florida

Disclosure of financial interest information is required by Standing Order from one Middle District of Florida judge.

Who Must File	civil: all non-government corporate parties criminal: the government
Required Information	civil: identification of all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public criminal: identification of victims of the conduct alleged in the Indictment who are entitled to restitution; and for any non-government corporate victims, identification of all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public
Time of Initial Filing	within 11 days of the date of the Standing Order
Negative Report	
Disclosure Form	
Number of Copies	
Scope of Applicability	civil and criminal cases
Obligation to Update	stated
Note	

U.S. District Court for the Middle District of Florida (continued)

A second Middle District of Florida judge obtains disclosure of financial interest information through use of several case management tools. These include a Case Management Report (civil cases), Order Requiring [the] Government to File a Certificate of Interested Parties (criminal cases) and [Order titled] Notice to Counsel or Any Pro Se Party to Review and to Certify Compliance (bankruptcy cases).

Who Must File	civil: parties criminal: the government bankruptcy: parties, including pro se parties
Required Information	civil: identification of all attorneys, persons, associations of persons, firms, partnerships and corporations, including subsidiaries, conglomerates, affiliates, parent corporations, and other identifiable legal entities related to a party, or as to which such party has a controlling interest, that have an interest in the outcome of the case; criminal: identification of all persons, associations of persons, firms, partnerships, corporations, including subsidiaries, conglomerates, affiliates, and parent corporations and other identifiable legal entities related to each Defendant, or over which Defendant exercises a controlling interest and who or which may have a financial or monetary interest in the outcome of the case or whose stock or equity value may be substantially affected by the outcome of the case proceedings; identification of known victims, including those to whom restitution may be owed bankruptcy: identification of any person, associations of persons, attorneys, firms, partnerships, corporations, or entities whose stock or equity value may be substantially affected by the outcome of the proceedings, including subsidiaries, conglomerates, affiliates, parent corporations and other identifiable legal entities related to a party
Time of Initial Filing	criminal and bankruptcy: within 30 days of the date of the order
Negative Report	
Disclosure Form	
Number of Copies	

U.S. District Court for the Middle District of Florida (continued)

Scope of Applicability	civil, criminal, and bankruptcy cases
Obligation to Update	stated
Note	

U.S. District Court for the Northern District of Georgia

Civil Local Rule 3.3 Certificate of Interested Persons

Who Must File	all private (non-governmental) parties
Required Information	identification of persons, associations of persons, firms, partnerships, or corporations having either a financial interest in or other interest which could be substantially affected by the outcome of this particular case (the listing shall specifically include all subsidiaries, conglomerates, affiliates, and parent corporations, and any other identifiable legal entity related to a party); identification of each person serving as a lawyer in the proceedings
Time of Initial Filing	within 15 days after the first pleading is filed by any defendant or defendants
Negative Report	
Disclosure Form	Certificate of Interested Persons; form of the certificate prescribed in the local rule
Number of Copies	
Scope of Applicability	civil cases
Obligation to Update	stated
Note	counsel for all cases submit joint-certification; if the government is a party, however, certification is submitted only by the private party or parties; in cases of default, the moving party shall submit the required information before seeking any court action on the case

U.S. District Court for the Southern District of Georgia

Civil Local Rule 3.2 Disqualification of Judges
Local Rules for the Administration of Criminal Cases

Who Must File	all private (non-government) parties, both plaintiffs and defendants
Required Information	identification of all parties; officers, directors, or trustees of parties; and all other persons, associations of persons, firms, partnerships, corporations, or organizations which have a financial interested in, or another interest which could be substantially affected by, the outcome of the particular case
Time of Initial Filing	with the first filing (and any subsequent filing) of a complaint and answer
Negative Report	
Disclosure Form	Certificate of Interested Parties Form, located in the Appendix of Forms to the Local Rules
Number of Copies	
Scope of Applicability	civil cases (L.R. 3.2); criminal cases ["These Local Rules...are to be construed consistently with the generally applicable {Civil} Local Rules, supra."]; bankruptcy proceedings in the district court are presumed covered
Obligation to Update	
Note	

U.S. Bankruptcy Court for the Southern District of Georgia

Local Rules for Bankruptcy Cases: Uniformity of Practice

The Uniformity of Practice Statement directs that Civil Local Rule 3.2 of the U.S. District Court for the Southern District of Georgia applies by incorporation to bankruptcy cases and proceedings.

Who Must File	all private (non-government) parties
Required Information	in conformance with Local Rule 3.2 of the district court, parties identify all parties; officers, directors, or trustees of parties; and all other persons, associations of persons, firms, partnerships, corporations, or organizations which have a financial interest in, or another interest which could be substantially affected by, the outcome of the particular case
Time of Initial Filing	
Negative Report	
Disclosure Form	Certificate of Interested Parties, located in the Appendix of Forms to the Local Rules
Number of Copies	
Scope of Applicability	bankruptcy cases in bankruptcy court
Obligation to Update	
Note	

U.S. District Court for the Northern District of Illinois

General Rule 2.23 Notification as to Affiliates

The court is currently revising its local rules. General Rule 2.23 will be renumbered as General Rule 3.2 but the provisions will remain intact. A form titled "Disclosure of Affiliates Pursuant to Local Rule 3.2" will be provided counsel for reporting. The form includes space for counsel to furnish stock ticker symbols.

Who Must File	any party which is an affiliate of a public company
Required Information	identification of any public company of which the party is an affiliate, where: 1) The term "public company" means a corporation any of whose securities are listed on a stock exchange or are the subject of quotations collected and reported by the National Association of Securities Dealers Automated Quotations Systems (NASDAQ). 2) The term "affiliate of a public company" means another corporation that controls, is controlled by or is under common control with the public company. The term includes but is not limited to a corporation 10% percent or more of whose voting stock is owned by the public company. 3) The term "control" of a corporation means possession, direct or indirect, of the power to direct or cause the direction of the management and policies of that corporation through the ownership of voting securities or otherwise.
Time of Initial Filing	a plaintiff files notification with the complaint; a defendant files notification with the answer or with a motion in lieu of answer; if a party becomes a party after the filing of the complaint, the notification is filed with the first pleading filed on behalf of the party
Negative Report	
Disclosure Form	
Number of Copies	
Scope of Applicability	civil and criminal cases are presumed from the wording of the local rule, applicability to bankruptcy cases and other matters is not known

U.S. District Court for the Northern District of Illinois (continued)

Obligation to Update Note

U.S. District Court for the Southern District of Illinois

Rule 11.1.b — Disclosure of Interested Parties/Affiliates

Who Must File	private (non-governmental) parties
Required Information	identification of any publicly owned corporation, not a party to the case, that has a financial interest in the outcome of the case
Time of Initial Filing	at the time of the initial pleading
Negative Report	
Disclosure Form	
Number of Copies	
Scope of Applicability	civil
Obligation to Update	
Note	

U.S. District Court for the Central District of Illinois

General Rule 11.3 Certificate of Interest

Who Must File	non-governmental parties and amicus curiae, unless the party is a pro se litigant
Required Information	identification, if party or amicus is a corporation, of its parent corporation, if any, and a list of corporate stockholders which are publicly held companies owning 10 percent or more of the stock of the party or amicus if it is a publicly held company; the name of all law firms whose partners or associates appear for a party or are expected to appear for the party in the case
Time of Initial Filing	with the complaint or upon the first appearance of counsel in the case
Negative Report	
Disclosure Form	Certificate of Interest; form of the certificate is prescribed in the local rule
Number of Copies	
Scope of Applicability	applicable in all proceedings in all of the courts in the district (CD-IL 1.1)
Obligation to Update	
Note	

U.S. Bankruptcy Court for the Central District of Illinois

General Rule 1.1 of the U.S. District Court for the Central District of Illinois directs that the general and civil rules of the court apply in all of the courts in the district.

U.S. District Court for the District of Kansas

Local Rule 3.2	Required Certification of Interested Parties
Adopted	January, 1999
Repealed	**April, 1999**

Local Rule 3.2 was adapted from Tenth Circuit Rule 46.1.3 entitled "Certification of Interested Parties and Rule 42.1 "Dismissal for Failure to Prosecute". The court adopted its local rule effective January 1, 1999 and repealed it in April 1999. Repeal was based on a finding that problems with the rule's enforcement outweighed any advantage the new procedure potentially offered over existing automated procedures for identifying conflicts of interest. Failure to comply with the provisions of the rule resulted in either dismissal or a default judgment (see Note 1, below). Enforcing compliance with the rule proved excessively burdensome for both Clerk's Office and chambers staff (see Note 2, below).

The structure of the original rule is summarized in the table that follows.

Who Must File	all parties
Required Information	identification of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, or other legal entities who are financially interested in the outcome of the litigation (if a large group of persons or firms can be specified by a generic description, no individual listing is required); identification of all parties not named in the caption of the initial pleading or paper; for corporate parties and interested entities, identification of all parent and subsidiary corporations; identification of attorneys not entering an appearance in the court who have appeared for any party in any administrative proceedings sought to be reviewed, or in any related proceedings that preceded the action being pursued in the court
Time of Initial Filing	with the initial pleading or other paper filed for a party
Negative Report	
Disclosure Form	form provided by the clerk and outlined in the local rule
Number of Copies	

U.S. District Court for the District of Kansas (continued)

Scope of Applicability	all proceedings
Obligation to Update	stated
Note 1	The repealed rule established the following consequences for failure to comply: "If a party fails to comply with the provisions of this rule, the clerk shall notify the party that unless the failure of compliance is remedied within 10 days from the date of the notice the following action will be taken: (a) If the party is a plaintiff, that the action will be dismissed as to that party plaintiff for lack of prosecution; (b) if the party is other than a plaintiff, that default will be entered against that party for lack of prosecution."
Note 2	Excerpt from a July 2, 1999 letter from Clerk of the Court Ralph L. DeLoach to Abel Mattos of the Administrative Office of the United States Courts, describing enforcement difficulties with the repealed rule: "[The ruled] required all parties to attach a certificate of Interested Parties to every initial pleading filed in every civil case. An issue quickly developed regarding what constituted an 'initial pleading.' An example would be whether a Motion for Extension of Time (to answer a Complaint) filed by a defendant would be considered an initial pleading. The docket clerks were overwhelmed with this issue as pleadings come with many different titles. If a party failed to attach the required Certificate, a notice was sent from the Clerk's Office to the assigned judge indicating non-compliance with the rule. The judge would then determine whether further action was necessary. When a Certificate was filed in compliance with the Rule it was then sent to the assigned judge for a determination of a possible conflict of interest. Needless to say, the amount of paperwork generated by this Rule was voluminous. It greatly impacted the workload of both Clerk's Office staff and chambers staff. A great deal of time was spent following up on non-compliance with the Rule. Special codes were created to enable reports to be generated from ICMS tracking delinquent Certificates filing status. The court determined that a lot of work was being done to find the one 'needle in a haystack.'"

U.S. District Court for the District of Maine

Civil Rule 83.7 Corporate Disclosure Statement

Who Must File	non-governmental corporate parties
Required Information	identification of all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public
Time of Initial Filing	with the party's first appearance
Negative Report	
Disclosure Form	
Number of Copies	
Scope of Applicability	civil cases
Obligation to Update	
Note	

U.S. Bankruptcy Court for the District of Maine

Bankruptcy Rule 1002-1(b)(3)	Disclosure Statement
Who Must File	non-governmental, non-individual debtors
Required Information	identification of all "affiliates" and "insiders", as defined in 11 U.S.C. §101(2),(31).4 Under 11 U.S.C. §101(2) "affiliate" means -- (A) entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities (i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or (ii) solely to secure a debt, if such entity has not in fact exercised such power to vote; (B) corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor, or by an entity that directly or indirectly owns, controls, or holds with power to vote 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities (i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or (ii) solely to secure a debt, if such entity has not in fact exercised such power to vote; (C) person whose business is operated under a lease or operating agreement by a debtor , or person substantially all of whose property is operated under an operating agreement with the debtor; or (D) entity that operates the business or substantially all of the property of the debtor under a lease or operating agreement. Under 11 U.S.C. §101(31) an "insider" includes— (A) if the debtor is an individual: (i) relative of the debtor or of a general partner of the debtor; (ii) partnership in which the debtor is a general partner; (iii) general partner of the debtor; or (iv) corporation of which the debtor is a director, officer, or person in control;

U.S. Bankruptcy Court for the District of Maine (continued)

	(B) if the debtor is a corporation: (i) director of the debtor; (ii) officer of the debtor); (iii) person in control of the debtor; (iv) partnership in which the debtor is a general partner; (v) general partner of the debtor; or (vi) relative of a general partner, director, officer, or person in control of the debtor; (C) if the debtor is a partnership: (i) general partner of the debtor; (ii) relative of a general partner in, general partner of, or person in control of the debtor; (iii) partnership in which the debtor is a general partner; (iv) general partner of the debtor; or (v) person in control of the debtor; (D) if the debtor is a municipality, elected official of the debtor or relative of an elected official of the debtor; (E) affiliate, or insider of an affiliate as if such affiliate were the debtor; and (F) managing agent of the debtor.
Time of Filing	with the petition or within 15 days thereafter
Negative Report	
Disclosure Form	
Number of Copies	
Scope of Applicability	bankruptcy cases and proceedings under Title 11 pending in the district court and in the bankruptcy court
Obligation to Update	
Note	

U.S. District Court for the District of Maryland

Civil Rule 103.3 Disclosure of Affiliations and Financial Interest

Who Must File	parties
Required Information	the identity of any parent or other affiliate, if the party is a corporation, and a description of the relationship between the party and such affiliates; the identity of any corporation, unincorporated association, partnership or other business entity, not a party to the case, which may have any financial interest whatsoever in the outcome of litigation, and the nature of the financial interest; the term "financial interest in the outcome of the litigation" includes a potential obligation of an insurance company or other person to represent or to indemnify any party to the case; information to be provided to the district court clerk
Time of Initial Filing	when filing an initial pleading or promptly after learning of the information to be disclosed
Negative Report	
Disclosure Form	
Number of Copies	2
Scope of Applicability	civil cases
Obligation to Update	
Note	

U.S. District Court for the Northern and Southern Districts of Mississippi (operating under uniform local rules)

(Proposed)

Local Rule 3.1(D) — Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation

Who Must File	all parties (including amici) to a civil action, a maritime proceeding, or a bankruptcy proceeding filed in the district court, and all corporate defendants in a criminal prosecution; the rule does not apply to the United States, to state and local governments in cases in which the opposing party is proceeding without counsel, or to parties proceeding in forma pauperis
Required Information	a non-governmental corporate party must identify parent corporations, publicly held companies owning 10% or more of the party's stock, similarly situated master limited partnerships, real estate investment trusts, joint ventures, syndicates, or other legal entities whose shares are publicly held or traded; the disclosure form, but not the proposed rule, asks that grandparent and great-grandparent corporations be identified; the disclosure form, but not the proposed rule, asks that publicly held corporations or other publicly held entities that have a direct financial interest in the outcome of the litigation be identified, along with the nature of the interest
Time of Initial Filing	the clerk will deliver the disclosure form to parties with the notice of a case's having been assigned to a district judge; return filing is required within 10 days of receipt
Negative Report	required
Disclosure Form	Disclosure of Corporate Affiliations and Other Entities With a Direct Financial Interest in Litigation; the form is provided by the clerk
Number of Copies	
Scope of Applicability	civil actions, maritime proceedings, bankruptcy proceedings, and criminal cases

U.S. District Court for the Northern and Southern Districts of Mississippi (operating under uniform local rules) (continued)

Obligation to Update	stated
Note	proposed local rule

U.S. District Court for the Eastern District of Missouri

Local Rule 2.09 Disclosure of Corporation Interests

Who Must File	non-governmental corporate parties
Required Information	identification of all parent companies of the corporation, subsidiaries not wholly owned, and any publicly held company that owns 10% or more of the corporation's stock
Time of Initial Filing	first pleading or entry of appearance
Negative Report	required
Disclosure Form	
Number of Copies	
Scope of Applicability	civil and criminal cases
Obligation to Update	stated
Note	

U.S. District Court for the District of Nevada

Local Rule 10-6 Certificate as to Interested Parties

Who Must File	all private (non-governmental) parties in cases other than habeas corpus cases
Required Information	identification of all persons, associations of persons, firms, partnerships or corporations known to have an interest in the outcome of the case
Time of Initial Filing	at the time counsel enters the case
Negative Report	required
Disclosure Form	form prescribed in the local rule
Number of Copies	
Scope of Applicability	all cases except habeas corpus cases
Obligation to Update	
Note	The court finds the current form of the rule insufficient, and has asked the Standing Committee on the Local Rules to consider a proposal modifying the rule to additionally provide that "concurrent with the filing of a complaint or a responsive pleading the party shall be required to file a list of the names of any publicly traded subsidiary and/or parent companies and/or corporation of the party" [August 6, 1999 letter from District Court Executive/Clerk of the Court Lance S. Wilson]

U.S. District Court for the District of New Hampshire

Local Civil Rule 83.6(a)(4) — Appearances

Who Must File	non-governmental corporate parties and non-governmental corporate defendants
Required Information	identification of all parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates that have issued shares to the public
Time of Filing	at the time an appearance is filed
Negative Report	
Disclosure Form	
Number of Copies	
Scope of Applicability	civil cases, bankruptcy cases, agency review proceedings, and criminal cases
Obligation to Update	stated
Note	

U.S. District Court for the Southern and Eastern Districts of New York (operating under uniform local rules)

Civil Rule 1.9 Disclosure of Interested Parties

Who Must File	private (non-governmental) parties
Required Information	identification of any corporate or other parents, subsidiaries, or affiliates of the party, securities or other interests which are publicly held
Time of Initial Filing	filing of the initial pleading or other court paper on behalf of the party
Negative Report	
Disclosure Form	the reverse side of the civil cover sheet used in the Eastern District of New York has a section directing corporate parties to identify corporate parents, subsidiaries and affiliates
Number of Copies	
Scope of Applicability	civil actions
Obligation to Update	
Note	

U.S. District Court for the Western District of Pennsylvania

Local Rule 3.2 Disclosure Statement

Who Must File	a corporation, association, joint venture, partnership, syndicate, or other similar entity appearing as a party or amicus in any proceeding
Required Information	identification of all parent companies, subsidiaries, and affiliates that have issued shares or debt securities to the public, where: (1) "affiliate" means a person that directly or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, the specified entity, (2) "parent" means an affiliate controlling such entity directly, or indirectly through intermediaries, and (3) "subsidiary" means an affiliate controlled by such entity directly or indirectly through one or more intermediaries; identification of the represented entity's general nature and purpose; if the entity is unincorporated, identification of any members of the entity that have issued shares or debt securities to the public; no listing is required, however, of the names of members of a trade association or professional association, where "trade association" is defined as a continuing association of numerous organizations or individuals operated for the purpose of promoting the general commercial, professional, legislative, or other interests of the membership
Time of Initial Filing	filing of the initial pleading or other court paper on behalf of that party or as otherwise ordered by the court; where it is impossible or impracticable to file with the initial pleading or other court paper, the required Disclosure Statement must be filed within seven days of the date of the original filing
Negative Report	Disclosure Statement, but not the local rule, indicates that a negative report should be filed
Disclosure Form	form titled Disclosure Statement, located in Appendix A of the local rules
Number of Copies	

U.S. District Court for the Western District of Pennsylvania (continued)

Scope of Applicability	all proceedings
Obligation to Update	stated
Note	

U.S. District Court for the District of South Carolina

Local Rule	General Provisions Governing Discovery; Duty of Disclosure
Who Must File	any party (plaintiff or defendant) that is either a publicly owned entity, or is a partner, parent, subsidiary or affiliate of a publicly owned entity [except for parties in bankruptcy proceedings and other specifically exempted case types listed in Local Rule 26.01]
Required Information	identification of the publicly owned entity and its relationship to the disclosing party; identification of any publicly owned entity not a party to the case that has a significant financial interest in the outcome of litigation and the nature of the interest
Time of Initial Filing	a plaintiff files disclosure with the initial pleading; a defendant files within 30 days of the later of (1) defendant's responsive pleading or (2) the date on which the person asserting a claim against the defendant serves answers to interrogatories and produces documents pursuant to the local rule
Negative Report	
Disclosure Form	
Number of Copies	
Scope of Applicability	civil cases
Obligation to Update	
Note	

U.S. District Court for the District of Vermont

General Order No. 45 In Re: Disclosure of Corporate Interests

Who Must File	all non-governmental corporate parties
Required Information	identification of parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates that have issued shares of ownership to the public
Time of Initial Filing	with a party's first appearance
Negative Report	
Disclosure Form	
Number of Copies	
Scope of Applicability	all proceedings
Obligation to Update	
Note	

U.S. District Court for the Eastern District of Wisconsin

Local Rule 5.05 Certificate of Interest

Who Must File	all non-governmental parties and amicus curiae
Required Information	if the party or amicus is a corporation: identification of a parent corporation, if any; identification of corporate stockholders which are publicly held companies owning 10% or more of the stock of the party or amicus; the full name of every party or amicus represented in the case and the name of all law firms whose partners or associates appear for a party or are expected to appear for the party
Time of Initial Filing	with the appearance of the party or upon the first filing of a paper on behalf of the party, whichever occurs first
Negative Report	
Disclosure Form	form prescribed in the local rule
Number of Copies	
Scope of Applicability	
Obligation to Update	
Note	

U.S. District Court for the Western District of Wisconsin

The court has no local rule, court-wide standing order, or individual standing orders on the subject of party disclosure of financial interest information. Private parties that are businesses, companies, or corporations are expected, however, to provide such information at the outset of a case on a form provided by the clerk.

Who Must File	private (non-governmental) parties that are businesses, companies, or corporations
Required Information	identification of the parent corporation or affiliate and the relationship between such and the party, if the party is a subsidiary or affiliate of a publicly owned corporation; identification of any publicly owned corporation not a party to the case that has a financial interest in the outcome of litigation and the nature of the financial interest
Time of Initial Filing	at the time of initial pleading
Negative Report	
Disclosure Form	form titled Disclosure of Corporate Affiliations and Financial Interest is provided by the clerk
Number of Copies	
Scope of Applicability	civil cases
Obligation to Update	
Note	

Part IV. Summary Tables for Bankruptcy Appellate Panels

Four of the appellate courts with Bankruptcy Appellate Panels (BAP) have a relevant local rule. The rules apply to bankruptcy cases appealed from final judgements in bankruptcy courts to BAP. We have organized these rules into tables with a structure identical to the tables summarizing bankruptcy and district court rules. The courts included here are the U.S. Courts of Appeals in the:

Second Circuit;
Eighth Circuit;
Ninth Circuit; and
Tenth Circuit.

Bankruptcy Appellate Panels in the U.S. Court of Appeals for the Second Circuit

BAP Local Rule 8009.1(c)	Disclosure of Interested Parties

Who Must File	private (non-governmental) parties
Required Information	identification of persons, associations of persons, firms, partnerships and corporations which may have an interest in the outcome of the case; identification of the connection and interest in the appeal
Time of Filing	with the initial brief
Negative Report	
Disclosure Form	the general form of the disclosure certificate is prescribed in the BAP rule
Number of Copies	
Scope of Applicability	bankruptcy appeals before a bankruptcy appellate panel
Obligation to Update	
Note	The information is provided on the inside cover of the initial brief.

Bankruptcy Appellate Panels in the U.S. Court of Appeals for the Eighth Circuit

BAP Local Rule 8009.A(1) — Certification of Interested Parties

Who Must File	appellant (and appellee if the appellee exercises the option to prepare and file a separate appendix with its brief, Internal Operating Procedures Manual at IOP III.B.2)
Required Information	identification of parties that have an interest in the outcome of the appeal; identification of the connection and interest in the appeal
Time of Filing	at the same time as a party's brief (Internal Operating Procedures Manual at IOP III.B.2)
Negative Report	
Disclosure Form	the general form of the disclosure certificate is prescribed in the BAP rule
Number of Copies	
Scope of Applicability	bankruptcy appeals before a bankruptcy appellate panel
Obligation to Update	
Note	The information is provided in an appendix to the appellant's brief.

Bankruptcy Appellate Panels in the U.S. Court of Appeals for the Ninth Circuit

BAP Local Rule 5(c) Certification as to Interested Parties

Who Must File	parties
Required Information	identification of all persons, associations of persons, firms, partnerships and corporations which have an interest in the outcome of the case
Time of Filing	
Negative Report	
Disclosure Form	the general form of the disclosure certificate is prescribed in the BAP rule
Number of Copies	
Scope of Applicability	bankruptcy appeals before a bankruptcy appellate panel
Obligation to Update	
Note	The information is provided on the inside cover of the initial brief.

Bankruptcy Appellate Panels in the U.S. Court of Appeals for the Tenth Circuit

BAP Local Rule 8001-2(b) — Certificate of Interested Parties

Who Must File	parties, including pro se parties (BAP Rule 8001-2(a))
Required Information	identification of all parties to the litigation not revealed by the caption of the notice of appeal; identification of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, or other legal entities that are financially interested in the outcome of the litigation; for corporations, identification of all parent corporations and identification of any publicly held company that owns 10% or more of the corporation's stock; an individual listing is not necessary if a large group of persons or firms can be specified by a generic description; identification of attorneys not entering an appearance in the court who have appeared for any party in the bankruptcy court case or proceeding sought to be reviewed, or in related proceedings that preceded the original action being pursued in this court
Time of Filing	with each entry of appearance; first entry of appearance should be filed within 10 days after service of notice that the appeal has been docketed with the court (BAP Rule 8001-2(a))
Negative Report	required
Disclosure Form	Form 3. Entry of Appearance, Certificate of Interested Parties, and Oral Argument Statement, located in BAP L.R. Appendix A.
Number of Copies	
Scope of Applicability	bankruptcy appeals before a bankruptcy appellate panel
Obligation to Update	stated
Note	

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ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K RABIEJ
Chief
Rules Committee Support Office

September 23, 1999

MEMORANDUM TO ADVISORY COMMITTEE ON CIVIL RULES

SUBJECT: *Special Masters Report*

Tom Willging advises me that a report on special masters is scheduled to be completed by the Federal Judicial Center in about a week. It will be mailed to you upon completion.

Judge Vinson, chair of the special masters subcommittee, plans to make an oral presentation at the meeting on the status of the subcommittee's progress.

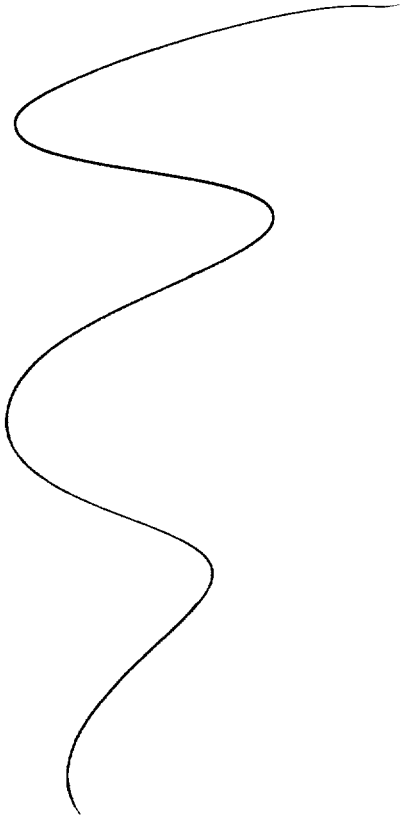
John K. Rabiej

Supplemental

Agenda

Book

Materials



Special Masters and Court-Appointed Experts: Incidence and Activity

A Preliminary Report to the Advisory Committee on Civil Rules and its Subcommittee on Special Masters

Tom Willging, Tim Reagan, John Shapard, and Dean Miletich

Federal Judicial Center

October, 1999

This report was undertaken at the request of the Subcommittee on Special Masters of the Advisory Committee on Civil Rules and is in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. Any views expressed are those of the authors and not necessarily those of the Federal Judicial Center.

Special Masters and Court-Appointed Experts: Incidence and Activity

A Preliminary Report to the Advisory Committee on Civil Rules and its Subcommittee on Special Masters

Table of Contents

Acknowledgements

This report represents the combined efforts of many Center staff members and others. Among staff contributors, the authors gratefully acknowledge the substantial and skillful work of Melissa Deckman Fallon, Aletha Janifer, Yvette Jeter, Jennifer Evans Marsh, Jackie Morson, Robert Niemic, Carol Witcher and law students Kristina Gill, Abena Glasgow, Ross Jurewitz, Nick Merkin, and Colin Ray. We also acknowledge the indispensable assistance of Professor Edward Cooper in reviewing the research design proposal and protocol as well as an earlier draft of this report. We are also grateful to the Honorable Roger Vinson (Chair), the Honorable Shira Ann Scheindlin, the Honorable John Carroll, and Myles V. Lynk, Esq. (members) of the Special Masters Subcommittee, for their comments on our proposal and protocol.

Background

Federal Rule of Civil Procedure 53 ("Rule 53") provides that a "court in which any action is pending may appoint a special master therein" [Rule 53(a)] and that a "reference to a special master shall be the exception and not the rule." [Rule 53(b)]. In discussing the powers to be assigned to special masters, Rule 53(c) seems to contemplate the traditional activity of a special master in holding evidentiary hearings and issuing reports with factual findings to facilitate a trial. Rule 53 contains no explicit authorization for pretrial or posttrial activities of a special master.

A proposal to amend Rule 53 has been pending before the Advisory Committee on Civil Rules since 1994.[1] The proposed revision "recognizes that in appropriate circumstances masters may properly be appointed to perform [pretrial and posttrial] functions and regulates such appointments."[2] At its November 1998 meeting, the Committee discussed Rule 53 and its relationship to contemporary practice. Judge Paul V. Niemeyer, Chair, announced his intention to appoint a subcommittee to study Rule 53 proposals and issues—particularly whether any change in Rule 53 is needed at this time—and to report back to the full committee at its October 1999 meeting.

In discussing the need for a subcommittee, the committee's minutes indicate that "an initial difficulty will lie in attempting to form a clear picture of the seeming wide variety of present practices." [Civil Rules Advisory Committee Minutes, November 1998, p. 39]. In January 1999, Judge Niemeyer appointed Judge Roger Vinson (N.D. Fla.) to chair a subcommittee composed of Magistrate Judge John Carroll (M.D. Ala.), Myles Lynk, Esq. (Washington, D.C.), and District Judge Shira Scheindlin (S.D. N.Y.). The subcommittee met in January 1999 and asked the Federal Judicial Center (FJC) to prepare a research design, proposing an empirical study of the use and nonuse of special masters and other comparable judicial adjuncts. The subcommittee discussed the FJC research design (Appendix A) during its April 19, 1999 meeting, and, after adding some questions, approved its implementation.

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[1] Edward H. Cooper, *Civil Rule 53: An Enabling Act Challenge*, 76 Tex. L. Rev. 1607, 1608-09, nn. 7-8 (1998). In that article, Professor Cooper presents a reporter's draft of proposed changes in Rule 53 as well as an extensive draft committee note explaining the proposed rule changes. *Id.* at 1614-35.

[2] *Id.* at 1619 (draft committee note).

Note that throughout this report, the term "special master" is used as an encompassing term and is meant to refer to a wide range of judicial adjuncts including court-appointed experts, auditors, assessors, appraisers, examiners, referees, and trustees. On occasion, because of general interest in their use, court-appointed experts will be discussed as a separate subgroup of the special master group.

Research Design and Questions

The Center's design calls for a two-phased study. The first phase is the subject of this report, and the second phase is to be completed in the spring of 2000. The proposed design posed the following questions:

- How frequently and in what types of cases have district judges or parties considered whether to appoint a special master or other adjunct? (Phase 1)
- In general, what actions have district judges taken regarding special masters and what activities have special masters performed? (Phase 1) What purposes have masters been appointed to serve and what authority have judges cited in making appointments? (Phase 1) Who have judges appointed as special masters (lawyers, accountants, magistrate judges, others)? How have judges identified those appointed? How was compensation determined and paid? (Phases 1 and 2)
- How often have masters been appointed to serve at various stages of civil litigation, such as (1) pretrial proceedings (e.g., discovery management), (2) trials (especially jury trials), or (3) posttrial settings (including monitoring or administering injunctive decrees, establishing damages in class actions, or determining attorneys' fees)? (Phase 1)
- What is the relationship between the activities of special masters and the activities of magistrate judges? (Phases 1 and 2)
- What problems have judges and litigants encountered in relation to the appointment of a special master? (Phases 1 and 2)
- What kinds of adjuncts (other than special masters) have judges appointed to assist them in ways that might otherwise be covered under a revised version of Rule 53? (Phase 2)

- Given that Rule 53 speaks only to appointment of trial masters, how, if at all, has that formulation constrained judges from using judicial adjuncts for other purposes? If there was a more expansive rule, how might judges use special masters? In what situations would special masters be likely to be helpful? (Phase 2)

Methods

A more detailed discussion of the methods is presented in Appendix B. For the first phase of the study, we used an electronic data base consisting of docket entries for 445,729 cases terminated in 87 federal district courts in FY1997 and FY1998. We then electronically searched that data base for variations of the terms "special master," "court-appointed expert," "referee," "auditor," "examiner," "assessor," "appraiser," and "trustee." As discussed more fully in Appendix B, our search may understate the incidence of special master consideration. "Special master" was by far the term most frequently identified. Our search identified approximately 1,500 cases in which one of the above terms was used in a docket entry. Based on our estimate of the number of cases necessary to address the questions posed by the subcommittee, we drew a sample of 136 cases.

We then requested from the clerks of the district courts relevant documents from the 136 cases, such as the motions, orders of appointment, special master reports, and any judicial actions related to those reports. To maintain consistency and quality, we implemented two measures. First, we trained five law students to complete a 34 question protocol (Appendix C), using standards established by the first-named author of this report. Second, that author reviewed every response in every completed protocol. Data from these protocols were compiled and form the basis for the findings in this report.

For the second phase of the study, we plan to interview judges and attorneys in a selected portion of the 136 cases. We will select relatively complex cases that illustrate the following features: (1) nontraditional uses of special masters, (2) use of multiple adjuncts (including magistrate judges, special masters, and court-appointed experts in a variety of roles), (3) problems that arise in implementing the appointment (such as ex parte communications), (4) reasons for not appointing special masters, (5) reasons for appointing magistrate

judges as special masters, and (6) the effects, if any, of retaining the narrow range of authority in Rule 53.

Summary of Findings

In general, our data tell the following story. On rare occasions, a judge, or perhaps a plaintiff, raised the question of whether to appoint a special master. If any opposition surfaced, it was likely to come from a defendant. If the case was not dismissed or settled, the judge generally granted the motion or reaffirmed a sua sponte "show cause" order. The ruling was not likely to cite or discuss any authority; Rule 53 may have been cited, but not discussed. After receiving nominations from the parties, the judge appointed a special master, usually an attorney. Nonattorneys may have been appointed to address specific issues at the trial or posttrial stages of the litigation. Plaintiffs and defendants generally shared the master's expenses.

Special master activities covered a full spectrum of civil case management and fact-finding activities at the pretrial, trial, and posttrial stages. Judges generally accepted the reports of special masters, but occasionally modified a finding, conclusion, or recommendation. Special master activity rarely determined the outcome of the case and just as rarely had no influence on the outcome. Most often, special masters had a substantial or moderate influence.

A more detailed summary of our major findings follows, with cross-references to tables that appear in the text:

Incidence

- Consideration of appointing special masters was indeed exceptional (Table 1). In about 3 cases out of 1,000 (0.3%), the judge or one or both parties raised the question of whether such an appointment should be made. An appointment took place in about 60% of those cases, that is, fewer than 2 cases in 1,000 (0.2%).
- Consideration of appointing an expert under Federal Rule of Evidence 706 ("Rule 706") was far rarer, occurring in about 3 cases in every 10,000 (0.03%). Experts were appointed at a rate of approximately 1 case in every 10,000 (0.01%).
- Cases involving patents, environmental matters, and airplane personal injury litigation showed higher incidences of judicial consideration of special master appointments, but the parties or judges in those types of cases would be expected to raise the possibility of an appointment no more than 7% of the time.

Processes of appointment and activity

- The plurality of suggestions for appointing special masters came from judges (Table 2). Plaintiffs filed motions to appoint almost as often as judges raised the question. Defendants infrequently took the initiative.
- Most motions or sua sponte "show cause" orders regarding special masters were not opposed (Table 3). Unopposed motions were far more likely to be granted. Some unopposed motions were not granted because the case was dismissed or settled.
- Judges granted motions or affirmed sua sponte "show cause" orders about 60% of the time (Table 4). Rule 53 was the authority most frequently cited, appearing in 30% of the orders. Many orders (45%) cited no authority (Table 5).
- Judges typically appointed special masters after receiving nominations from the parties (Table 6). About three-fourths of the appointees were attorneys (Table 7). Nonattorney appointments were most likely to involve trial activity (e.g., testifying as an expert) or posttrial activity (e.g., monitoring compliance with a court order) (Table 8).
- Plaintiffs and defendants generally shared special master expenses equally, but on a number of occasions, judges ordered defendants to pay the entire bill after they had been found liable to the plaintiff (Table 10).
- We found special master activities across the full spectrum of litigation, from rulings on discovery disputes to reports on enforcing a court order (Table 11). Special master activity included—but definitely was not limited to—trial-related fact finding.
- Judges generally accepted special masters' reports, and only occasionally modified or rejected findings, conclusions, or recommendations (Tables 12 & 13).
- Special master activity rarely appeared to have determined the outcome of a case and just as rarely appeared to have had no influence on the outcome (Table 14). In most cases, the special master's work seemed to have had either a substantial or moderate influence on the outcome.

Stages of litigation

For purposes of this analysis we divided all instances of special master activity into pretrial, trial, and posttrial stages.

- Judges were more likely to cite Rule 53 in making pretrial appointments than in making other appointments (Table 16).
- Judges were more likely to initiate appointments for pretrial purposes than for trial or posttrial purposes (Table 17).
- Plaintiffs were more active in calling for trial and posttrial uses than they were in calling for pretrial uses (Table 17). At all three stages of litigation, few of the appointments had been opposed (Table 18).
- Judges were more likely to review special master trial reports than pretrial and posttrial products (Table 19).

- Appointments for pretrial use of special masters were more likely than other appointments to occur in cases that ended with a settlement (Table 20).

Special master and magistrate judge activity compared

- Magistrate judges were infrequently appointed formally as special masters.
- Magistrate judges served in their everyday capacities in about two-thirds of the cases studied, and they performed the same range of functions as special masters, except, of course, magistrate judges never served as expert witnesses (Figure 1).
- Magistrate judges and special masters often served overlapping functions at the pretrial stage, sometimes served overlapping functions at the trial stage, and, rarely served overlapping functions at the posttrial stage (Figure 1).
- In general, magistrate judge activity tended to be more frequent at the pretrial stage; special master activity tended to be more frequent at the trial stage; and special masters and magistrate judges served in equal numbers of cases at the posttrial stages. At all stages, special masters and magistrate judges generally served different functions (Figure 1).

Further analysis of the issues identified by the subcommittee will be addressed during Phase 2 of this study, to be completed during the winter of 2000.

Findings and Discussion

1. How frequently and in what types of cases have district judges or parties raised the question of whether to appoint a special master or other adjunct?

Under Rule 53, use of special masters is to be "the exception, not the rule."[3] Our data suggest that this restriction was followed, both in the aggregate of cases and in specific types of cases. Rule 706 contains no such restriction, but even without an explicit restraint its use has been rare in modern times.[4]

Parties to the litigation or the judge rarely raise the question—at least on the record—of whether a special master should be appointed. In the study as a whole, whether to appoint a special master was raised in an estimated 1,223 out

[3] Fed. R. Civ. P. 53(a).

[4] See Joe S. Cecil & Thomas E. Willging, Court-Appointed Experts: Defining the Role of Experts Appointed Under Federal Rule of Evidence 706 7-8 (Federal Judicial Center 1993) (finding that only 20% of sitting federal judges reported appointing an expert one or more times during their careers on the bench).

of 445,729 cases, which is .27% or 2.7 cases in 1,000. Put differently, in 99.73% of the cases, appointment of a special master was not formally considered.

Our data cover two distinct phases of behavior relating to special masters: judicial consideration of an appointment and special master activity flowing from such an appointment. We use the term "consideration of" a special master appointment to refer to on-the-record evidence that a judge or party thought about such an appointment. Later, we use the term special master "activity" to refer to the post-appointment conduct and reports of a special master.

Consideration of appointing an expert to testify was rare and appointment of such an expert even rarer. Approximately 10% of the appointments we examined referred to Rule 706 in a ruling. That figure indicates that court-appointed experts have been considered at a rate of approximately 2.7 cases per 10,000 in recent years (.027%). In our sample of 136 cases, there were sixteen requests that sought appointments for the purpose of providing testimony. Half of those requests were in cases involving one or more pro se litigants. In all, three-fourths of the requests were denied. These data indicate that appointment of an expert can be expected less than once in 10,000 cases.

In some exceptional types of cases, for example, cases involving patents, environmental matters, or in personal injury cases arising from airplane crashes, the rates for consideration of special master appointments were notably higher. In patent cases, 21 cases per 1,000 (2.1%) evidenced consideration of a special master appointment; in environmental matters 24 cases per 1,000 (2.4%); and in airplane personal injury cases, 27 cases per 1,000 (2.7%). Again, the data demonstrate that considering a special master appointment is a rare event, even in cases reputed to involve the most complex subject matter. For those types of cases fewer than 3% included formal consideration of appointing a special master. The maximum rate of consideration that might be expected is about 5% (Table 1, Column 4).

It is important to note that we have defined the incidence of considering special master appointment as the rate of such consideration per filed case (which had been terminated). In two types of cases, Personal Injury-Product Liability and Prisoner-Civil Rights, our sample included cases that had been consolidated. Fourteen prisoner cases had been consolidated into three cases and

nine product liability cases had been consolidated into three cases. Based on our definition of incidence we included all twenty-three cases in the sample for purposes of calculating the rate of considering appointment. We could not eliminate consolidations from our calculations because we have no way of knowing how many consolidated cases were in the total population from which our sample was drawn. In parts 2, 3, and 4 of this report, we discuss specific procedures, such as the filing of motions, ruling on them, and appointing special masters. To avoid multiple counting of the same action, we collapsed each set of consolidated cases into a single case for all of the analyses in parts 2, 3, and 4.

Table 1 lists the incidence of consideration of a special master appointment in each case type for which there was any consideration in the sample. Column 1 lists the number of cases and the "nature of suit" (case type) as identified on the form completed by the attorney filing the case (JS 44).

Column 2 presents the estimated rate of considering a special master appointment per 1,000 cases for each nature of suit. To estimate the extent to which our results were a product of the particular sample drawn, we calculated confidence intervals. Columns 3 and 4 present the lower and upper limits of 95% confidence intervals. These confidence intervals indicate that, if our data are representative, there is a 95% degree of certainty that the rate falls within the rates stated in columns 3 and 4. For example, in environmental matters we can say with 95% confidence that special master consideration occurs in between 8 and 56 cases per 1,000. Thus, since there were 998 environmental filings in 1998, we can say (with 95% confidence) that consideration of appointing a special master is likely to occur in at least 8 of those cases but in no more than 56 of those cases. In the nature of suit categories with few cases in the sample, the confidence intervals are wider than those with more cases in the sample.

In general, the confidence intervals for individual types of cases are quite wide, but for the sample as a whole the confidence interval is much narrower. We can say with a 95% degree of confidence that special master consideration in the population studied lies between 2.3 and 3.2 cases per 1,000.

Table 1. Estimated Rate of Special Master Consideration Per 1,000 Cases, in Cases Terminated During FY 97 and FY98 in 87 Federal District Courts (*n*=136 of 445,729 cases)

Column 1 Nature of Suit	Column 2 Estimated Rate of Special Master Consideration (per 1,000 cases) By Case Type	Column 3 95% Confidence Interval Re Minimum Rate of Special Master Consideration (per 1,000 cases) By Case Type	Column 4 95% Confidence Interval Re Maximum Rate of Special Master Consideration (per 1,000 cases) By Case Type
Railway Labor Act (*n*=1)	29	1	153
Land Condemnation (*n*=2)	29	4	101
Airplane Personal Injury (*n*=4)	27	7	68
Habeas Corpus-Death Penalty (*n*=1)	26	1	138
Environmental Matters (*n*=5)	24	8	56
Patent (*n*=8)	21	9	40
RICO-Racketeer Influenced & Corrupt Org. (*n*=3)	18	4	53
Antitrust (*n*=2)	17	2	59
Foreclosure (*n*=11)	14	7	26
Prisoner-Civil Rights (*n*=32)	7	5	9
Civil Rights-Housing Accommodations (*n*=1)	6	0	32
Other Fraud (*n*=2)	5	1	18
Personal Injury-Product Liability (*n*=13)	5	3	8
Other Contract (*n*=12)	4	2	6
Contract-Insurance (*n*=5)	3	1	8
Fair Labor Standards Act (*n*=1)	3	0	18
Civil Rights-Other (*n*=10)	3	1	5
Civil Rights-Employment (*n*=13)	3	2	5
Other Statutory Actions (*n*=4)	2	1	6
ERISA (*n*=3)	2	0	5
Habeas Corpus (*n*=2)	1	0	2
Other Personal Injury (*n*=1)	1	0	3
All Types (*n*=136)	2.7	2.3	3.2

not the rule, and consideration of court appointment of experts occurred even less frequently.

2. In general, what actions have district judges taken regarding the appointment of special masters and what activities have special masters performed?

In this part we present an overview of motions and rulings on special master appointments as well as an initial look at activities performed by appointed special masters. We will look at:

- Who raised the question of a special master appointment?
- Was the motion opposed?
- How many motions were granted, denied, or not ruled on? What authority was cited in a ruling?
- How many appointments were made?
- How were special masters selected, instructed, and compensated?
- What did special masters do? Were their reports reviewed and, if so, what was the outcome?
- Finally, what was the impact of the special master's work on the case's outcome?

In later parts we analyze the above issues in relation to different purposes for appointments, different stages of the litigation process at which appointments occurred, and other aspects of the use of special masters.

Motions and sua sponte orders

Table 2 presents information on the origin of the special master ' consideration. The plurality of suggestions (40%) came from judges in sua sponte orders or discussion in pretrial conferences. Plaintiffs moved for an appointment more than three times as often as defendants (37% versus 10%). The parties acted jointly 11% of the time.

Table 2. Source of Motion or Suggestion for Appointment of a Special Master (*n*=129 motions or suggestions in 115 cases)

Source	Number	Percentage
Plaintiff	48	37
Defendant	13	10
Joint motion of the parties	14	11
Judge (sua sponte)	52	40
Other	2	2
Total	129	100

Opposition and outcomes

Table 3 shows that the vast majority of motions or sua sponte orders encountered no opposition. Only about one in four cases involved opposition to the proposed appointment of a special master. Just as plaintiffs were more likely to move for an appointment (Table 2), defendants were more likely to oppose a proposed appointment.

Table 3. Source of Any Opposition to Motion or Suggestion for Appointment of a Special Master (*n*=129 motions or suggestions in 115 cases)

Source	Number	Percentage*
Plaintiff	10	8
Defendant	23	18
None of the parties	95	74
Other	8	6

*Note: Percentages exceed 100% because more than one category might apply to a single motion or suggestion.

In a direct comparison of cases with and without opposition, we found that judges were significantly more likely to grant a motion or affirm a show cause order (73%) when there had been no opposition than when there had been opposition (32%).

The infrequency of opposition should not necessarily be taken to mean that opposition to special masters would be infrequent under all circumstances. It may be that motions or sua sponte orders were formalized only when it appeared likely—based on informal discussions—that the parties would agree to such a course of action. In an earlier study of court-appointed experts, FJC researchers found that judges sometimes deferred to objections by the parties

because they generally have to pay the appointee.[5] It seems reasonable to expect that the same reluctance to appoint may have occurred in the cases studied here since the parties also have to pay a special master's fees. On the other hand, special masters may be more likely than Rule 706 experts to expedite the litigation and reduce the parties' expenses.

Table 4 shows that about 60% of the motions were granted in whole or in part, that about 25% were denied and the balance did not receive a ruling. We get a different sense of the rate of granting motions if we examine pro se cases separately from other cases. Motions in cases where the parties were represented by counsel were granted at a much higher rate (76%) than motions in pro se cases (33%).[6]

Table 4. Outcomes of Motions or Sua Sponte Orders for Appointment of Special Masters (*n*=129 motions or orders in 115 cases)

Outcome	Number	Percentage
Granted motion or affirmed order	76	59
Granted/affirmed in part and denied in part	3	2
Denied motion/dismissed order	32	25
Did not rule on motion/order	18	14
Total	129	100

The difference between the relatively low rate of opposition (Table 3) and the higher rate of denying or not ruling on motions (Table 4) indicates that judges sometimes do not grant motions even though none of the parties opposed them. In sixteen instances judges denied unopposed motions; eleven of the sixteen cases in which unopposed motions were filed ended with a dismissal of plaintiff's claim or a summary judgment for the defendant.

In eleven instances a judge did not rule on an unopposed motion to appoint a special master. Most cases in which those motions had been made terminated in a settlement, dismissal (voluntary or other), or an arbitration ruling; in four instances the cases proceeded to summary judgment or a bench trial without a ruling on the motion.

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[5] Cecil & Willging, *supra* note 4, at 21 (discussing deference by some judges to objections from the parties based on costs).

[6] That difference is statistically significant, using a Chi-square test. All comparisons discussed in this report are statistically significant ($p < .05$) unless otherwise noted.

In all but three of the seventy-six instances in which a motion was granted, an appointment was made. Two of the three cases settled shortly after the judge granted the motion. In the third case, an appellate decision reversed a finding for the plaintiff and mooted the issue of appointing a master to monitor enforcement of the court's order.

Authority cited

In Table 5, we report that almost half of the rulings regarding special master appointments do not cite any authority. About 30% of the cases in which there was a ruling cite Rule 53. We were surprised at first to discover that the percentage of Rule 53 references was not higher, but, as Table 5 shows, there are seven sources of authority that explicitly refer to special masters or court-appointed experts. In addition, presented in the "Other" category are little-used sources of authority, such as Federal Rule of Civil Procedure 71A(h)'s authorization for a court to appoint commissioners, with the power of special masters, to determine the issue of compensation in eminent domain cases. In that same category are instances of reliance on a number of local rules and federal statutes, such as ERISA, the Securities Investor Protection Act, and a statute dealing with Executive and Judicial Sales (28 U.S.C. Section 2001).

Table 5. Authorities Cited in Rulings on Motions or Sua Sponte Orders for Appointment of Special Masters or Rule 706 Experts (*n*=116 rulings)

Authority	Number	Percent of Rulings*
Fed. R. Civ. P. 53	35	30
Other (e.g., local rules and federal statutes)	19	16
Fed. R. Evid. 706	11	10
28 U.S.C. § 636(b)(2)	4	3
42 U.S.C. § 2000(e)-5(f)(5)	3	3
Inherent Authority of the Court	3	3
28 U.S.C. § 1915(d) (lack of authority)	3	3
Fed. R. Civ. P. 54(d)(2)(D)	1	1
Prison Litigation Reform Act of 1995	1	1
No authority cited	52	45

*Note: Percentages exceed 100% because more than one category might apply to a single ruling.

We searched for evidence of reliance on inherent authority. We hypothesized that a judge's reliance on inherent authority might indicate that

existing rules were not perceived as adequate to meet the needs of a case. In our sample, few judges (3, or 3%) relied on inherent authority in ruling on a request to appoint a special master. We do not know, of course, whether a judge may have relied on inherent authority in the 52 cases in which the judge cited no authority. Likewise, we do not know from this study whether some judges did not appoint—or even consider appointing—a special master in pretrial or posttrial contexts because they did not think they had the authority to do so. We did not find any rulings in which a judge stated that there was no authority to appoint a special master in a given case. We discuss authorities cited for pretrial, trial, and posttrial appointments in part 4, below.

Selection methods

Table 6 outlines the methods judges used to select special masters, as gleaned from the documents relating to each appointment. In instances where information was available, the predominant method used was to invite nominations from the parties. In about two-thirds of the 46 instances in which some process was identified, the judge received nominations from the parties as part of the appointment process. In about one-third of the appointments, the judge either appointed a magistrate judge or otherwise had personal knowledge of the appointee's qualifications.

Table 6. Process Used to Select Special Masters (When a Process Was Identified) (*n*=46)

	Number	Percentage*
Nominations from the parties	31	67
Magistrate judge appointed	12	26
Judge's knowledge of special master's qualifications	4	9
Special master service in another case	2	4
Search by outside agency, special master, or court representative	0	0
Other search process	4	9

*Note: Percentages exceed 100% because more than one category might apply to a single appointment.

In no instance did the judge identify a special master by using a formal search process like the one used to identify court-appointed experts in the breast

implant litigation.[7] In 7 (9%) of 77 appointments, documents indicated that the judge or the parties had conducted an examination of the appointee's background to determine whether there were any conflicts of interest. We have no way of knowing at this time how frequently such searches may have taken place but not been recorded.

As Table 7 shows, almost three-quarters of the special masters were identified as attorneys, a number of whom were also magistrate judges or retired state or federal judges. Predominance of attorneys is not surprising because many of the duties contemplated for special masters under Rule 53 require familiarity with legal procedures.

Table 7. Positions Held by Special Masters at the Time of Appointment (*n*=72 appointments)

Position	Number	Percentage*
Attorney	53	74
Magistrate Judge	12	17
Professor	6	8
Retired State Court Judge	5	7
Medical Doctor	4	6
Accountant	3	4
Retired Federal District Judge	2	3
Social Scientist	1	1
Engineer	1	1
Retired Federal Magistrate Judge	1	1
Other	20	28

*Note: Percentages exceed 100% because more than one category might apply to a single appointment.

Court-appointed experts (Rule 706)

Motions involving appointment of an expert under Rule 706 for the purpose of testifying contained a different mix of positions than the pattern shown for all special masters in Table 7. Only two of the six appointees were attorneys, and both had additional degrees and qualifications. One was a professor of mathematics and the other was a medical doctor serving as the chief

[7] *In re* Silicone Gel Breast Implant Prods. Liab. Litig. (MDL 926), Order 31 (N.D. Ala. May 30, 1996) (creating a screening panel of special masters to conduct a nationwide search for candidates for appointment as Rule 706 experts).

of psychiatry at a correctional institution. The four nonattorneys had expertise in computer science, engineering, medicine, and accounting.

Nonattorney special masters

Overall, the functions that nonattorneys performed clustered at the trial and posttrial stages of the cases.

Table 8. Activity by Nonattorney Special Masters

Activity	Special Masters	
	Number n=18	Percent*
Supervise discovery	0	—
Rule on discovery disputes	0	—
Other pretrial activity	1	6
Facilitate settlement	0	—
Recommend approval/implement settlement	1	6
Written report on selected issues	4	22
Written report on entire case	0	—
Testify to a jury	2	11
Calculate damages	0	—
Establish claims process	2	11
Draft enforcement decree	1	6
Report on enforcement	1	6
Report on compliance	2	11
No activity reported	8	44

*Note: Percentages exceed 100% because more than one category might apply to a single appointment.

As Table 8 shows, nonattorney appointments were most likely to involve trial activity (e.g., filing a written report on selected issues or testifying as an expert) or posttrial activity (e.g., monitoring compliance with a court order). Only one nonattorney master issued a pretrial order. In four instances (22%), nonattorneys issued written reports with findings of fact on selected issues, and in two instances (11%) they testified as court-appointed experts pursuant to Rule 706. In one instance, the master recommended approval of a settlement and in two instances established claims processes for distribution of a settlement. On four occasions (22%), nonattorney special masters addressed issues relating to drafting of, enforcement of, or compliance with a court order. In almost half of the appointments, there was no written report by the special master, perhaps because the case settled or terminated without the need for a report.

Instructions to appointees

As evidenced by their written orders, judges' instructions to special masters covered a wide range of topics (Table 9). In addition, other topics may have been covered orally, but records of such discussions were outside the scope of our examination. Generally, but not always, judicial instructions covered the role to be played by the special master and the issues to be addressed. In instances in which this central topic was not addressed, we assume that there was further oral instruction that we could not identify from docket records. Judges often established a procedure for the special master to report to the court and the parties. Judges also addressed questions about who should pay the special master and how much.

Table 9. Content of Instructions to Special Master (*n*=72)

Instruction	Number	Percent*
Defined the issues to be addressed	39	54
Defined the role of special master	60	83
Limited the communications between appointee and parties	3	4
Limited the communications between appointee and the judge	2	3
Set procedure for appointee to report to the court and the parties	30	42
Established the rate of compensation for appointee	24	33
Established a formula for determining fees	4	6
Established who should pay appointee's compensation	34	47
Fixed a procedure for appointee to obtain information	7	10
Established standard for reviewing the appointee's report	4	6
Created a power to appoint others to assist	2	3
Instructed appointee to sell property and deliver proceeds	4	6

*Note: Percentages exceed 100% because more than one category might apply to a single appointment.

Table 9 also shows that judges infrequently broached the subject of how the special master should proceed with the task of gathering information relevant to his role. Work with court-appointed experts has shown that ex parte communications involving such experts can lead to serious problems.[8] While special masters serve different roles than such experts, problems with ex parte communications may arise nonetheless. In one of the study cases,

[8] Cecil & Willging, *supra* note 4, at 35-45 (discussing communications of experts with judges and parties and procedures that courts have used to prevent problems from arising).

communications by a special master with one of the parties outside of the presence of another party led to a hotly contested and apparently disruptive motion to recuse the special master.[9]

Compensation of special masters

Generally, plaintiffs and defendants shared the costs of special masters on an equal basis (Table 10). However, in ten instances (24%), one of the parties was responsible for paying the entire cost. In seven of those instances defendants had full responsibility. Six of those appointments came after liability had been determined by judgment or settlement and the seventh involved shifting the cost of appraisal to a defendant in a default judgment.

Table 10. Arrangements for Compensating Special Masters (*n*=42 motions)

	Number	Percent
Plaintiff and defendant equally	22	52
Defendant to pay 100%	7	17
Plaintiff to pay 100%	3	7
Plaintiff to pay/defendant to pay	1	2
Other	9	21
Total	42	100

We were initially surprised to find that three plaintiffs were assigned full responsibility for payment of the special masters' fees (Table 10). In all three instances, however, the special master was appointed at the plaintiff's request to sell foreclosed property or act as a receiver for rents on property to be sold. These functions would not ordinarily be considered special master functions, but the docket entries and documents described the appointees as a special master or, in one instance, as a referee. We presume that the special master costs were shifted to the defendant as part of any judgment in the case.

We found information in the record about the rate of compensation paid to twenty-two special masters, fewer than one-third of the appointments. More than two-thirds of all payments appear not to have been channeled through the

[9] United States v. Western Processing Co., C83-252M, Memorandum of Authorities in Support of Motion to Remove Special Master and for Other Relief (W.D. Wash., filed March 10, 1986).

clerks' office. The typical (median) rate was $188 per hour. Half of the rates were between $150 and $250 per hour.

For fourteen appointments, we were able to ascertain the total amount of compensation paid to a special master. The median amount was $35,500, but 25% of the appointments involved total payments of $290,000 or more. The appointments with the highest payments were all protracted cases in which special masters served major roles for an extended time, as long as a decade.

Special masters' activities

Special masters engaged in a wide range of activities at pretrial, trial, and posttrial stages of the litigation (Table 11). About a third (35%) of the appointments involved some activity at the trial stage. Written reports with recommendations occurred in about a third of the cases. Testimony or advice to a judge or jury was rare, occurring in about 4% of the appointments.

Special masters performed pretrial functions in about one-sixth (16%) of the appointments. About half of the pretrial activity consisted of rulings on discovery disputes.

Special masters also performed posttrial functions in about one-sixth (16%) of the appointments. Generally, these activities involved reports discussing enforcement of a court's order or describing and monitoring the parties' compliance with such an order.

Table 11. Products of Special Master Activity (*n*=71)

Product	Number	Percent*
PRETRIAL		
Rulings on discovery disputes	11	16
Pretrial case management orders	8	11
Facilitating a settlement	6	9
Recommendation regarding court approval of a settlement	2	3
TRIAL		
Rulings on admissibility of evidence	4	6
Written report with findings of fact on selected issues	19	27
Written report with findings of fact on all issues	2	3
Report recommending an outcome for entire case	7	10
Advice or testimony (in a bench trial) to the judge on scientifically or technically complex matters	1	1
Testimony to a jury on scientifically or technically complex matters	2	3
POSTTRIAL		
Recommended decree to enforce court judgment	1	1
Report discussing enforcement of a court order	4	6
Report describing parties' compliance with a court order	4	6
OTHER		
Other report or product	6	9

*Note: Percentages exceed 100% because more than one category might apply to a single appointment.

Review of special masters' work

In 27 (61%) of the 44 appointments for which information was available, a judge reviewed the special masters' first report. Table 12 shows the outcomes of those reviews.

Table 12. Outcome of Judicial Review of First Special Master Report (*n*=27)

Outcome	Number	Percent*
Adopted findings of fact	15	56
Adopted conclusions of law	10	37
Modified findings of fact	1	4
Modified conclusions of law	1	4
Rejected findings of fact	0	—
Rejected conclusions of law	0	—
Accepted recommendations	14	52
Modified recommendations	4	15
Rejected recommendations	0	—
Took other action	4	15

*Note: Percentages exceed 100% because more than one category might apply to a single report.

When finding of fact and conclusions of law were included in the special master's report, judges generally accepted them. In only two instances (in two separate cases) did a judge modify findings of fact or conclusions of law. In four instances (two of which involved the modification of the findings of fact and conclusions of law discussed above), the judge modified a special master's recommendations. In the remaining instances, judges acted favorably on the special master's report.

Many cases had multiple special master reports. Including those reports adds 42 reports to the 27 reports presented in Table 12. Table 13 presents the actions judges took on all 69 reports. Adding the supplemental reports changed little about the rate of modification of reports shown in Table 12. One change is that judges rejected special master recommendations twice whereas, in reviewing initial reports, judges never rejected recommendations. While the number and rate of rejections is small and not statistically meaningful, the fact that there were rejections indicates that special master recommendations were not automatically accepted.

Table 13. Outcome of Judicial Review of All Special Master Reports (*n*=69 reports)

Outcome	Number	Percent*
Adopted findings of fact	29	42
Adopted conclusions of law	20	29
Modified findings of fact	4	6
Modified conclusions of law	3	4
Rejected findings of fact	0	--
Rejected conclusions of law	0	--
Accepted recommendations	40	58
Modified recommendations	10	15
Rejected recommendations	2	3
Took other action	15	22

*Note: Percentages exceed 100% because more than one category might apply to a report.

Impact on outcome of the case

To measure the impact special masters had on case outcomes, we examined all special master activity in a given case. After reviewing the relevant documents and records, the first-named author of this report made a judgment

about which of the categories in Table 14 best described the impact of the special master's activities on the outcome of the litigation. We used the term "determined the outcome" (Table 14) to indicate that the special master (1) produced a report or other work product that was totally consistent with the outcome and that was neither altered nor explained by a judge, or (2) produced a final determination based on the parties' stipulation. Table 14 reports those judgments.

Table 14. Researcher's Judgments in Each Case About the Impact of Special Master Activity on Case Outcome (*n*=74)

Judgment	Number	Percent
Special master activity determined the outcome	10	14
Special master activity appeared to have a substantial influence on the outcome	25	34
Special master activity appeared to have a moderate influence on the outcome	18	24
Special master activity appeared to have no influence on the outcome	12	16
Other	9	12
Total	74	100

Evaluated by these standards, special masters did not appear to determine the outcome of the case.[10] As Table 14 shows, in fewer than half of the cases a special master had a substantial or determining influence on the outcome of the case. In about an equal number of instances, the special master had a moderate influence or no influence at all on the case's outcome.

Looking only at the six cases in which a Rule 706 expert was appointed for the purpose of providing testimony, in four of those cases the experts' activities were judged to have had a substantial influence on the outcome of the case. In one case, the expert was seen to have had a moderate influence. In the one case in which the expert testified to a jury, the expert appeared to have had no influence; in fact, the jury ruled contrary to the expert's testimony. We found no indication in the six cases that the court-appointed expert determined the outcome of the litigation.

[10] Compare Cecil & Willging, *supra* note 4, at 52-56 (finding that case outcomes were almost always consistent with the testimony or report of a court-appointed expert and that such experts exerted a strong influence on those outcomes).

Summary

As noted in our opening summary, our data tell the following story. On rare occasions, a judge, or perhaps a plaintiff, raised the question of whether to appoint a special master. If any opposition surfaced, it was likely to come from a defendant. If the case was not dismissed or settled, the judge generally granted the motion or reaffirmed a sua sponte "show cause" order. The ruling was not likely to cite or discuss any authority; Rule 53 may have been cited, but not discussed. After receiving nominations from the parties, the judge appointed a special master, usually an attorney. Nonattorneys may have been appointed to address specific issues at the trial or posttrial stages of the litigation. Plaintiffs and defendants generally shared the master's expenses.

Special master activities covered a full spectrum of civil litigation activities at the pretrial, trial, and posttrial stages. Judges generally accepted the reports of special masters, but occasionally modified a finding, conclusion, or recommendation. Special master activity rarely determined the outcome of the case and just as rarely had no influence on the outcome. Most often, special masters had a substantial or moderate influence.

With this overview, we now turn to some of the more specific questions posed by the subcommittee.

3. How often have special masters been used at the pretrial, trial, or posttrial stages of civil litigation?

Rule 53 contemplates reference to a special master in a trial setting. There is objective, albeit anecdotal, evidence that special masters have been used in a host of pretrial and posttrial settings as well. Supervising discovery and monitoring consent decrees in institutional litigation are two of the more familiar uses.[11] By its terms, though, Rule 53 does not limit appointments to the trial stage. In fact, the rule begins with the following sweeping authorization: "The

[11] See generally Geoffrey C. Hazard, Jr. and Paul R. Rice, *Judicial Management of the Pretrial Process in Massive Litigation: Special Masters as Case Mangers,* in WAYNE D. BRAZIL, GEOFFREY C. HAZARD, JR. & PAUL R. RICE, MANAGING COMPLEX LITIGATION: A PRACTICAL GUIDE TO THE USE OF SPECIAL MASTERS 305 (1983) (special master activity supervising discovery in massive commercial litigation); Vincent Nathan, *The Use of Masters in Institutional Reform Litigation*, 10 U. TOL. L. REV. 419 (1979) (special master activity monitoring and enforcing prison conditions cases).

court in which any action is pending may appoint a special master therein." [Rule 53(a)].

The extent of special master activity outside of the trial setting is of special interest in determining whether a rule change is needed. Relatively frequent appointment in nontrial settings in comparison to appointments at the trial setting, especially if referenced to Rule 53, might refocus the question of whether a rule change is needed.[12] Any rule change in that context might only make explicit what judges and litigants have found to be implicit in the current rule. On the other hand, a paucity of use might suggest that the lack of explicit authorization in a national rule has inhibited the use of special masters outside the trial setting. Any inference, however, must be tempered by our finding in part 1 that judges and parties rarely raised the question of whether to appoint a special master.

In Table 11, we saw that the appointed special masters generated products spanning a wide range of activities. Table 11 was based on data related to each appointment, with some cases involving more than one appointment. To aid in the analysis we regrouped those activities at a case level into pretrial, trial, and posttrial activities. As Table 15 shows, one or more special masters engaged in one or more pretrial activities (discovery and other pretrial management) in 19 cases; one or more trial activities (reporting or testifying on factual issues) in 24 cases; and one or more posttrial activities in 12 cases. Thus, it appears that special masters are primarily active in the pretrial and trial phases of litigation. The amount of posttrial activity, however, is not negligible.

[12] See Cooper, *supra* note 1, at 1609-10 (noting that "... even a confident judgment that masters are frequently appointed for purposes not contemplated by Rule 53 need not dictate revision" and warning about the "law of unintended consequences").

Table 15. Special Master Activity in Pretrial, Trial and Posttrial Stages (n=44)

Pretrial Activity		Trial Activity		Posttrial Activity	
Number	Percent*	Number	Percent*	Number	Percent*
19	43	24	55	12	27

*Note: Percentages exceed 100% because a special master may have engaged in activity at more than one stage.

Authority cited

Table 16 shows the authorities cited for appointment of a special master at each of the three stages of litigation. We were surprised to find that in 13 (68%) of the 19 cases with pretrial special master activity the judge had cited Rule 53 in ruling on a proposed appointment. In contrast, judges cited Rule 53 in only about one-third of the cases in making appointments at the trial (38%) and posttrial (33%) stages.

We presume that judges making appointments at the pretrial stage felt more need to cite authority than judges applying Rule 53 in traditional fashion to trial activities. It is worth noting, however, that none of these orders of appointment contained extended discussion of legal authority. Most, if not all, simply cited an authority in passing. In only two instances did judges address the question of exceptional circumstances by pointing to the legal and factual complexity of the underlying litigation. One of those cases involved complicated calculation of damages and the other involved a factually and legally complex commercial case in which a number of heated discovery disputes occurred early in the litigation.

Table 16. Authorities Cited in Appointing Special Masters in Cases with Pretrial, Trial, and Posttrial Special Master Activity

Authority	Pretrial Activity (n=19)		Trial Activity (n=24)		Posttrial Activity (n=12)	
	No.	%*	No.	%*	No.	%*
Fed. R. Civ. P. 53	13	68**	9	38	4	33
Fed. R. Civ. P. 54(d)(2)(D)	0	—	1	4	0	—
Fed. R. Evid. 706	1	5	4	17	0	—
42 U.S.C. § 2000e-5(f)(5)	2	11	0	—	0	—
Prison Litigation Reform Act of 1995	0	—	0	—	0	—
28 U.S.C. § 636(b)(2)	4	21	2	8	0	—
Inherent Authority of Court	1	5	1	4	0	—
Other	6	32	3	13	2	17
None	4	21**	10	42	9	75***

*Note: Percentages exceed 100% because more than one category might apply to a single ruling.
**Differences between pretrial and non-pretrial activities are statistically significant.
*** Differences between posttrial and non-posttrial activities are statistically significant.

Judges rarely invoked inherent authority at any of the stages (Table 16). As discussed above (part 2), relying on inherent authority may be interpreted as a sign that existing rules do not authorize the use in question, but that sign did not appear with any frequency in our data.

Citing no authority might also be interpreted as a sign of a need for a rule change, but the data in Table 16 show that the absence of a citation to authority occurred more frequently where the authority is clear—at the trial stage. As Table 16 indicates, in about one out of five cases with pretrial special master activity the judge cited no authority. In contrast, that absence of citations was considerably higher for cases with trial activity (42%) and for cases with posttrial activity (75%). As noted above, judges did not write lengthy opinions parsing the elements of Rule 53 or its applicability to any stage of the litigation.

Source of motion or suggestion

In Table 2, we saw that the great majority of appointments originated in a motion by the plaintiff or a sua sponte order by the judge. Table 17 breaks that information into pretrial, trial, and posttrial activity in instances where such activity occurred. Judges initiated consideration of special master appointments at the pretrial stage almost three-fourths of the time. This may have reflected their unique vantage point of being able to assess the complexity and demands of a particular case in relation to their own skills, needs, and competing time demands.

Table 17. Origin of Motion or Suggestion for Appointment of a Special Master by Stage of Litigation in which Special Master Activity Occurred

Origin	Pretrial Activity (n=19)		Trial Activity (n=24)		Posttrial Activity (n=12)	
	No.	%*	No.	%*	No.	%*
Plaintiff	2	11**	8	33	8	66***
Defendant	0	—	2	4	0	—
Joint Motions	3	16	5	21	3	25
Judge (sua sponte)	14	74**	13	54	3	25***
Other	1	5	0	—	0	—

* Percentages exceed 100% because special master activity may have occurred more than once in a case.
**Differences between pretrial activity and non-pretrial activity are statistically significant.
***Differences between posttrial activity and non-posttrial activity are statistically significant.

At the trial stage, the parties were more active, with plaintiffs seeking appointments (either alone or jointly with defendants) in about half of the cases (Table 17). At the posttrial stage, plaintiffs took the initiative far more frequently, perhaps reflecting their status as the holder of a judgment and their legal stake in the outcome. We also found that at the posttrial stage, in all but two instances, the appointment was based on nomination by the parties.

Opposition

As we saw in Table 3, one-fourth of the time a party opposed the proposed appointment of a special master. In the discussion surrounding Table 3, we reported that judges were far more likely to grant a motion or affirm a show cause order if there had been no opposition filed. Table 18 presents data on opposition in relation to appointments at the three stages of the litigation. At the pretrial, trial, and posttrial stages, appointments occurred without opposition at rates of 84%, 83%, and 92%, respectively.

Table 18. Source of Any Opposition to Motion or Suggestion for Appointment of a Special Master by Stage of Litigation in which Special Master Activity Occurred

Source	Pretrial Activity (n=19)		Trial Activity (n=24)		Posttrial Activity (n=12)	
	Number	Percent	Number	Percent	Number	Percent
Plaintiff	1	5	1	4	0	—
Defendant	2	11	6	25	1	8
None of the Parties	16	84	20	83	11	92
Other	1	5	1	4	0	—

Judicial review of special masters' reports

We saw variation in the frequency of judicial review in the pretrial, trial, and posttrial stages of special master activities. Table 19 shows the results of our analysis. The most striking finding is that judges reviewed trial-related reports far more frequently than they did pretrial reports (67% versus 32%). One might expect that level of review because trial level review is more likely than pretrial review to involve matters that may be dispositive of the case. Our data do not include information about whether a party sought judicial review.

Table 19. Judicial Review of Special Master Reports by Stage of Litigation at which Special Master Activity Occurred

Judicial Review	Pretrial Activity (n=19)*		Trial Activity (n=24)*		Posttrial Activity (n=12)*	
	Number	Percent	Number	Percent	Number	Percent
Yes	6	32	16	67***	5	42
No	10	53**	6	25	4	33

* Percentages exceed 100% because special master activity may have occurred more than once in a case.

** Differences between pretrial and non-pretrial activities are statistically significant.

*** Differences between trial and non-trial activities are statistically significant.

Case outcomes

The stage of special master activity appears to be related to several types of case outcomes, particularly settlement. As Table 20 shows, when a special master had been active at the pretrial stages of the litigation, settlement was the outcome almost two-thirds of the time. As Table 11 indicates, special masters participated in settlement activities in six of the appointments. All six of those cases ended in a settlement.

Table 20. Case Outcomes in Relation to Special Master Activities at Pretrial, Trial, and Posttrial Stages

Outcome	Pretrial Activity (*n*=19)		Trial Activity (*n*=24)		Posttrial Activity (*n*=12)	
	No.	%	No.	%	No.	%
Judgment for plaintiff after jury trial	0	—	0	—	0	—
Judgment for plaintiff after bench trial	1	5	4	17	1	8
Judgment for defendant after jury trial	0	—	1	4	0	—
Judgment for defendant after bench trial	1	5	2	8	0	—
Settlement	12	63*	7	29**	5	42
Voluntary dismissal	0	—	1	4	0	—
Other	0	—	4	17	1	8
Summary judgment for plaintiff	1	5	0	—	0	—
Summary judgment for defendant	0	—	0	—	0	—
Default judgment for plaintiff	1	5	3	13	5	42***
Plaintiff's case dismissed	1	5	1	4	0	—
Consent judgment for plaintiff	1	5	3	13	1	8
MDL case pending	1	5	0	—	1	8
Arbitration ruling	0	—	1	4	0	—

* Differences between pretrial and non-pretrial activities are statistically significant.

** Differences between trial and non-trial activities are statistically significant.

*** Differences between posttrial and non-posttrial activities are statistically significant.

Table 20 also shows a somewhat surprising finding regarding the outcome of cases with posttrial activity. Five (42%) of the twelve cases were resolved by a default judgment for the plaintiff. These were cases involving the foreclosure sale of real property, designation of the Pension Benefit Guaranty Board as trustee of the assets of an ERISA retirement fund, and appointment of a trustee to liquidate a business for the benefit of private investors under the Securities Investors Protection Act. To some extent, these cases explain why there was no opposition to posttrial appointment of special masters, as discussed above.

Impact of special master activity on outcome

Table 21 presents our judgments about the impact of the special master's activities on the outcome of the case. There appear to be no meaningful differences in the impact of pretrial and trial activities by the special master. Special master activity was somewhat more likely to have had little or no influence at the pretrial stage than at the trial stage, but the numbers were small and not statistically significant. At the posttrial stage, special master activity had a moderate to substantial influence in every case. This finding may be related to the fact that the outcome of the case had been determined. These differences are

statistically significant, but they do not seem meaningful. As we have seen, five of the twelve posttrial cases involved default judgments and ministerial special master activity.

Table 21. Researcher's Judgments About the Impact of Special Master Activity on Case Outcome Where Special Master Activity Occurred at Pretrial, Trial, and Posttrial Stages

Judgment	Pretrial Activity (*n*=19)		Trial Activity (*n*=24)		Posttrial Activity (*n*=12)	
	No.	%	No.	%	No.	%
Special master activity determined the outcome	6	32	8	33	0	—
Special master activity appeared to have a substantial influence on the outcome	7	37	11	46	6	50
Special master activity appeared to have a moderate influence on the outcome	4	21	3	13*	6	50**
Special master activity appeared to have no influence on the outcome	2	11	2	8	0	—
Total	19	100	24	100	12	100

* Differences between trial and non-trial activity are statistically significant.
** Differences between posttrial and non-posttrial activity are statistically significant.

Summary

Overall, the stage at which a special master was appointed seems to have been related to several factors in our study. Appointments for pretrial purposes were more likely than other appointments to be initiated by judges and more likely to cite Rule 53. Appointments for pretrial use of special masters were also more likely to end with a settlement than were other appointments. Parties, especially plaintiffs, were more active in requesting special masters for trial and posttrial purposes than they were at the pretrial stage. Few of the trial appointments and none of the posttrial appointments encountered any opposition. Judges were, however, more likely to review trial and posttrial reports of the special master than pretrial products.

4. How have the activities of special masters related to activities of magistrate judges?

Two of the questions the subcommittee posed were "Why are magistrate judges ever used as special masters?" and "Why are magistrate judges not always used as special masters?" We can give only a partial answer to the premise underlying the two questions: Magistrate judges were sometimes—but certainly not always—used as special masters. Specifically, magistrate judges were appointed as special masters in 11 (14%) of 77 appointments (in 72 cases, some of which had more than one appointment). We must wait until phase 2 of the study to address more fully the reasons why magistrate judges were and were not appointed to serve as special masters.

Even when they were not appointed as special masters, magistrate judges played roles in about two-thirds of the cases in the study. Figure 1 portrays the division of activity between special masters and magistrate judges in cases in which a judge appointed one or more special masters. Cases in which a magistrate judge was appointed as the special master were excluded.

Figure 1: Special Master and Magistrate Judge Activity Compared (N=103 Cases in which the magistrate judge was not appointed as special master)

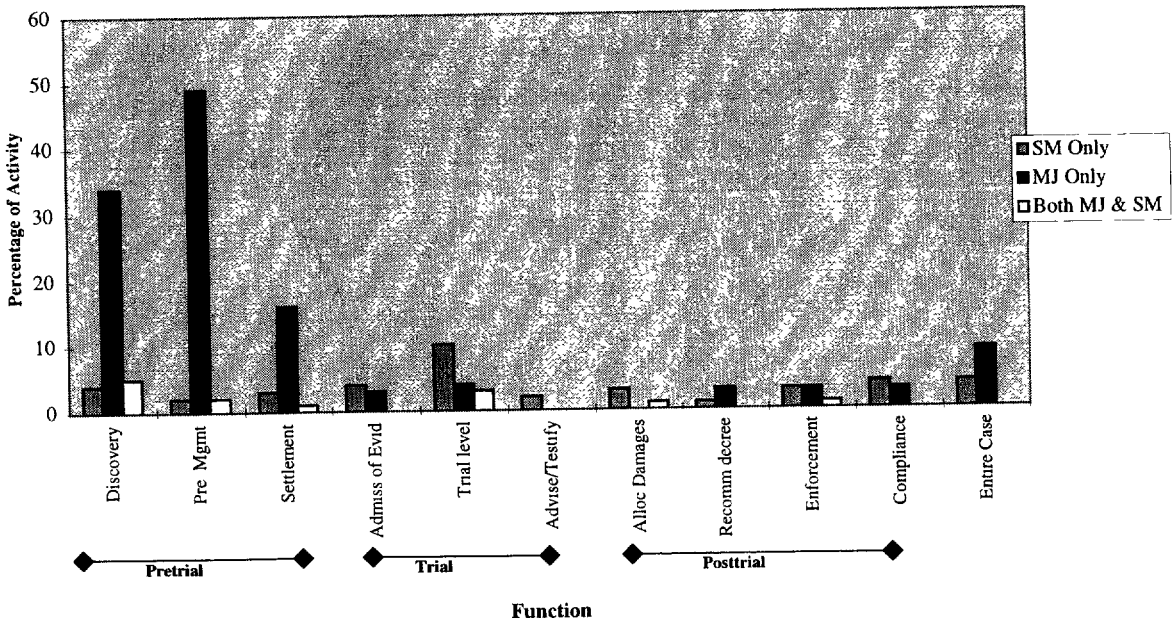

Figure 1 reveals several important points.

First, there was no function that judges reserved for special masters who were not magistrate judges. There was only one function, labeled "advisory/testimonial," that was not performed by magistrate judges, but that function was primarily filled by Rule 706 experts, not Rule 53 special masters.

Second, as the third (white) column in Figure 1 shows, there was a notable overlap of functions performed by special masters and magistrate judges at the pretrial stage, some overlap of functions at the trial stage, and very little overlap at the posttrial stage. Both types of judicial adjuncts were involved in the discovery, pretrial management, and settlement stages.

Third, magistrate judge activity occurred far more frequently at the pretrial stage than special master activity; special master activity occurred more frequently than magistrate judge activity at the trial stage; and special master and magistrate judge activity occurred in approximately equal numbers of cases at the posttrial stage. In the posttrial stage, however, there appears to have been only one assignment of a special master and a magistrate judge to perform the same type of function.

Further analysis of the division of functions among special masters and magistrate judges will be included in the second phase of this study.

For a summary of the findings for the entire report, see page 4.

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September 27, 1999

MEMORANDUM TO ADVISORY COMMITTEE ON CIVIL RULES

SUBJECT: *Agenda Materials for the October 14-15, 1999 Meeting in Maine*

Attached is the agenda book for the October 14-15 Civil Rules Committee meeting in Kennebunkport. I am also attaching a brief memorandum from Professor Cooper on Agenda Item VII dealing with the financial disclosure issue. Please bring the materials with you to the meeting.

The meeting will be held at the Colony Hotel in the Ballroom. It will start on Thursday at the later-than-usual time of 9:00 a.m. Dinner information for the evening of October 14 was sent to you under a separate letter.

John K. Rabiej

Attachments

cc: Honorable Anthony J. Scirica
Professor Daniel R. Coquillette

Introductory Note: Corporate Disclosure

Corporate disclosure questions come back to us with the initial fruits of the FJC study, and with a renewed sense of urgency. The Standing Committee would like advice on these questions, addressing at least these issues:

It seems to be accepted that we should not attempt to adopt a set of disclosure forms that would reveal every possible basis for recusal. Even in the realm of financial information, the number of questions that must be asked to establish comprehensive disclosure would be formidable. One narrowing device is implicit in the frequent reference to "corporate" disclosure. Whatever means of disclosure is adopted, the most difficult chore will be to determine how much information is sufficient, even though it is not complete.

Perhaps the first question is whether the rules for disclosure should be set by rules adopted through the Enabling Act Process. There are plausible arguments, explored briefly at the Civil Rules meeting in November, 1998, that these matters do not belong in the Civil Rules, Criminal Rules, and so on. It takes years to develop a rule, and will take years to amend a rule if the first rule is not successful. During this time there are likely to be significant improvements in the capacities for filing and matching information by electronic means. Today's argument that "forms" may be better than rules will give way to tomorrow's argument that "programs" are better than forms. Development and administration of disclosure requirements may be better accomplished by the Administrative Office, with assistance from the Committee on Codes of Conduct, than by national rules.

If there are to be national rules, a second question is whether there are sufficient differences to justify different rules for appellate courts, district courts, and bankruptcy proceedings. Appellate Rule 26.1 has been revised recently, after careful thought. If there are no discernible reasons to conclude that civil and criminal proceedings in the district courts require more elaborate disclosure, the path of least resistance is to rely on this recent work. The only question then would be one of location. It might make sense to adopt a single rule as part of the Federal Rules of Attorney Conduct that may emerge one day, rather than to adopt identical provisions for each of the sets of procedural rules. But that approach does not fit well with expedition that is made possible by adopting the Appellate Rule; it is likely to be easier and faster to adopt parallel rules of procedure than to fold this project into the FRAC project.

The question whether to adopt a uniform disclosure system for all courts is not easy in itself. Uniformity is intrinsically good if it means that a very good disclosure

system displaces weaker systems. Uniformity across federal courts also seems desirable for its own sake. And uniformity would have real advantages for repeat players in the litigation business. The work of developing a disclosure statement need be faced only once; adjustments need be made only once. It seems likely that there is some correlation between the complexity of disclosure and repeat-player status: big enterprises with complicated relationships to disclose are not unlikely to be involved in regular litigation. It is not clear what concerns might offset the values of uniformity. Although some litigants may be more concerned about the possible interests of a district judge who, alone, wields great procedural discretion, it is difficult to translate that concern into more detailed disclosure requirements. Bankruptcy may present special concerns arising from the frequent appearance of multiple participants, but it is not clear whether that calls for greater and more cumbersome disclosures. So long as there is a uniform set of standards for recusal, the tug toward uniform disclosure requirements is strong. But these issues need to be explored from a practical viewpoint.

Even if it is determined that a single system of disclosure is best for all federal courts, it is possible to ask whether Appellate Rule 26.1 provides the best answer. A decision to explore beyond Appellate Rule 26.1 need not mean that, in the end, a different conclusion will be reached. But many questions will be faced if the inquiry is opened up. The local rules described in the FJC study include many that extend disclosure beyond the requirements of Rule 26.1. Disclosure of this additional information may be useful. It also may be costly, both to provide and to process. Consideration of the disclosures required by these local rules should provoke clear thought about the possible values of moving beyond Rule 26.1.